Barzakh_ "Cinematic Spaces of Exception" series of film screenings and talks, organized by Ali Jaber.

Cluster I_ A short index of accompanying readings pertaining to the first paper and theoretically connected to the first cluster of films

- Christ Lloyd, *Deconstruction and Bio-politics: Asymmetrical visuality, spacing, power* in Synthetic Legalities: Sensory Dimensions of Law and Jurisprudence (2017)
- Margaret Davies, *Inner and outer Space* in Law Unlimited: Materialism, Pluralism, and Legal Theory (2017)
- Dimitris Vardoulakis, *Kafka's Empty Law: Laughter and Freedom* in *The Trial* in Philosophy and Kafka (2013)
- Giorgio Agamben, *Homo Sacer* in Homo Sacer: Sovereign Power and Bare Life
- Robert G. White, Resisting the Continuum of History: Messianic Time, Violence and Mourning in Palestinian Cinema (2017)
- Michael Naas, B*iopolitics and the Politics of Sacrifice: Derrida on Life, Life Death, and the Death Penalty* in The Biopolitics of Punishment: Derrida and Foucault (2022)

Cluster I_ A list of associated and interconnected films to be watched in parallel to the cluster of screened films

- Orson Welles, *The Trial* (1961)
- Elia Suleiman, *Divine Intervention* (2002)
- Annemarie Jacir, *Like Twenty Impossibles* (2003)
- Kamal Aljafari, *Recollection* (2015)
- Hany Abu-Assad, *Omar* (2013)

8

DECONSTRUCTION AND BIO-POLITICS

Asymmetrical visuality, spacing, power

Chris Lloyd

Introduction

This chapter speculatively investigates the relationship between Jacques Derrida's metaphysical critique (deconstruction) and Michel Foucault's conception of the politics of life (bio-politics). Drawing on crucial recent works by Kalpana Rahita Seshadri[1] and Kevin Attell[2] that have posited strong connections between Derrida and "the greatest contemporary divulgator of Foucault's biopolitical narrative" (Giorgio Agamben),[3] the chapter then examines Foucault's original bio-political thinking – namely, his work on Jeremy Bentham's "Panopticon" – in an attempt to connect this to a lesser-known area of Derrida's deconstructive juridical thought.

This original and tentative connection will be attempted via an account of visuality that is uncannily similar in both Derrida's juridical thought and Foucault's account of bio-politics. Using the thought of Catherine Malabou, it will be argued that this shared account acts as the "motor scheme" for both theorists[4] and consequently allows for Derrida and Foucault to conceptualize law and bio-politics respectively. Visuality is thus the "tool capable of garnering the greatest quantity of energy and information in the text of an epoch"[5] and is an example of the way in which "[t]o think is always to schematize, to go from the concept to existence by bringing a transformed concept into existence."[6]

1 Kalpana Rahita Seshadri, *HumAnimal: Race, Law, Language* (Minneapolis: University of Minnesota Press, 2012).

2 Kevin Attell, *Giorgio Agamben: Beyond the Threshold of Deconstruction* (New York: Fordham University Press, 2015).

3 Timothy Campbell and Adam Sitze, eds., *Biopolitics: A Reader* (Durham and London: Duke University Press, 2013), 25. See also Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), 9, for Agamben's account of his *Homo Sacer* as an heir to Foucault's work on bio-politics: "The Foucauldian thesis will then have to be corrected or, at least, completed."

4 Catherine Malabou, *Plasticity at the Dusk of Writing: Dialectic, Destruction, Deconstruction*, trans. Carolyn Shread (New York: Columbia University Press, 2010), 14. See generally 12–15.

5 Ibid., 14.

6 Ibid., 13.

The account of visuality in both the deconstructive and bio-political works stipulates that an asymmetrical and disproportionate power exchange is required for juridical and bio-political functions to occur. Those subjected to such functions are observed within a disproportionate field of vision from which they cannot escape, nor can they see those who watch them. Foucault describes this disproportionate visuality in relation to those administered by bio-political mechanisms: "He is seen, but he does not see; he is the object of information, never a subject in communication."[7] In turn Derrida calls this the *visor effect* in which "we do not see the one who sees us."[8] Consequently the asymmetry within both accounts is evident.

The juridical and bio-political accounts then suggest a more intrinsic connection between deconstruction and bio-politics premised on Foucault's concept of the "diagram"[9] and Derrida's concepts of *différance*[10] and the "trace."[11] It will be argued these concepts connect the conceptualizations of space, vision, and power found in deconstruction and bio-politics. Adapting Seshadri's phrase, the connection aims to illustrate "the [juridico-]political valence of the trace" present in both deconstruction and bio-politics.[12]

Deconstruction and bio-politics

To begin a discussion on deconstruction and bio-politics, let us briefly consider three recent and important engagements on this topic from Malabou, Seshadri, and Attell.

Malabou: bio-politics as sovereignty's deconstruction

Malabou's essay "Will Sovereignty Ever Be Deconstructed?"[13] asks if we have succeeded in Foucault's declaration that "[w]e need to cut off the king's head" in order to move away from sovereign-centered political theories.[14] She ponders whether "after Foucault, after Derrida – and I add, after Agamben," we have successfully "cut off the king's head"[15] via the theorization of bio-politics, those "disciplines of the body" and the "regulations of the population . . . around which the organization of power over life was deployed."[16] Here

7 Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (London: Penguin Books, 1991), 200.

8 Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International*, trans. Peggy Kamuf (New York and London: Routledge Classics, 2006), 7.

9 Foucault, *Discipline and Punish*, 205.

10 See generally Jacques Derrida, "Différance," trans. Alan Bass, in *Margins of Philosophy* (Chicago: The University of Chicago Press, 1982), 3–27.

11 See J. Hillis Miller, "Trace," in *Reading Derrida's* Of Grammatology, eds. Sean Gaston and Ian Maclachlan (London and New York: Continuum, 2011), 47–51.

12 Seshadri, *HumAnimal*, 109.

13 Catherine Malabou, "Will Sovereignty Ever Be Deconstructed?" in *Plastic Materialities: Politics, Legality, and Metamorphosis in the Work of Catherine Malabou*, eds. Brenna Bhandar and Jonathan Goldberg-Hiller (Durham and London: Duke University Press, 2015), 35–46.

14 Michel Foucault, "Truth and Power," trans. C. Lazzeri, in *Power: Essential Works of Michel Foucault 1954–1984: Volume Three*, ed. James D. Faubion (London: Penguin Books, 2002), 122.

15 Malabou, "Will Sovereignty Ever Be Deconstructed?," 36.

16 Michel Foucault, *The Will to Knowledge: The History of Sexuality, Vol. 1*, trans. Robert Hurley (London: Penguin Books, 1998), 139. See also Roberto Esposito, *Terms of the Political: Community, Immunity, Biopolitics*, trans. Rhiannon Noel Welch (New York: Fordham University Press, 2013), 69: "biopolitics

Malabou is clear: "My answer, here, is no."[17] She disagrees that Foucault's bio-politics are "absolutely incompatible with relations of sovereignty,"[18] because bio-politics stands as *sovereignty's own deconstruction of itself*: "biopolitics is already, in itself, a deconstructive tool of sovereignty."[19] Hence, sovereignty remains, even if monarchical sovereignty wanes, because sovereignty deconstructs itself and reappears as an epistemic condition for bio-politics: "It is only . . . when biology is constituted as a science replacing natural history, that biopolitics becomes possible."[20] Accordingly, Malabou diagnoses the problems of the past:

> The problem is the following: for Foucault, as for Agamben or Derrida, even in different ways, biology is always presented as intimately linked with sovereignty in its traditional figure.[21]

Yet Malabou's analysis lacks comment on the metaphysical connection between the *functioning* of deconstruction and bio-politics. However Seshadri's and Attell's work alleviate this lack.

Seshadri: deconstruction as the site of the bio-political

Seshadri's exquisite monograph *HumAnimal: Race, Law, Language* thoroughly investigates the metaphysical relationship between the functioning of deconstruction and bio-politics. Her thesis argues that "what Derrida indicates as 'trace' or the play of *difference*" within deconstruction *is* "the site of the biopolitical."[22] Developed somewhat, Derrida's deconstructive critique can be mapped onto, and account for, concepts that are necessary for the functioning of bio-politics. Thus, deconstruction's critique of metaphysical categories considered as "proper," and of "self-presence and purity," allows for bio-politics to operate.[23] With her focus on racism (something Foucault identified as being born out of biopolitics),[24] Seshadri illustrates how racism emerges from the bio-political separation of *bios* from *zōē*, as explicated in Agamben's seminal work *Homo Sacer: Sovereign Power and Bare*

refers to the increasingly intense and direct involvement established between political dynamics and human life (understood in its strictly biological sense), beginning with a phase that we can call second modernity."

17 Malabou, "Will Sovereignty Ever Be Deconstructed?," 36.

18 Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975–76*, trans. David Macey and ed. Arnold I. Davidson (London: Penguin Books, 2004), 35.

19 Malabou, "Will Sovereignty Ever Be Deconstructed?," 37.

20 Ibid., 38. See also Maria Muhle, "A Genealogy of Biopolitics: The Notion of Life in Canguilhem and Foucault," in *The Government of Life: Foucault, Biopolitics, and Neoliberalism*, eds. Vanessa Lemm and Miguel Vatter (New York: Fordham University Press, 2014), 84: "The articulation of power that governs the living thus supposes a knowledge of the living. In the epistemic conjuncture in which biopolitics emerges, this knowledge is articulated by medicine and biology at the beginning of the nineteenth century."

21 Malabou, "Will Sovereignty Ever Be Deconstructed?," 38.

22 Seshadri, *HumAnimal: Race, Law, Language*, xiii.

23 Ibid.

24 Foucault, *Society Must Be Defended*, 258: "The juxtaposition of – or the way biopower functions through – the old sovereign power of life and death implies the workings, the introduction and activation, of racism. And it is, I think, here that we find the actual roots of racism."

Life.[25] The metaphysical explanation for this is that "biopower depends on a contamination, the trace, the *différance* between biological (natural) life and political (human) life, in order to produce the specter of bare life."[26] Consequently, racism *qua* bio-politics enters the world due to, and through, the deconstructive act that differs and defers biological life from political life.[27]

Attell: Agambenian deconstruction and bio-politics

If we turn to Attell's book *Giorgio Agamben: Beyond the Threshold of Deconstruction*, we see that he too posits a profound connection between deconstruction and Agambenian bio-politics: "Derrida must be considered Agamben's primary contemporary interlocutor" because "Agamben views deconstruction as perhaps the most significant body of philosophical thought in the postwar period."[28] Attell illustrates how Agamben's thought, as perhaps the foremost on bio-politics, is imbued with a scrupulous reading of Derrida's deconstructive critique, even if it is often challenged.[29] Perhaps the most significant connection between the theorists is found in their respective metaphysical critiques: Derrida's *différance* and Agamben's "abandonment," or simply, the "ban."[30] In critiquing metaphysical completion, they both illustrate "a minimal but irreducible difference between two elements," which then suffers either "contamination or even a proliferation" via *différance*, or a "strategic articulation across an obscure fictional nexus" via the "ban."[31] Notwithstanding slight differences between the concepts,[32] there are prescient resonances between them, something Attell makes very clear. He states that of all Agamben's juridico-political concepts the "ban" "is the most evidently 'deconstructive' in its derivation and function" and that its "deconstructive provenance" must not be neglected:[33]

> It would be difficult to overstate the importance of the logic of the ban in Agamben's work from *Homo Sacer* on. This logic is, for example, the linchpin of his biopolitical theory, since it is by virtue of the ban-structure that *zōē* is

25 Seshadri, *HumAnimal: Race, Law, Language*, 86. And see Agamben, *Homo Sacer*, 1–12.

26 Seshadri, *HumAnimal: Race, Law, Language*, 86.

27 But see Jacques Derrida, *The Beast & the Sovereign: Volume I*, trans. Geoffrey Bennington (Chicago and London: The University of Chicago Press, 2009), 326, for Derrida's "dissatisfaction" with Agamben's "distinction between *bios* and *zōē*." On this see also Seshadri, *HumAnimal: Race, Law, Language*, 86.

28 Attell, *Giorgio Agamben*, 3.

29 Ibid., 4: "the critique of deconstruction runs like a sort of unconscious beneath the limpid prose of Agamben's entire oeuvre."

30 Of relevance here, as Attell notes, ibid., 127, is that Agamben's critique follows that found in Jean-Luc Nancy's, arguably deconstructive, essay "Abandoned Being," trans. Brian Holmes, in *The Birth to Presence*, trans. Brian Holmes and others (Stanford: Stanford University Press, 1994), 36–47.

31 Attell, *Giorgio Agamben*, 130.

32 Although see Seshadri, in *HumAnimal: Race, Law, Language*, 133, where she argues that this is "the parade construction that Agamben engages in" – a parody of Derrida's metaphysical critique. See 131–135 generally.

33 Attell, *Giorgio Agamben*, 127. If we recall that Agamben adopts "abandonment" from Nancy, it is worth noting the immense affinity between Nancy's work and Derrida's; this may account for the similarities between "abandonment" and *différance*. Indeed, as Marie-Eve Morin states in *Jean-Luc Nancy* (Cambridge: Polity Press, 2012), 19: "the influence of Derrida's questioning on Nancy's intellectual trajectory

> excluded-and-included in the juridico-political body of the human, thus becoming bare-life.[34]

From the three theorists we can now see that there are intimate connections between deconstruction and bio-politics, particularly between the work of Derrida and Agamben as explicated by Seshadri and Attell. However, this chapter's engagement lies with Foucault's original bio-political thinking, *à la* Malabou, and therein it attempts a connection between the functioning of bio-politics and Derrida's deconstructive critique.

Foucault, bio-politics, and panopticism: a diagram

Bio-politics: political power administering life

Foucault's bio-political thought warrants little, if any, introduction. It proposed to explain how, why, and where "political power had assigned itself the task of administering life,"[35] in which it monitored, developed, and regulated biological life, or moreover a biological population, rather than individual subjects.[36] This was achieved by two complementary means: disciplining the individual body and regulating the biological body. Commenting on these, Thomas Lemke makes a crucial observation:

> The difference between the two components of biopolitics should, however, be acknowledged with caution. Foucault stresses that discipline and control form "two poles of development linked together by a whole intermediary cluster of relations." They are not independent entities but define each other. Accordingly, discipline is not a form of individualization applied to already existing individuals, but rather it presupposes a multiplicity.[37]

Lemke's point here is important; Foucault insisted that "the disciplines" and the mechanisms that "regulated" the population were not *wholly* separate. He argued that whilst juridical mechanisms were not the same as either disciplinary or bio-political mechanisms,[38] it was neither the case that these different mechanisms "cancelled" out or "replaced" one

cannot be underestimated. In a sense, Derrida is the most important force in the milieu in which Nancy, the student and the young academic, comes to his own questioning." Then see generally 19–21.

34 Attell, *Giorgio Agamben*, 130. See also Seshadri, *HumAnimal: Race, Law, Language*, 86.

35 Foucault, *The History of Sexuality, Vol. 1*, 139.

36 Ibid., 139: "*a bio-politics of the population*." But note the problem of an exhaustive definition of bio-politics. See Campbell and Sitze, *Biopolitics: A Reader*, 6: "we don't suppose that Foucault's brief remarks on biopolitics, whether in his little 1976 book or, especially, in the lectures concurrent with that book, can be interpreted as though they are consistent, transparent, and fully worked-through."

37 Thomas Lemke, *Biopolitics: An Advanced Introduction*, trans. Eric Frederick Trump (New York and London: New York University Press, 2011), 37. The Foucault quotes are from, respectively, Foucault, *The History of Sexuality, Vol. 1*, 139 and Foucault, *Society Must Be Defended*, 242–243.

38 See Foucault, *The History of Sexuality, Vol. 1*, 144; Foucault, *Society Must Be Defended*, 34–40; Foucault, *Discipline and Punish*, 183; and Michel Foucault, *Security, Territory, Population: Lectures at the College de France, 1977–78*, trans. Graham Burchell and ed. Arnold I. Davidson (Hampshire: Palgrave Macmillan, 2009), 66.

another, or disappeared within a crude chronology,[39] nor the case that they operated without contamination between one another.[40] Rather, Foucault stated there was a "continuum of apparatuses,"[41] a "dovetail[ing]" effect,[42] and "a profound historical link" between all the mechanisms,[43] because "there is not a series of successive elements, the appearance of the new causing the earlier ones to disappear. There is not the legal age, the disciplinary age, and then the age of security."[44] As he explained, "we have a triangle: sovereignty, discipline, and governmental management, which has population as its main target and apparatuses of security as its essential mechanism."[45]

Consequently, the topic examined within Foucault's work is not *merely* disciplinary because it blurs disciplinary, normalizing, and bio-political actions; this is Jeremy Bentham's "architectural figure"[46] of the Panopticon, which is discussed at length in Foucault's 1975 book *Discipline and Punish: The Birth of the Prison*.[47] It features prominently in Foucault's account of the development of discipline, as is well known.[48] However, Foucault then abstracts the concept into "panopticism,"[49] which broaches both discipline and normalization: "Panopticism . . . [is] a type of power that is . . . the molding and transformation of individuals in terms of certain norms."[50] Indeed, it has even been argued that Foucault's use of Bentham's Panoptic-utilitarianism acts as an influential pre-cursor to his later work on bio-politics and governmentality.[51] In what follows, panopticism is examined with regards to its bio-political significance and the motor scheme of visuality that resides at its core. This examination begins with an account of the Bentham's original Panopticon.

39 Foucault, *Security, Territory, Population*, 7, 107. See also Foucault, *Society Must Be Defended*, 242 and Foucault, *The History of Sexuality, Vol. 1*, 144.

40 See Foucault, *The History of Sexuality, Vol. 1*, 144. See also the Michel Foucault, "Truth and Juridical Forms," trans. Robert Hurley, in *Power: Essential Works of Michel Foucault 1954–1984: Volume Three*, ed. James D. Faubion (London: Penguin Books, 2002), 1–89, for Foucault's in-depth analysis over the course of five lectures of (ibid., 4) "juridical forms and their evolution in the field of penal law."

41 Foucault, *The History of Sexuality, Vol. 1*, 144.

42 Foucault, *Society Must Be Defended*, 242.

43 Foucault, *Security, Territory, Population*, 108.

44 Ibid., 8. See also Foucault, *Society Must Be Defended*, 250: "What is more, the two sets of mechanisms – one disciplinary and the other regulatory – do not exist at the same level. Which means of course that they are *not* mutually exclusive and *can* be articulated with each other." Emphasis added.

45 Foucault, *Security, Territory, Population*, 107–108.

46 Foucault, *Discipline and Punish*, 200.

47 Ibid., 195–228.

48 Ibid., 170: "The exercise of discipline presupposes a mechanism that coerces by means of observation; an apparatus in which the techniques that make it possible to see induce effects of power, and in which, conversely, the means of coercion make those on whom they are applied clearly visible."

49 Ibid., 208. See also Anne Brunon-Ernst, "Deconstructing Panopticism into the Plural Panopticons," in *Beyond Foucault: New Perspectives on Bentham's Panopticon*, ed. Anne Brunon-Ernst (Farnham: Ashgate, 2012), 26, footnote 11. Here Brunon-Ernst distinguishes between "Panopticon" and "panopticism" as conceptual terms: "Scholars should use 'panopticism' to refer to features elucidated by Foucault's texts on Bentham's first 1786–91 projects, and not to the Panopticon itself."

50 Foucault, "Truth and Juridical Forms," 70.

51 See Anne Brunon-Ernst, *Utilitarian Biopolitics: Bentham, Foucault and Modern Power* (Oxon: Routledge, 2016), 1: "The book's main argument is that Foucault assimilated Bentham's utilitarianism when forging his theories on government and that a recognition of this source of Foucault's inspiration allows for a reconsideration of the concept of biopolitics itself."

Bentham's Panopticon

Bentham's Panopticon was designed in the late 1700s and published in a 1791 collection entitled *Panopticon: or the Inspection House*.[52] The design and concordant aims of the Panopticon became synonymous with Bentham's larger theoretical endeavors in utilitarianism because he believed the architectural concept could achieve utilitarian ends:

> Morals reformed – health preserved – industry invigorated – instruction diffused – public burthens lightened – Economy seated, as it were, on a rock – the gordian knot of the Poor-Laws are not cut, but untied – all by a simple idea in Architecture![53]

This opening gambit presents the Panopticon as a bastion of utilitarian ideals: it cures the sick; reforms the violent; educates or trains the population; and provides work for the idle.[54] It also achieves these results in a variety of institutional settings: prisons; work-houses; factories; insane asylums; hospitals; and even schools.[55] Here one finds the undisputed locus of Benthamite utilitarianism.[56] And at the core of this design lies a fever-stricken obsession for observation and a peculiar account of visuality.

This obsession is revealed through Bentham's feverous decree regarding the Panopticon's successful operation: "The essence of it consists, then, in the *centrality* of the inspector's situation, combined with the well-known and most effectual contrivances for *seeing without being seen*."[57] Here, alongside the instruction for the centrality of the inspector's tower, is Bentham's clear and prominent motor scheme of visuality whereby the inspector sees but is not seen; this is the "*scheme*, that is, a *motive*, produced by a rational imagination, enabling it to force open the door to an epoch and open up exegetical perspectives suited to it."[58] This asymmetrical construction of visuality – "*seeing without being seen*" – is critical for the success of the Panopticon because only the illusion of constant surveillance guarantees constant discipline.[59] Bentham's most pertinent account of this comes in stating the "fundamental advantage" of the design:

> I mean, the *apparent omnipresence* of the inspector (if divines will allow me the expression), combined with the extreme facility of his *real presence*.[60]

52 Jeremy Bentham, *The Panopticon Writings* (London and New York: Verso, 1995), 31. This volume, *The Panopticon Writings*, contains all Bentham's "Panopticon Letters" and a selection of his "Postscript" writings. For a general informative account see also Gertrude Himmelfarb, *Victorian Minds* (London: Widenfeld and Nicolson, 1968), 32–81.

53 Bentham, *The Panopticon Writings*, 31.

54 Ibid., 34.

55 Ibid., 32.

56 However, it has been argued that the key motivating factor of the Panopticon was economic prosperity. See Himmelfarb, *Victorian Minds*, 52: "In the new and improved Panopticon, health, morals, and industry all conspired to the same end – that of economy."

57 Bentham, *The Panopticon Writings*, 43. All emphasis in the original.

58 Malabou, *Plasticity at the Dusk of Writing*, 13.

59 Miran Božovič, *An Utterly Dark Spot: Gaze and Body in Early Modern Philosophy* (Ann Arbor: The University of Michigan Press, 2000), 111: "the illusion of constant surveillance: the prisoners are not really always under surveillance, they just think or imagine that they are."

60 Bentham, *The Panopticon Writings*, 45.

This is the heart of the Panopticon's motor scheme in which visuality, or observation, is structured asymmetrically because of the combination of the *real presence* of the inspector and his *apparent omnipresence*, thus illustrating an "*enlargement, extension*, or *transformation* of a concept at a given moment in the history of thought."[61] Miran Božovič further explains this by stating "the inspector is apparently omnipresent precisely insofar as he is not really present, since a momentary exposure to the eyes of the prisoners is sufficient for him to lose his apparent omnipresence."[62] Thus, for Bentham's revolutionary architectural project, asymmetrical visuality is the critical motor scheme. Returning to Foucault, his account of the Panopticon shows much the same to be true.

Foucault's panopticism

Within Foucault's thought, Bentham's Panopticon is extremely important. It appears numerous times throughout his *oeuvre*,[63] the most famous of which being the aforementioned reference in his *Discipline and Punish*.[64] But it also appears two years earlier, in 1973, in his lecture series "Truth and Juridical Forms" delivered at the Pontifical Catholic University of Rio de Janeiro,[65] and in no less than four of the lecture series Foucault delivered at the Collège de France spanning nearly a decade: (in chronological order) *The Punitive Society (1972–73)*;[66] *Psychiatric Power (1973–74)*;[67] *Security, Territory, Population (1977–78)*;[68] and *The Birth of Biopolitics (1978–79)*.[69] Turning to Foucault's own thought on the importance of this concept, we recall his assertion in "Truth and Juridical Forms":

> I hope historians of philosophy will forgive me for saying this, but I believe that Bentham is more important for our society than Kant or Hegel. All our societies should pay homage to him.[70]

Following this Foucault then stated: "We live in a society where panopticism reigns."[71] These statements evidence the crucial importance of Bentham's Panopticon in Foucault's *oeuvre*, and they also introduce Foucault's neologism "panopticism," an abstract concept derived from Bentham's original.[72] Panopticism refers to an exercise of power over

61 Malabou, *Plasticity at the Dusk of Writing*, 13.
62 Božovič, *An Utterly Dark Spot*, 103.
63 For an account of Foucault's references to the Panopticon, see Brunon-Ernst, "Deconstructing Panopticism into the Plural Panopticons," 28, footnote 43.
64 Foucault, *Discipline and Punish*, 195–228.
65 Foucault, "Truth and Juridical Forms," 58, 70–74.
66 Michel Foucault, *The Punitive Society: Lectures at the Collège de France, 1972–73*, trans. Graham Burchell and ed. Arnold I. Davidson (Hampshire: Palgrave Macmillan, 2015), 64.
67 Michel Foucault, *Psychiatric Power: Lectures at the Collège de France, 1973–74*, trans. Graham Burchell and ed. Arnold I. Davidson (Hampshire: Palgrave Macmillan, 2008), 73–79.
68 Foucault, *Security, Territory, Population*, 66.
69 Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–79*, trans. Graham Burchell and ed. Arnold I. Davidson (New York: Picador, 2008) 67, 255–256.
70 Foucault, "Truth and Juridical Forms," 58.
71 Ibid. Note that at 70, Foucault gives another account of this point: "Today we live in a society programmed basically by Bentham, a panoptic society, a society where panopticism reigns."
72 Ibid., 71: ". . . in homage to Bentham – 'panopticism.'"

individuals that is a synthesis of control, punishment, and compensation, which implements transforming corrections toward certain norms.[73] Importantly, Foucault's panopticism features the same motor scheme as the Panopticon, that of asymmetrical visuality. This creates a synesthetic trap whereby "everything the individual does is exposed to the gaze of an observer who watches . . . without anyone being able to see him."[74] Consequently, in Foucault's work there is also an "*enlargement, extension*, or *transformation* of a concept at a given moment in the history of thought."[75] However, the difference between the Panopticon and panopticism[76] is that the latter is an "indefinitely generalizable mechanism."[77] Considering the importance of this concept within Foucault's work on disciplinary and bio-political power, this point warrants elaboration.[78]

Foucault defines panopticism in two ways. The narrow definition sees panopticism as the true intention behind Bentham's design: "Bentham's Panopticon is not a model of a prison . . . it is a model, and Bentham is quite clear about this, for a prison, but also for a hospital, for a school, workshop, orphanage, and so on."[79] This abstract model of power, derived from the disciplines, operates via a distinct negative form of visuality:

> Disciplinary power, on the other hand, is exercised through its invisibility: at the same time it imposes on those whom it subjects a principle of compulsory visibility.[80]

Foucault reinforces this negative asymmetrical account of visuality in explaining that the subject of panopticism "is seen, but he does not see; he is the object of information, never a subject in communication."[81] This repeated account of asymmetrical visuality[82] is clearly the

73 Ibid., 70.

74 Ibid., 58. Foucault, in *Discipline and Punish*, 201, also noted the Panopticon's motor scheme of asymmetrical visuality: "Unverifiable: the inmate must never know whether he is being looked at at any one moment; but he must be sure that he may always be so."

75 Malabou, *Plasticity at the Dusk of Writing*, 13.

76 Brunon-Ernst, "Deconstructing Panopticism Into the Plural Panopticons," 41: "The Panopticon is not panopticism."

77 Foucault, *Discipline and Punish*, 216.

78 However, panopticism is not a totalizing and universal type of power; for this would be to misunderstand Foucault's account of power. Rather for Foucault power is "something that functions only when it is part of a chain. It is never localized here or there, it is never in the hands of some, and it is never appropriated in the way that wealth or a commodity can be appropriated." See Foucault, *Society Must Be Defended*, 29. For further clarification of panopticism's lacking universality, see Michel Foucault, "The Eye of Power," trans. Colin Gordon, in *Power/Knowledge: Selected Interviews and Other Writings 1972–77*, ed. Colin Gordon (Brighton: Harvester Press, 1980), 148: "the procedures of power that are at work in modern societies are much more numerous, diverse and rich. It would be wrong to say that the principle of visibility governs all technologies of power used since the nineteenth century." Finally, for a contextual analysis critiquing the omnipotence of the gaze in surveillance societies, see Véronique Voruz, "The Status of the Gaze in Surveillance Societies," in *Re-reading Foucault: On Law, Power and Rights*, ed. Ben Golder (Oxon: Routledge, 2013), 144–145.

79 Foucault, *Psychiatric Power*, 73–74. See also Bentham, *The Panopticon Writings*, 34.

80 Foucault, *Discipline and Punish*, 187.

81 Ibid., 200.

82 Ibid., 222: "[speaking of the disciplines] They have the precise role of introducing insuperable asymmetries and excluding reciprocities"; ibid., 223: "panopticism enables . . . a machinery that is both immense and minute, which supports, reinforces, multiplies the asymmetry of power and undermines the limits that are traced around the law."

motor scheme of panopticism, for this "machinery that assures dissymmetry, disequilibrium, difference,"[83] is what "constitute[s], both vaguely and definitely, a material 'atmosphere.' "[84]

Thereafter, Foucault's abstract definition describes panopticism as a "form for a series of institutions"[85] and "a generalizable model of functioning."[86] This develops panopticism from a disciplinary concept to one that underpins the bio-political normalization and regulation of the population, hence far from a narrow interpretation of Bentham's Panopticon:

> But the Panopticon must not be understood as a dream building: it is the diagram of a mechanism of power reduced to its ideal form; its functioning, abstracted from any obstacle, resistance or friction, must be represented as a pure architectural and optical system; it is in fact a figure of political technology that may and must be detached from any specific use.[87]

Here Foucault repeatedly describes panopticism as a "generalizable"[88] form of power that will become critical within his *oeuvre* for underpinning bio-political mechanisms. It is the "diagram" of an ideal form that by design must be detached from concrete instances. And once again asymmetrical visuality is the motor scheme of this concept, whereby a "model-image"[89] operates and illustrates that "the power exercised is only ever an optical effect."[90]

Later we will return to this abstract and generalizable form of panopticism when consulting Gilles Deleuze's reading of this ideal form in order to illustrate how it connects inextricably with Foucault's bio-political thought.[91] However, the chapter now moves to examine Derrida's deconstructive juridical thought in order to lay the ground for an attempted connection between these two juridico-political fields via asymmetrical visuality.

Derrida, law, and anachrony: *différance*

Deconstruction and hauntology

Turning to Derrida's deconstructive juridical thought, one finds the same asymmetrical visuality playing an equally crucial role. References to this visual account are scattered throughout his juridical texts, from those well-known to those more obscure. In what follows, its original proposition will be explored and its significance thereafter will be examined.

In Derrida's *Specters of Marx: The State of the Debt, the Work of Mourning and the New International*, he uses his deconstructive critique of metaphysics to solicit Karl Marx's dogmatic "ontology of presence as actual reality and as objectivity."[92] Accordingly he states:

83 Ibid., 202.
84 Malabou, *Plasticity at the Dusk of Writing*, 14.
85 Foucault, *Psychiatric Power*, 74.
86 Foucault, *Discipline and Punish*, 205.
87 Ibid.
88 Ibid., 205, 207, 209, 215, 216, 222, 224.
89 Malabou, *Plasticity at the Dusk of Writing*, 14.
90 Foucault, *Psychiatric Power*, 77.
91 Gilles Deleuze, *Foucault*, trans. and ed. Seán Hand (London: Bloomsbury, 2006), 21–38.
92 Derrida, *Specters of Marx*, 214.

"Ontology is a conjuration."[93] Derrida's primary methodology is a deconstructive reading of William Shakespeare's *Hamlet*, which illuminates the play's ontological critique, something that Derrida terms – in a playful French-English homonym – "*hauntology*":

> Let us call it a *hauntology*. This logic of haunting would not be merely larger and more powerful than an ontology or a thinking of Being (of the "to be," assuming that it is a matter of Being in the "to be or not to be," but nothing is less certain). It would harbour within itself, but like circumscribed places or particular effects, eschatology and teleology themselves.[94]

Hauntology, in Derrida's deconstructive theory, is one of many "nonsynonymous substitutions,"[95] such as *différance*, trace, supplement,[96] or *pharmakon*,[97] which all demonstrate his critique of the metaphysics of presence. Hauntology plays off the "presence" of King Hamlet's ghost in Act I, Scene V, of Shakespeare's tragedy,[98] as it "appears" and commands Prince Hamlet to "Revenge his foul and most unnatural murder"[99] at the hands of Claudius, "Ay, that incestuous, that adulterate beast."[100] For as commented by Simon Critchley and Jamieson Webster (as well as Derrida),[101] there is nothing "present" in the ghost's appearance: "The ghost *is* nothing, of course, so Barnardo confesses that he has seen it, that is, not seen it. In matters ghostly, there *is* nothing to see."[102] Hence, Derrida's critique utilizes the ghost's simultaneous "presence" *and* "absence" to deconstruct "the sharp distinction between the real and the unreal, the actual and the inactual, the living and the non-living, being and non-being ('to be or not to be', in the conventional reading), in the opposition between what is present and what is not."[103] As Derrida explains, hauntology affects not only the concept of metaphysical being but *every* concept:

> To haunt does not mean to be present, and it is necessary to introduce haunting into the very construction of a concept. Of every concept, beginning with the concepts of being and time. That is what we would be calling here a hauntology.[104]

93 Ibid., 202.
94 Ibid., 10. For an account of Derrida, *Hamlet*, and deconstruction see Hélène Cixous, "Shakespeare Ghosting Derrida," trans. Laurent Milesi. *The Oxford Literary Review* 34, no. 1 (2012): 1–24.
95 Derrida, "Différance," 12.
96 See Jacques Derrida, *Of Grammatology*, trans. Gayatri Chakravorty Spivak (Baltimore and London: John Hopkins University Press, 1976), 141–164.
97 See Jacques Derrida, "Plato's Pharmacy," trans. Barbara Johnson, in *Dissemination* (London: Continuum, 2004), 67–186.
98 *Hamlet*, 1.5.1–91.
99 Ibid., 1.5.25.
100 Ibid., 1.5.42.
101 Derrida, *Specters of Marx*, 5: "The Thing is still invisible, it is *nothing* visible. . . . "
102 Simon Critchley and Jamieson Webster, *The Hamlet Doctrine* (London and New York: Verso, 2013), 26.
103 Derrida, *Specters of Marx*, 12. See also Jacques Derrida and Bernard Stiegler, "Spectrographies," trans. Jennifer Bajorek, in *Echographies of Television: Filmed Interviews* (Cambridge: Polity Press, 2002), 117: "A spectre is both visible and invisible, both phenomenal and nonphenomenal: a trace that marks the present with its absence in advance. The spectral logic is de facto a deconstructive logic."
104 Derrida, *Specters of Marx*, 202.

Consequently, hauntology also critiques the metaphysical concept of time. Derrida emphasizes this through repeated reference to Prince Hamlet's famous line: "The time is out of joint. O cursèd spite / That ever I was born to set it right!"[105] This additional metaphysical critique illustrates that just as there can be no sovereign instance of presence or being within metaphysics, equally there cannot be a sovereign "present" moment in time because the deconstructive trace obliterates the "*present, past*, and *future*":[106]

> The concepts of *present*, *past*, and *future*, everything in the concepts of time and history which implies evidence of them – the metaphysical concept of time in general – cannot adequately describe the structure of the trace.[107]

Consequently, Derrida's thought critiques being, presence, and the temporal moment of "*Now*," or "the living present";[108] these are the fundamentals of deconstructive critique.[109] However, in order to deduce how this deconstructive critique relates to asymmetrical visuality and Derrida's juridical thought, we need to return to Act I, Scene V, of *Hamlet*.

Hamlet, *the visor effect, "Anachrony makes the law"*

The closing scene of Act I in *Hamlet* sees the ghost of King Hamlet appear and command revenge from Prince Hamlet.[110] This is quite literally the command of a sovereign: "Wielding the threefold authority of supernatural being, king, and father, he very appropriately begins with a command."[111] Derrida reflects on the specific details of this scene and comments that the ghost, of course, is not "present," because he is a ghost and thus invisible: "The Thing is still invisible, it is *nothing* visible ('I haue seene nothing')."[112] He then analyzes the ghost's famous costume, for it is clad in armor and wearing a helmet with a visor which obscures the prince's view of the ghost's face.[113] This is a critical point of Derrida's

105 *Hamlet*, 1.5.196–197.
106 Derrida, *Of Grammatology*, 67.
107 Ibid. For an account of this point see Donald Cross, "The *Vigil* of Philosophy: Derrida on Anachrony," *Derrida Today* 8, no. 2 (2015): 185–188.
108 Derrida, *Of Grammatology*, 67.
109 Derrida, "Différance," 13: "It is because of *différance* that the movement of signification is possible only if each so-called 'present' element, each element appearing on the scene of presence, is related to something other than itself, thereby keeping within itself the mark of the past element, and already letting itself be vitiated by the mark of its relation to the future element, this trace being related no less to what is called the future than to what is called the past, and constituting what is called the present by means of this very relation to what it is not: what it absolutely is not, not even a past or a future as a modified present."
110 *Hamlet*, 1.5.7, 1.5.25.
111 William Shakespeare, *The Oxford Shakespeare: Hamlet*, ed. G.R. Hibbard (Oxford: Oxford University Press, 1994), 185, note 2.
112 Derrida, *Specters of Marx*, 5.
113 Ibid., 6–8. See also Anselm Haverkamp, *Shakespearean Genealogies of Power: A Whispering of Nothing in* Hamlet, Richard II, Julius Caesar, Macbeth, The Merchant of Venice, *and* The Winter's Tale (London and New York: Routledge, 2011), 23: "It takes the stage in the armor of the old King . . . but it otherwise bears no individual features that the son could recognize."

analysis because this leads us to an uncanny account of negative, asymmetrical visuality and Derrida's corresponding "*visor effect*":

> This Thing meanwhile looks at us and sees us not see it even when it is there. A spectral asymmetry interrupts here all specularity. It de-synchronizes, it recalls us to anachrony. We will call this the *visor effect*: we do not see who looks at us.[114]

In developing the *visor effect*, Derrida then describes both the synesthetic experience that accompanies it and how this asymmetrical visuality relates to law:

> This spectral *someone other looks at us*, we feel ourselves being looked at by it, outside of any synchrony, even before and beyond any look on our part, according to an absolute anteriority . . . and asymmetry, according to an absolutely unmasterable disproportion. Here anach[r]ony makes the law.[115] To feel ourselves seen by a look which it will always be impossible to cross, that is the *visor effect* on basis of which we inherit from the law. Since we do not see the one who sees us, and who makes the law, who delivers the injunction . . . since we do not see the one who orders "swear," we cannot identify it in all certainty, we must fall back on its voice.[116]

This crucial passage contains several important points for Derrida's juridical thought. First, because the ghost is a sovereign authority Derrida equates its commands with those of law; they are "injunctions."[117] Second, he posits that the functioning of these legal commands is disrupted, desynchronised, or otherwise deconstructed due to an "anachrony"[118] caused by the *visor effect*: "anachrony makes the law."[119] Thus, the subject of the law is unable to relate to the source of the law in either presence, time, or metaphysical being.[120] Consequently, they experience the law as an "unmasterable disproportion"[121] produced

114 Derrida, *Specters of Marx*, 6.

115 Ibid., 6. Of note is that the 1994 and 2006 Routledge English translations of *Specters of Marx* feature the word "anachony" and not "anachrony." Peggy Kamuf, the translator for both editions, has confirmed that the loss of the "r" in these editions is a typographical error. This conversation is on file with the author. Reference to the original French text confirms this; see Jacques Derrida, *Spectres de Marx: L'État de la dette, le travail du deuil, et la nouvelle Internationale* (Paris: Éditions Galilée, 1993), 27: "L'anachronie fait ici la loi."

116 Derrida, *Specters of Marx*, 6–7.

117 Ibid., 7.

118 M.C. Howatson, ed., *The Oxford Companion to Classical Literature* (3rd Edition) (Oxford: Oxford University Press, 2011), 39: "anachrony – The narration of events taken outside their chronological sequence, usually in a narrator's recapitulation of past happenings."

119 Derrida, *Specters of Marx*, 7. See also Gérard Genette, *Narrative Discourse: An Essay in Method*, trans. Jane E. Lewin (Oxford: Basil Blackwell, 1980), 40: "the general term *anachrony* [is used] to designate all forms of discordance between the two temporal orders of story and narrative (we will see later that these discordances are not entirely limited to analepsis and prolepsis)."

120 Derrida, *Specters of Marx*, 7. See also 32: ". . . an anachrony, some *Un-Fuge*, some 'out of joint' dislocation in Being and in time itself . . ."

121 Ibid., 7.

by the *visor effect*.[122] These points reveal the motor scheme in Derrida's juridical thought, whereby "the essential core can pass through the narrow lens" of the *visor effect's* asymmetrical visuality.[123]

From the work examined above, it is clear that this account has strong connections to the motor scheme of asymmetrical visuality in Foucault's work on bio-politics. However, the instance detailed above from *Specters of Marx* is not the only example of this deconstructive concept featuring in Derrida's juridical thought; rather, asymmetrical visuality is in fact a prolific element in his deconstructive legal theory.

Before the (asymmetrical) law

Beyond *Specters of Marx*, Derrida then makes two direct references to the *visor effect*, both of which reinforce its significance to his juridical thought. In a 1993 interview with Bernard Stiegler,[124] Derrida explicitly refers to

> the "visor effect": the ghost looks at or watches us, the ghost concerns us. The specter is not simply someone we see coming back, it is someone by whom we feel ourselves watched, observed, surveyed, as if by the law: we are "before the law," without any possible symmetry, without reciprocity, insofar as the other is watching only us, concerns only us, we who are observing it (in the same way that one observes and respects the law) without even being able to meet its gaze. Hence this dissymmetry and, consequently, the heteronomic figure of the law.[125]

Then, from a text published in French two years later, Derrida states the following in *Archive Fever: A Freudian Impression*: "The phantom makes the law – even, and more than ever, when one contests him. Like the father of Hamlet behind the visor, and by virtue of the *visor effect*, the specter sees without being seen."[126] These references illustrate a continuing, acute, and clear account of the asymmetrical and anachronous visuality that affects Derrida's juridical thought.

Evidently, within Derrida's deconstructive legal theory, the source of law is hidden from view due to deconstructive critiques; those "nonsynonymous substitutions"[127] that disrupt presence, time, and metaphysical being. It is submitted that this anachronous asymmetrical visuality operates as the motor scheme in Derrida's juridical thought because, as per Malabou's description, it "constitute[s], both vaguely and definitely, a material 'atmosphere' " for

122 Derrida reinforces this point several times: ibid., 7: "The armor . . . permit[s] him to see without being seen"; ibid., 8:. ". . someone, beneath the armor, can safely see without being see or without being identified"; and ibid., 8:. ". . the supreme insignia of power: the power to see without being seen."

123 Malabou, *Plasticity at the Dusk of Writing*, 13.

124 Derrida and Stiegler, "Spectrographies." Note this is the same year as the publication for the original French version of *Specters of Marx*.

125 Ibid., 120.

126 Jacques Derrida, *Archive Fever: A Freudian Impression*, trans. Eric Prenowitz (Chicago and London: University of Chicago Press, 1996), 61.

127 Derrida, "Différance," 12.

his theory.[128] As Derrida states in his essay "Before the Law" (a reading of Franz Kafka's famous parable of the same name from *The Trial*):[129] "What *must not* and cannot be approached is the origin of *différance*: it must not be presented or represented and above all not penetrated. That is the law of the law, the process of a law of whose subject we can never say "There it is," it is here or there."[130] Hence, the deconstructive critique of *différance* differs, defers, disrupts, and desynchronizes the subject of the law in order that it may never be seen nor identified. This is the fourth example within Derrida's juridical thought that illustrates the asymmetrical visuality at the core of law. However, there are several other examples from Derrida's *oeuvre* that could be consulted. Here one could refer to "The Laws of Reflection: Nelson Mandela, In Admiration,"[131] "Declarations of Independence,"[132] or "Force of Law: The 'Mystical Foundation of Authority'"[133] for similar accounts of law's operative asymmetry.

From the numerous accounts given above, it is clear that within Derrida's juridical thought the *visor effect* and asymmetrical visuality are vital for the functioning of law; they ensure that the law is presented asymmetrically to those who are subjected to it:

> What remains concealed and invisible in each law is thus presumably the law itself, that which makes laws of these laws, the being-law of these laws.[134]

The concealment of the law ensures that it remains at a distance, out of sight, and ultimately in a superior position within a disproportionate power exchange. In addition to Derrida's prominent use of *Hamlet*, he also utilizes Kafka's parable to illustrate this, in which the "door keeper" is a parallel to the ghost of King Hamlet and indeed the inspector in Bentham's Panopticon: "the doorkeeper, who is himself the observer, overseer, and

128 Malabou, *Plasticity at the Dusk of Writing*, 14.

129 See Franz Kafka, *The Trial*, trans. Idris Parry (London: Penguin Classics, 2000), 166–167.

130 Jacques Derrida, "Before the Law," trans. Avital Ronnell and Christine Roulston, in *Acts of Literature*, ed. Derek Attridge (New York: Routledge, 1992), 205.

131 Jacques Derrida, "The Laws of Reflection: Nelson Mandela, In Admiration," trans. Mary Ann Cows and Isabelle Lorenz, in *For Nelson Mandela*, eds. Jacques Derrida and Mustapha Tlili (New York: Seaver Books, 1987), 22. Derrida states there is a "[a] terrifying dissymmetry" in the law, with "no simply assignable origin for the history of law, only a reflecting apparatus, with projections of images, inversions of paths, interior duplications, and effects of history for a law whose structure and whose "history" consist in taking away the origin."

132 Jacques Derrida, "Declarations of Independence," trans. Tom Keenan and Tom Pepper, in *Negotiations: Interventions and Interviews, 1971–2001*, ed. Elizabeth Rottenberg (Stanford: Stanford University Press, 2002), 49–50. Here Derrida describes the temporal anachrony illustrated by the actions of those who signed the Declaration of Independence to constitute the United States of America: "But these people do not exist. They do *not* exist as an entity, the entity does *not* exist *before* this declaration, not *as such*. . . . The signature invents the signer. This signer can only authorize him-or herself to sign once he or she has come to the end – if one can say this of his or her own signature in a sort of fabulous retroactivity."

133 Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" trans. Mary Quaintance, in *Acts of Religion*, ed. Gil Anidjar (New York: Routledge, 2002), 241. Here Derrida states that law's originary moment does not exist in a present moment within a chronology linear time. Rather the "very moment of foundation or institution . . . is never a moment inscribed in the homogenous fabric of a story or history, since it rips it apart with one decision."

134 Derrida, "Before the Law," 192.

sentry, the very figure of vigilance . . ."[135] The door keeper illustrates that law's subjects are watched and yet denied any reciprocity, for there is "no itinerary, no method, no path to accede to the law."[136] In the parable, the door keeper continuously watches and interrogates the man from the country but never allows him to experience the law that lies just beyond him.[137] The door to the law is in fact open, but the position designated for the man from the country denies him sight of the law: "It lets the inside (*das Innere*) come into view – not the law itself, perhaps, but interior spaces that appear empty and provisionally forbidden."[138]

This visual asymmetry is consistently present in Derrida's deconstructive account of the law, yet it is also clear that sometimes "Derrida's project" broadens beyond visuality and thus conveys disruptions or asymmetries in time, presence, or metaphysical being; but such is what is at stake: "When speaking of Derrida's project, the reference is of course to his deconstruction of the metaphysics of presence."[139] Accordingly, deconstruction informs his juridical thought beyond *merely* visuality, but this does not bar one from highlighting the disproportionate structural relation nevertheless posited between the law and its subject: "we do not see the one who sees us, and who makes the law."[140]

Having now explained the asymmetrical visuality within Derrida's juridical thought, we will now attempt to theorize a connection between this and Foucault's work on bio-politics.

Deconstruction and bio-politics: the juridico-political valence of the trace

Deconstruction and bio-politics: a connection in function?

Thus far in examining both Foucault's bio-political thought and Derrida's juridical thought, this chapter has argued that asymmetrical visuality operates as the motor scheme in both works. However, in order to propose a fulfilling connection between the two works – à la those shown in Seshadri's and Attell's respective monographs – it is not sufficient to simply observe the shared use of a concept. Rather, the challenge is to extend Malabou's aforementioned engagement[141] by addressing how asymmetrical visuality relates to the functioning of deconstruction and bio-politics. To achieve this, both fields of thought must be brought into the same register – either Foucault's genealogical archaeology[142] or Derrida's metaphysical philosophy. Considering that Derrida's thought

135 Ibid., 196.
136 Ibid.
137 Kafka, *The Trial*, 166–167.
138 Derrida, "Before the Law," 203.
139 Jacques de Ville, *Jacques Derrida: Law as Absolute Hospitality* (Oxon: Routledge/GlassHouse, 2011), 13.
140 Derrida, *Specters of Marx*, 7.
141 Malabou, "Will Sovereignty Ever Be Deconstructed?," 37: "The philosopher has to deconstruct biopolitical deconstruction, that is, to unveil it and resist its ideological tendency."
142 On this see Giorgio Agamben, "Philosophical Archaeology," *Law and Critique* 20, no. 3 (2009): 211–231.

is an ahistorical critique,[143] it is Foucault's work that must be read metaphysically. To achieve this, Deleuze's thought will be utilized, for he reads Foucault as a philosopher of the metaphysical "diagram": "the presentation of the relations between forces unique to a particular formation."[144]

Philosophies of power: espacement; space and time

We recall that Foucault's bio-politics is premised upon the two inextricable poles of individual discipline and population regulation.[145] In analyzing this point, it was suggested above that panopticism (in its most abstracted form)[146] underpins Foucault's bio-political thought.[147] Deleuze explains this in his book *Foucault* in the chapter "A New Cartographer (Discipline and Punish),"[148] whereby Foucault's panopticism is, as per the narrow definition, "a visual assemblage and a luminous environment . . . in which the warder can see all the detainees without the detainees being able to see either him or one another."[149] But Deleuze further explains panopticism as

> a machine that not only affects visible matter in general (a workshop, barracks, school or hospital as much as a prison) but also in general passes through every articulable function. So the abstract formula of Panopticism is no longer 'to see without being seen' but *to impose a particular conduct on a particular human multiplicity*.[150]

Deleuze's important explanation does two things. First, it alters the register of Foucault's work to metaphysical philosophy; second, it explains that panopticism, as Foucault's "diagram,"[151] imposes forms of conduct on particular human multiplicities, or, rather, "provided the multiplicity is large (a population)."[152] Hence, Deleuze explicates that the abstract methodology that Foucault utilizes for "*regulatory controls*" and "*a bio-politics of the population*"[153] is the diagram of panopticism. In Foucault's words, it is a blueprint for bio-politics because it is a "way of making power relations function in a function."[154] And Deleuze further explains that Foucault uses the concept due to his concern to

143 Jacques Derrida, "Autoimmunity: Real and Symbolic Suicides," trans. Pascale-Anne Brault and Michael Naas, in *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida*, ed. Giovanna Borradori (Chicago and London: The University of Chicago Press, 2003), 131: "This movement of 'deconstruction' did not wait for us to begin speaking about 'deconstruction': it has been underway for a long time, and it will continue for a long time."
144 Deleuze, *Foucault*, 61.
145 Foucault, *The History of Sexuality, Vol. 1*, 139.
146 Foucault, *Discipline and Punish*, 205.
147 See above pages 117–118.
148 Deleuze, *Foucault*, 21–38.
149 Ibid., 28.
150 Ibid., 29. All emphasis in the original.
151 Ibid., 29–30, 60–61. See also Foucault, *Discipline and Punish*, 205.
152 Deleuze, *Foucault*, 61.
153 Foucault, *The History of Sexuality, Vol. 1*, 139.
154 Foucault, *Discipline and Punish*, 207.

understand instances where "power controls the whole field," for "every diagram is a spatio-temporal multiplicity."[155] This accords to Foucault's thought whereby "[p]ower . . . is diagrammatic,"[156] and thus the flows of "power relations" "do not emanate from a central point or unique locus of sovereignty,"[157] but rather are the varied spatial and temporal relations required for bio-political regulation. As Sven-Olov Wallenstein explains when discussing the architectural design of hospitals:

> The curing machine is a way of ordering and regimenting space, and it comes close to what Foucault in *Discipline and Punish* calls a "diagram" or, to use Deleuze's terminology on his book on Foucault, an "abstract machine."[158]

From Deleuze's and Wallenstein's accounts of diagrammatic panopticism, it is evident that Foucault's bio-political regulation is conducted through spatial and temporal relations that allow for the administration of populations. In then turning to Derrida's deconstructive juridical thought, we can highlight the embedded spatio-temporal connection with regard to the functioning field of deconstruction.

Here it is worth noting Derrida's acute awareness of the asymmetrical visuality in Foucault's *Discipline and Punish*:

> it is a book that deals among other things with the historical transformation of the spectacle, with the organized visibility of punishment, with what I will call, even though this is not Foucault's expression, the *seeing-punish* [voir-punir], a *seeing-punish* essential to punishment.[159]

However, beyond Derrida's knowledge of *Discipline and Punish*, there is perhaps a prevalent connection between deconstruction and bio-politics via the configuration of spatio-temporal relations. In recalling that Foucault's diagrammatic panopticism enables the functioning of the spatio-temporal power relations necessary for bio-politics, we also note that Derrida's *différance*, which is integral to his deconstructive juridical thought and the asymmetrical visuality therein, is itself a configuration of space and time. It is simultaneously spatial, to differ ("an interval, a distance, *spacing*"),[160] and temporal, to defer ("a delay, a relay, a reserve . . . *temporization*").[161] Indeed, his concept of "spacing," "*espacement*," is also a metaphysical configuration of space *and* time: "*Spacing* (notice that this word speaks the articulation of space and time, the becoming-space of time and the becoming-time of space) . . ."[162] These spatio-temporal concepts enable Derrida's hauntology and the

155 Deleuze, *Foucault*, 30.
156 Ibid., 61.
157 Ibid., 62.
158 Sven-Olov Wallenstein, *Biopolitics and the Emergence of Modern Architecture* (New York: Buell Center/FORuM Project and Princeton Architectural Press, 2009), 32. Note also at 37: "the extent to which the older idea of the hospital as laboratory is still at work in the contemporary biopolitical diagram, is the emphasis today on preventive medicine." The Deleuze quote is from Deleuze, *Foucault*, 30.
159 Jacques Derrida, *The Death Penalty: Volume I*, trans. Peggy Kamuf (Chicago and London: The University of Chicago Press, 2014), 43.
160 Derrida, "Différance," 8.
161 Ibid.
162 Derrida, *Of Grammatology*, 68.

asymmetrical visuality that operates at the root of his juridical thought because they instruct the metaphysical critique of presence in time and space:

> The disjointure in the very presence of the present, this sort of non-contemporaneity of present time with itself (this radical untimeliness or this anachrony on the basis of which we are trying here to *think the ghost*) . . .[163]

Consequently, it becomes apparent that if deconstruction encompasses a spatio-temporal metaphysical critique and bio-politics operates on diagrammatic "spatio-temporal multiplicity,"[164] then perhaps there can be shown that *différance* underpins the metaphysical functioning of bio-politics? This connection warrants further development beyond this work, but perhaps it would engender the next stage in Malabou's critique of deconstruction's relation to bio-politics.

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163 Derrida, *Specters of Marx*, 29. All emphasis in the original.
164 Deleuze, *Foucault*, 30.

LAW UNLIMITED

Materialism, Pluralism, and Legal Theory

a GlassHouse book

ROUTLEDGE

Margaret Davies

Law Unlimited

This book engages with a traditional yet persistent question of legal theory – what is law? However, instead of attempting to define and limit law, the aim of the book is to *unlimit* law, to take the idea of law beyond its conventionally accepted boundaries into the material and plural domains of an interconnected human and nonhuman world. Against the backdrop of analytical jurisprudence, the book draws theoretical connections and continuities between different experiences, spheres, and modalities of law. Taking up the many forms of critical and socio-legal thought, it presents a broad challenge to legal essentialism and abstraction, as well as an important contribution to more general normative theory. Reading, crystallising, and extending themes that have emerged in legal thought over the past century, this book is the culmination of the author's 25 years of engagement with legal theory. Its bold attempt to forge a thoroughly contemporary approach to law will be of enormous value to those with interests in legal and socio-legal theory.

Margaret Davies is Professor of Law at Flinders University, Adelaide, Australia.

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Contents

Preface

Legal theory encompasses a range of approaches, from analytical jurisprudence, to feminist legal theory, critical legal theory, critical race theory, and many forms of socio-legal theory. Legal theory is any undertaking that takes a theoretical view of law, trying to understand its depths and character, its inconsistencies, its politics, and its social resonances. It is no longer possible to confine legal theory to a core set of questions and approaches: it is expansive and uncontainable.

This book engages with one of the more traditional, yet persistent, questions of legal theory – 'what is law?' However, my endeavour has not been to define law, but rather to approach the question from a multitude of angles in order to illustrate the interconnectedness of law with existence at large and to prefigure new possibilities for legal theory. For a start, the question of *what* law is brings with it questions about the substance and materiality of law as well as its imagined and abstract forms. In addition to *what* I also ask (with the legal geographers) *where,* as well as questions about the modalities of law (its *how* and *when*), and its politics (a coming together of other questions with the issues of *who* and *why*).

My aim is therefore not to delimit law, but rather to *unlimit* it – to suspend law's conventional conceptual, doctrinal, and institutional boundaries in an effort to imagine different modalities for understanding law. Many of these conventional boundaries are very familiar to legal scholars: that law is associated with a state, that it is derived from particular institutional sources, that its meanings are evident though interpretable, that it is created by intentional human agents, and that it is separate from politics and morality. Critiques of these legal frontiers are also very familiar and have revealed the many ways in which law appears beyond the state, is not institutionally constrained, carries hidden meanings, and is complicit in everyday politics. These are important critiques, and I continue to promote them. But other boundaries in the understanding of law have emerged in recent scholarship, which are perhaps more associated with an ability to think (about) law as a *thing* at all: that it takes the form of identifiable abstract norms, that it exists outside the self, and that it is part of human culture and is not of the physical world. These constraints are the consequence of distinctions ingrained in Western philosophy between mind and matter, culture and nature, and subject and object. My purpose is to ask what can be made of an *unlimited* law in the light of renewed critique and rethinking of these distinctions. This is not to say that I abandon the more familiar

view of law that associates it with a state or with particular institutions. I see this as one form of a much more complex field of legality.[1]

The background theory and material I rely upon is broad and includes classical as well as critical and socio-legal theory. In writing the book I have had to make an effort to untangle a knot in which everything legal is connected to everything else – social, environmental, corporeal, psychological.[2] To use William James' description, the whole thing has been a 'turbid, muddled, gothic sort of an affair'.[3] To try to give it shape, I have subtitled it 'materialism, pluralism, and legal theory'. The terms 'materialism' and 'pluralism' are themselves historically and conceptually layered and somewhat open ended. In brief, the type of *materialism* I adopt is one that gives theoretical significance to the physical world (including human and non-human life and all matter), while, for me, *pluralism* is a question of approach or ethos rather than a fixed theoretical position. It simply takes theoretical notice of the fact of diverse philosophical-cultural traditions, diverse knowers within any such tradition, and endlessly dynamic connections of 'matter and meaning'.[4] Pluralism and materialism are connected because perceiving all fields of social and material existence as connected means that a diversity of types and genres of law necessarily emerge.

There may not be a great deal in this book that is new, though one or two elements may be unexpected in a book about legal theory. Most of the ideas it is based upon are to be found in the past 30 or 40 years of scholarly literature in law and other disciplines. By contrast to some of the brilliant though often quite abstract and complex contributions made by all varieties of legal theorists, I have tried to take a more pedestrian (some might say touristic) approach, and walked my way through some key questions without getting too caught up in extremely obscure questions. I have made it my task here essentially to try to bring together a range of existing ideas into a 'thick description' of the possibilities for legal theory. This is very much a composite picture of the variations of legality both inside and beyond the nation-state. Awkwardly, I have always found it difficult to maintain a clear sense of distinct intellectual traditions, and I acknowledge that this can lead to an insufficiently critical merging of what might look to others to be quite disparate perspectives. While it would be possible to confine the production of legal theory to a distinct perspective or orientation, I seem to be incapable of such discipline and have often wandered into fields and theorists that appear to have something exciting and new to offer.

With the exception of Chapters 5 and 10, the chapters in this book appear in pairs. Although this may (also) be a symptom of the cultural power of dualisms, the chapters emerged this way for a simple practical reason – the topics I wished

1 And in this sense, my work shares as much with socio-legal theory and the tradition of Ehrlich as it does with classical and critical legal theory.

2 Cf Commoner 1971, 33. Commoner's 'first law of ecology' is that 'everything is connected to everything else'.

3 James 1977, 26.

4 Cf Barad 2007.

to address could not be confined within the length of a readable chapter. Preferring short chapters to long ones (and hoping that readers feel likewise), I have divided the material concerning theoretical limits (Chapters 1 and 2); materialism (Chapters 3 and 4); scale and perspective (Chapters 6 and 7); and metaphors and meaning (Chapters 8 and 9). This leaves Chapter 5, which considers law inside and outside the limits of the self, and Chapter 10, a conclusion.

The first two chapters of this book are essentially an effort to open up some of the possibilities for a broad and inclusive approach to the theory of law. These chapters consider in rapid succession some of the matters that will be raised in more detail in later chapters. Their purpose is to look at some of the classical limitations of legal theory and to consider a range of variables, such as the subject, space, and materiality, which cast doubt on these limits. These chapters reflect some of the ways in which legal theory has been expanded by socio-legal and critical legal thought in particular. I also introduce the idea of prefigurative theory, an approach that promotes a future-oriented understanding of law while maintaining some faith with its past and present.

Chapters 3 and 4 consider the materiality of law. Chapter 3 reviews the theoretical traditions of (mainly) the twentieth century and considers the ways in which materiality is expressed in many, but not all, of these theoretical traditions. The material forms encompassed by this theory include legal practices, social life, subjectivity, corporeality, and text. Chapter 4 engages with 'new materialism', a materialism that questions foundational dualisms such as those of ideal–material, subject–object, epistemology–ontology, and culture–nature. New materialism poses fresh challenges and possibilities for thinking about an interconnected law emergent from a field in which not only human beings but also physical objects interact and engage.

Using Kafka's *The Trial* as an illustration, Chapter 5 looks at the flow of law inside and outside the self, considered as a corporeal and psychological unit. Although both classical jurisprudence and critical-socio-legal theory have paid some attention to internal expressions of law, it is more commonly understood as external to the self, as dephysicalised, and imagined in (exterior) spatial terms. My aim in Chapter 5 is to elucidate the entanglement of law in interior and exterior spaces, an exercise that also brings into play the aligned distinctions of mind–body and time–space. The 'mind' can be understood as epiphenomenal, an *effect* of embodied actions in the physical world rather than somehow different from the body. Theories of the embodied and extended mind make it easier to see that law is the product of engaged action in the world, and not just an abstraction. I end the chapter with a brief provisional description of the multiple identities of law.

Chapters 6 and 7 look at the related axes of scale and perspective: in simple terms, they consider framing and filtering options for understanding law. Scale is a significant concept for legal theory. This is not only because of the need to challenge the fixation of classical legal theory with the nation-state. The theory of scale also offers a genuinely dynamic terminology for understanding the ways in which normativity is interconnected through differently imagined frames, from the individual and small groups, to the global order. Despite the levels and hierarchies

implied by the idea of scale, the experiential subject also relates with flat everyday networks. Subject-based perspective is also therefore important for legal theory and in Chapter 7 I look at some of the work undertaken in this field by socio-legal scholars. A further complication, however, is the emergence of the idea of the 'posthuman' and in particular of non-human agency and the ways in which it can trouble the conception of law as emerging from exclusively human networks. Human beings have always been ecologically interconnected with the physical environment. It is only in recent decades, after generations of exploitation and a belated perception of the earth's finitude, that Western theory is starting to catch up with the normative significance of human–non-human relations.

Chapters 8 and 9 explore a different plane of legal imagining, that of metaphor and symbolism. One key purpose of these chapters is to interrogate the distinction between 'purely metaphorical' evocations and the literal/material worlds. Although the distinction is usually reasonably clear, there is also often an interconnection between metaphorical abstractions or displacements and physical referents. The examples I consider include the idea that law is a boundary, that it can be mapped, or represented as a landscape, and that it is a path to be followed. Chapter 9 considers in particular the idea of pathfinding as a literal and metaphorical practice of law. Like boundaries, paths are physical norms that influence action, but they also evoke an idea of normative action that is both collective and individual, generated by iteration or by fiat, and performative: following a path both repeats the past and creates the future. Neural pathways and the patterns of thought and action permitted by them can, for instance, be understood as physical norms created by iterative bodily (including mental) actions.

And finally, Chapter 10 summarises key themes and arguments and asks, without answering, 'what does it all mean' and 'what is to be done next'?

I have spent a great deal of my academic career trying to depart from a tradition of analytical legal theory, which I, and many others, have (often but by no means always) seen as static, inward-looking, and neglectful of power. This book is to some degree a departure from that attempted departure. While I have not been born again as some kind of disciple of Kelsen, Hart or (much less) Dworkin, this book aims for a more nuanced, more inclusive, and more genuinely pluralistic approach to legal theory. To put it at its simplest, and although I would not profess to a great knowledge about the analytical jurisprudential tradition, it has become clear that many of the legal theoretical traditions can co-exist.[5] If law can be described as plural, so can legal theory – which is not to say, of course, that its truths can be anything, since it always emerges from a field in which it is highly constrained by logic, evidence, experience, and distinctive if open-ended conceptual zones. It would be wrong to suggest, as I may have done in the past, that because a particular style of legal theory is largely self-referential and takes little regard of social factors it therefore has nothing to offer.

5 Cf Dickson 2015.

It has always seemed necessary to me to develop an understanding of law that connects it to human beings, to our social relationships, and to our material environments. In this sense, there is much in this book that is inspired by and indebted to the legal thinking of Indigenous Australians and, to a lesser extent, other First Nations commentators. These knowledges show some of the ways in which it is possible to understand law as humanly and ecologically connected rather than as a separate, abstract concept with a top-down method of control. The inspiration from, and the way shown by, Indigenous knowledges is real enough. However, I make no effort to draw specifically from or translate Indigenous understandings of law into Western thinking – I am not remotely qualified to undertake such a task. Rather, I have sought resources for a more connected conceptualisation of law in Western theory, emphasising those elements of it that strengthen the case for an interconnected and post-binary world view, and sidelining other aspects that I do not find as useful.

There are a number of people I would like to thank for their interest and involvement in this project. I thank the series editors, Davina Cooper, Sarah Keenan, and Sarah Lamble, for their encouraging and constructive feedback on the draft manuscript. In the last couple of years, I have presented parts of the work to audiences in Singapore, Sydney, Melbourne, Adelaide, and Canberra, and have received many helpful comments and questions from audiences on those occasions. My colleagues at Flinders University and friends and family in Adelaide, including my bushwalking and aquarobics groups, have patiently endured discussions about my various difficulties and obstacles in writing the book. The Flinders Law School theory reading group has been an excellent source of information about new theory. Ngaire Naffine has been constantly engaged with the work and has asked many challenging questions. Rhys Aston has provided excellent research assistance as well as a sounding board for some difficult concepts. I am very grateful to Kate Leeson for her outstanding editing. The Australian Research Council funded the research for which this book is the final output,[6] although it has taken ten years longer to appear than originally envisaged.

Finally, I would like to thank my dear partner Roz who, as a legal practitioner, has been an intellectual counterpoint as well as a legal reality check. Most importantly, she has been a wonderful source of inspiration and understanding throughout the project and I dedicate *Law Unlimited* to her.

6 DP0451107.

Note on the text

A few small sections of this book are drawn from material previously published elsewhere. In the process of dissecting, rewriting, and rethinking they have become quite different from their originals. These previously published works include several reviews published in the Equality section of *Jotwell*, The Journal of Things We Like (Lots) available at www.jotwell.com, and the following longer pieces from which a few paragraphs have been drawn: 'Beyond Unity: Feminism, Sexuality and the Idea of Law' in Vanessa Munro and Carl Stychin (eds) *Sexuality and the Law: Feminist Engagements*, Cavendish Press, 2007; and 'Pluralism and Legal Philosophy' *Northern Ireland Legal Quarterly* 57: 577–596, 2006.

For Roz

1 Theoretical variables

An overview

Introduction

My objective in this book is to think about unlimited law. Rather than start with the presumption that understanding law means defining it, or finding its essence and concept, or showing how it is different from non-law, I start with the presumption that law is connected and relational. Being connected and relational means that law is mobile, plural, and material. My approach is deliberately exploratory rather than analytical: rather than define, my aim is to imagine and extend. At the outset it is important to emphasise that this presumption does not foreclose the pursuit of limited definitions of law. These clearly exist and help to shape institutions and aspects of social life. But they can co-exist with a more expansive view of legality. After some brief comments about context, I start in this and the next chapter by looking at a number of the theoretical factors that have in the past constrained thinking about law.

New legal imaginaries

Legal theory has passed through many promising years of theoretical disruption, but still appears to be in the midst of a paradigm change. Broadly speaking, the transition is from a positivist, statist, and sometimes formalist view of law to something more open, more pluralist, more grounded in social fact, more textual, and more attentive to the law–power nexus. This period of change has been evident for quite some time, and it is impossible to pin down a beginning that does not refer back to some earlier movement or theorist. Did the paradigm begin its transition with the advent of Critical Legal Studies, feminist legal theory, critical race studies, postmodernism, and postcolonialism in the 1970s and 1980s? These interventions signal a period where questions about the ideology, the politics, the contingency, and the force of law started to expose the fragility of law's conceptual, if not institutional, boundaries. Or did the movement to a new paradigm begin much earlier in the first half of the twentieth century? At this time, what we now understand to be the dominant positivist-statist model of that century was still stabilising with the work of Hans Kelsen and (a little later) HLA Hart. At the same time, Kelsen was strongly challenged in Europe by Ehrlich's description of 'living law', a theoretical

innovation which was perhaps far ahead of its time.[1] Both formalism and positivism were challenged in different ways in the US with sociology of law, socio-legal studies, and legal realism.[2]

On the other hand, it is possible that there is no paradigm change at all, just an ever complex field of emergent and relatively stable theoretical positions. In its broadest sense, legal theory is characterised by a great deal of theoretical variety and micro-narratives – some scholars defend a view of law which ties it to state-like institutional authority while many others attempt to move beyond this view. This variability has been evident for decades. Regardless of whether we label this state of affairs as indicative of a 'paradigm change', I think it is fair to say that theory of law has the resources to move toward a more open, dynamic, and responsive understanding of law. My objective is to draw together elements of the emerging image of law, to build on work already done to generate a picture of law which is polyphonic and multi-sited – not only consisting of a variety of voices and perspectives, but which also locates law in a variety of places.

Broadly speaking, the theoretical transitions of the past century are part of what is sometimes referred to generically as the crisis of modernity. This crisis is broadly characterised by the disintegration, starting in the early twentieth century, of the accepted tenets of 'modern' order. These tenets include the authority of the nation-state, rationality and individualism, representational knowledge, and the cultural and political primacy of Europe. For law, the crisis has been instantiated as a questioning of statism, positivism, doctrinalism, and various aspects of the liberal world view, most notably the autonomous liberal individual or 'benchmark man'.[3] These changes are uneven and occasionally unsettling, but also exciting. Many have commented on the disruptive and unclear nature of the present, and of paradigm change in general. Over 20 years ago, for instance, Boaventura de Sousa Santos had this to say:

> Periods of paradigmatic transition are periods of fierce competition among rival epistemologies and knowledges. They are, therefore, periods of radical thinking – both deconstructive and reconstructive thinking. When viewed from the old outgoing paradigm, they are periods of unthinking or of utopia. When viewed from the new, incoming paradigm, they are periods of temporary and fragile scaffoldings, emergent ruins sustaining nothing but themselves, witnessing nothing but the future. In periods of paradigmatic transition, all competing knowledges reveal themselves as rhetorical in nature, bundles of arguments and of premises of argumentation which circulate inside rhetorical audiences.[4]

1 Ehrlich 1962; Ziegert 1998.
2 Pound 1910; 1911; Llewellyn 1931; Cohen 1935.
3 Thornton 1996, 2.
4 Santos 1995, 569.

It would be dangerous to try to allocate particular theorists to either the old or the new paradigms, since the nature of a transition is that it takes time and is reflected in different ways and unevenly across the disciplines. What might look to be part of a 'new' paradigm undoubtedly contains elements of the old, and whether it becomes sufficiently developed, enmeshed into culture and useful can only be known retrospectively. It is similarly imprudent to dismiss the 'old' since it may contain elements of the new or it may have been misread, downgraded, or simply forgotten.

As indicated, it is hard to identify a beginning to the current contestations in theory, but it is even more difficult – impossible probably – to see where it will end. Theory has hardly begun the transition needed to respond to the West's belated realisation that we need a world view in which humanity is just one part of an extended and open set of mutually reliant systems. The image of controlling 'man' (with his laws, societies, economies, etc) has had its day, but the effects of the current crises – environmental and otherwise – remain on the surface rather than ingrained in thought.

Santos refers to the 'unthinking' of present and past concepts and the 'fragile scaffoldings' that are witness to the future. This raises the question of the changing constraints that limit and engender theoretical possibilities for an expanded understanding of law. Theory is constrained in many ways – by deliberately chosen questions, by disciplinary histories and habits, by interdisciplinary gaps and silences, by political imperatives and social currents, and by the entire philosophical-cultural fabric which provides the contours and background to our engagement with the world.[5] None of these constraints are fixed and – over time – they all shift. Constraint itself is necessary, however. We choose words, we select particular issues, we embed ourselves in a theoretical context. We have the option of choosing *this* rather than *that* as our theoretical focus. Given a particular cultural-philosophical background we may have little discretion over *how* we approach a theoretical question and what world view we bring to it. Is it possible for a person educated in the Western liberal tradition to adopt a culturally *other* approach to understanding law?[6] If it is possible, it is no doubt extremely difficult, a question of degree, and will probably end with a hybrid theoretical result, especially when brought into a Western context.

In the remainder of this chapter I consider a range of theoretical constraints and their place in theory. My focus in this chapter is on some of the general narratives that have shaped Western engagement with the world into an intelligible theoretical space and the contestations that have disrupted its certainty. In particular, I address the crisis of subjectivity, the dynamism of conceptualisation, the 'new' materialism, and prefigurative approaches to theory. In Chapter 2, I continue the

5 Hekman 1999. Many thanks to Sami Thamir Alrashidi for drawing Hekman's important article to my attention.

6 See eg Black 2011, 15, discussing conditions for understanding 'the Indigenous world and its fluctuating *physis*', which she characterises as entering into a cosmology.

discussion by looking at matters that have a particular application in legal theory – the idea of theoretical singularity, the presumption that authority is hierarchical, the is–ought distinction, the visibility of legal 'systems' at the expense of a broader legality, and the very idea that law is limited. My purpose is to show that, once these constraints are questioned and we begin to come to terms with a post-binary world where apparent alternatives can both be true, approaches to law and legal theory are potentially extremely varied. These two chapters are in a sense an annotated list of some of the variables in legal theory. Paying attention to these factors as variables rather than constants can assist in generating a diverse theoretical space for law. There are no doubt many more variables than I have thought of, and the list is itself possibly endless. But it is a start.

Later chapters address a number of these points in more detail, and the questions raised here are not intended to provide any definitive view of an issue.

Aesthetics

Perhaps the most general issue relates to the aesthetics of theory, and the modernist preference for order over disorder, coherence as against incoherence. Theory ideally makes sense in its own terms, having laid down transparent and sensible definitions, adopted defensible disciplinary parameters, and placed limitations on its scale and scope. Philosophers and theorists have often tended to prefer conceptual order and clarity over disorder and ambiguity. By contrast, pluralist empiricists such as William James saw complexity in the world that could not simply be cleaned up by 'orderly conceptions':

> Philosophers have always aimed at cleaning up the litter with which the world is apparently filled. They have substituted economical and orderly conceptions for the first sensible tangle; and whether these were morally elevated or only intellectually neat, they were at any rate always aesthetically pure and definite, and aimed at ascribing to the world something clean and intellectual in the way of inner structure. As compared with all these rationalizing pictures, the pluralistic empiricism which I profess offers but a sorry appearance. It is a turbid, muddled, gothic sort of an affair, without a sweeping outline and with little pictorial nobility.[7]

As James suggests, there is absolutely no logical reason for theory to insist upon purity and neatness, especially if it means excluding or foreclosing the intrinsic complexity of its objects, and excluding or marginalising elements of those objects that do not quite fit.

The preference for theoretical coherence is especially evident in what is known as the mainstream of legal theory – formalism and positivism (including its many variants). In an analysis written 20 years ago, and which remains compelling, Desmond

7 James 1977, 26.

Manderson says, 'The aesthetics of coherence runs through modern legal theory like a refrain'.[8] Notions such as pedigree, purity, integrity, closure, hierarchy, and unity represent the unargued preferences of theorists who have removed or simplified human beings with their messy experiences and interpretations. Even some of the Critical Legal Studies of the time, says Manderson, yearned for coherence and determinacy while critiquing its absence. By contrast, many forms of pluralism recognise incoherence between competing experiences and concepts of law, but in its dominant forms place the plurality of law within a singularly conceived geographical space.[9] Much pluralism of the late twentieth century had also not yet learnt the lessons of feminist, racial, and other critiques of the subject, remaining captive to the image of the singular undifferentiated subject.[10]

In the succeeding 20 years however, much has taken place, and I think it is now possible to say that plurality and difference have come to inhabit almost every angle of legal theory. The intra-active subject,[11] the spatio-temporal media in which s/he lives, the materialised forms of law, and the engagements between these indistinct arenas are all intrinsically plural: they are complex dynamic elements of the legal and irreducible to an invariant type or idea. There are still, of course, theorists who maintain the image of coherence, logic, closure, verticality, and so forth. However, critique and socio-legal reframing have incrementally revealed the fractures and dynamism inherent in all of the formerly invariant dimensions of legal theory (such as space, subject, authority, text). This multidimensional dynamism in the theorisation of law is not a theory or a singular conception of law but rather more like a theoretical orientation, aesthetic preference, or ethos. As ethos it is an attitude of perception and may be applied to legality in general, or simply to one element of it (such as the state).

What is politically appropriate and defensible will of course be highly contextual. As early Critical Legal Studies found with its critique of rights, one size of critique does not fit all circumstances.[12] Adjustment to circumstances and to subjects is imperative. Similarly, the perception of plurality and incommensurability can coexist with legal closure, certainty, and singularity. The pragmatics of legal rhetoric must never be forgotten, given its incredibly powerful nature as a force for security (both the good sort and the inflated negative sort) and for incremental social progress. The image of law as conceptually limited and hierarchically structured, with a determinate centre and orderly spaces, serves a purpose for pedagogy as well as for practical governance. It allows citizens to comprehend 'the' law in a broad sense,

8 Manderson 1996, 1054. See also Balkin 1993.

9 Ibid, 1061. See also Anker 2014, 182–183.

10 Darian-Smith 1998, 92.

11 The term 'intra-active' is from Barad 2007, and is explained in Chapter 4. It essentially refers to the primacy of action in any relation, rather than the primacy of objects that relate. In other words, objects – and subjects – are created by action, rather than action being the result of existing objects relating.

12 Delgado 1987; Matsuda 1987; Williams 1987; pointing out that a rejection of rights discourse can only be promoted by relatively privileged people who take their rights for granted.

and the myriad of regulators and enforcers to point to a determinate (if complex, often obscure, and sometimes even secret) set of rules. Such an image may even be necessary or at least optimally efficient in extremely large and complex governance units such as nation-states. But it would be a mistake to assume that the philosophy of law can and should be limited by an image that serves essentially instrumental purposes. We are not governed by *legal theory*, though it provokes and informs our thinking about law. Nor is legal practice, in its immediacy and pragmatism, confined to this closed verticality. As I attempt to show throughout the book, theory is performative and prefigurative, in that it responds to material conditions and produces opportunities for imagining new forms. But this does not mean that theory can propose immediately viable alternatives for governance – such change is surely incremental and not modelled upon a philosophical approach to law.

Crisis of subjectivity

The aesthetics of order have, therefore, strongly inclined past theory toward singularity and coherence, but as a result of the theoretical upheavals of the twentieth century (post-Nietzsche and post-James, among others) Western theorists now seem much more comfortable with incommensurability, as well as empirical and conceptual disorder in various forms. (The list of descriptors around this state of affairs is impressive – we see rupture, fragmentation, crisis, incoherence, complexity, disjuncture, chaos, alienation, fissure, among others.)

The new disposition is evident in the image of the self and subject. The critique of the subject has been at the forefront of contemporary theory, and has been through too many iterations to mention here. Suffice it to say by way of overview, where the subject was once singular and self-determining (and aligned with the social attributes associated with such a person), it is now seen as fragmented, hybrid, relational, and plural. Not only is there plurality between subjects living in broadly characterised socio-political categories, but there is also plurality within subjects. Indeed, it is now plausible to say not only that the subject is an *effect* as much as a cause of language and of social relations (the discursively constituted subject), but also that s/he is also an effect of material interactions in a world of objects and other human bodies (the ecologically embedded or posthuman subject). Like almost everything else I address in this book, these variations in the understanding of the subject are not mutually exclusive. There is no model of the subject that I wish to (or can) adopt. Rather, they are layers of an idea, mobilised at different moments in theory and practice for different purposes.

One aim of my approach to legal theory is to ask what the critique and pluralisation of subjectivity means for the conception of law. From one angle, it means that feminists and many other scholars will continue to excavate the many forms of exclusion by state-based law: in so far as this law expects normative singularity, and society delivers diversity, there is a mismatch between the normative expectations of state law and the endless plurality of social life. As feminists and race scholars have argued, it is a biased mismatch, a privileging of some socially constituted voices and experiences to the exclusion of others. This mismatch

cannot be corrected by instating new forms of subjectivity within law, for instance in the form of specific laws reflecting the realities of women and men (as was once suggested by Luce Irigaray[13]): the illimitable nature of social identities ensures that any new category will itself be exclusive and inadequate.[14]

From another angle, though, the crisis in subjectivity has epistemological and ontological consequences, since diverse subjects read and reconstitute law in a diversity of ways. There are a number of issues to be unpacked here that go far beyond the point that is often made that judicial (and other official) interpretations of law take place through multiple layers of socially entrenched assumptions and filters. In addition to this important but limited matter, attention to the subject raises the following issues: the constructions of legality that take place in everyday settings;[15] the material performances that cite and reproduce normativity (including state law);[16] and the connective forms between the earth and its populations that provide new imperatives for a grounded view of law – one that does not separate the human from the rest of the world and that ultimately recognises that law subsists in material connections between living bodies, objects, and earth. The liberal separated subject is also one that is alienated, isolated, and detached – not only from other subjects, but also from the physical world. Exterior matter for such a subject can only be seen, in opposition to the self, as comprised of objects, rather than connective and integrated.[17] Understanding subjects as not only diverse and fragmented, but also emerging in a world of mutual reliance between different material forms (including human bodies and minds) reorients meaning and law away from an entirely cognitive human construction that is imposed and intentional to something more dynamic and with a strong horizontal character.

If we genuinely believe that state law is socially embedded and that the social is itself invariably material and concrete, if we refuse the positivist myths of legal separation and autonomy, then the diversity of readings and interactions by and between subjects, and between subjects and objects, has many consequences for any theoretical characterisation of law. Suffice it to say that any pluralised understanding of law cannot ignore the diversity of subjects in their multiple, embodied, overlapping, and contested social spheres because the subject is both creator and transmitter of law. I will consider the forms of subject-generated law in detail in Chapter 7.

Plural legality is therefore not simply a reflection of plural human subjectivities and their constructions (though it is that as well) but the consequence of law being intrinsically a material–social dialogue in process. Plurality is not only a sociological/observational conclusion. It does not simply look from the outside from the position of a disembodied knower at legal diversity or the multifaceted nature of

13 See Irigaray 1993, 50–51; 1996; see also the critique by Cornell 1998, 122.
14 Stychin 2003, 19–20; cf Hunter et al 2010; Douglas et al 2014.
15 Ewick and Silbey 1992.
16 Davies 1996; 2012; Blomley 2013.
17 Hodder 2012, 30–31.

some other object. Plurality is not only a 'fact',[18] or an approach towards developing a theory of law, albeit a theory of plural law. Rather, the ethos or attitude of pluralism brings into play factors that destabilise the idea of certain knowledge about law as well as its ontological status and location.

Materiality

Western theorists are used to differentiating between subjects and objects, knowers and known. The Cartesian subject is set apart from the physical world and made of a different substance – mental substance rather than extended or corporeal substance.[19] Subjects can think; we *are* in a sense our thinking. Everything else is essentially matter, including the human body (leaving aside Descartes' god). As Plumwood comments, '[c]onsciousness now divides the universe completely in a total cleavage between the thinking being and mindless nature, and between the thinking substance and "its" body, which becomes the division between consciousness and clockwork'.[20] Culture, formed from thinking human beings, is thus fundamentally different from nature. Nature versus culture is a total system, radical, and with no imaginable outside.

These divisions between thinking and physical reality, between culture and nature, themselves became overlaid with pernicious social readings and symbolism: in one narrative, women and non-European people were aligned with the material, unthinking, and natural side of the division.[21] In a tangential story, so-called 'natural' and positive law for many decades divided the jurisprudential universe, though natural law has never had a great deal to do with the world of nature (except, to a degree, with a presumed human nature).

Mind versus matter has been an incredibly successful ontology, so successful in fact that it is extremely difficult within the Western framework to see anything other than a divide between thinking human subjects (now at least paying lip service to inclusiveness) and the rest of life and the physical world. And yet, many non-Western ontologies do not deploy such a sharp division between the human/rational and natural worlds. In fact it takes only a small shift in perspective for us to realise that we are completely immersed in a material world and formed in connection with it – both as social bodies and in our reliance on physical things.[22] As Heidegger and the existentialists made clear, being is 'in-the-world' not separate from it[23] – our first and ongoing engagement is with *res extensa* and, although we may abstract or imagine a self and social networks that are different from the material environment, that does not change the fact of material priority. We cannot help but be fully part of existence, rather than outside it. We may, for the sake of

18 Cf Griffiths 1986.
19 Descartes 2008.
20 Plumwood 1993, 116.
21 Lloyd 1984; Naffine 1998.
22 See eg Beasley and Bacchi 2007; Bennett 2010.
23 Heidegger 1962; see also Hodder 2012, 28–29.

knowledge, stand apart from the world in an effort to grasp it cognitively. However, this assumed position is secondary to actual physical connection and, on a personal level, doomed to failure because of our situatedness.

For obvious reasons feminist theory does not always express itself in the patrilineal language of the theoretical 'greats'. It has therefore often been ignored or displaced, even by otherwise 'critical' thinkers. However, possibly because of the consignment of women to the 'natural' sphere and possibly because the normalised being of the realm of culture tended to be a white man abstracted from social life, feminist thought within the Western tradition has arguably been less insistent than the mainstream on erasing materiality and has accordingly been at the forefront of the recent materialist revival.[24] Standpoint epistemology, for example, which specifically values knowledge produced through social disempowerment, provides an exemplary case where feminist thought has made a strength out of experiential and material elements of existence, rather than focusing merely on the abstract and discursive.[25]

Materialism and its variations pose a challenge to Cartesian dualism, and it is a challenge that has over the past 15 years been gathering pace in various related ways. Some of the theoretical interventions include material cultures studies, Actor Network Theory, thing theory, object-oriented ontology, and agential realism. There are many focal points of this theory with implications for thinking about law. Most prominently, seeing law as embedded in material space and at the same time as an effect of human interactions with the physical world has been a key point of exploration for legal geographers. Recently, David Delaney has coined the term 'nomosphere' to refer to the arena in which social–material space and law are mutually constituted.[26] I will return to this and other insights raised by legal geography later in the book. There are also other challenges raised by the renewed focus on materialism, however – for instance the rather obvious insight that human beings share their physicality with other organic and even inorganic bodies (we are atoms, molecules, chemicals, minerals and so forth).[27] Matter itself is also seen as vibrant and energetic – it acts in human spheres and, although such action can hardly be said to be intentional in the human sense, it does engage and subsist in relationships.[28] Materialist scholarship has placed the human being in, but not at the centre of, a flat network of interconnections. Humans are not only constituted relationally with other humans, but also with animals, plants, the entire ecosphere, and inorganic matter as well.

Of course, it would be perfectly reasonable to continue to segregate human social constructions and continue to see law in the way that it has been seen for some centuries, as entirely resident in the human sphere and its constructed spaces.

24 See in particular Haraway 1991; Plumwood 1993; Grosz 1994; Barad 2007; Alaimo and Hekman 2008; Braidotti 2013; Conaghan 2013a.

25 Harding 1986; Haraway 1988.

26 Delaney 2010; see also Keenan 2015.

27 Bennett 2010, 11.

28 Haraway 1988; Latour 2005; Serres 2007.

However, I think there are opportunities for expanding the idea of law beyond the confines of humanity, and I will explore some points of departure in later chapters. I hasten to add that this in *no* way leads to any suggestion of a renewed 'natural' law. The point is rather to move beyond the nature–culture *divide*, to an undifferentiated *sphere* of natureculture.[29] (In any event, as I have said above, so-called 'natural' law has never had much to do with the 'natural' world – it has entirely been about supposed 'universals', principles that remain nonetheless human-derived principles or, worse, human-projected, god-derived universals.)

Plurality

Because they describe an inherent irreducibility of an object, or a matrix of subjects and objects, to a singular form, materialism and pluralism are generally co-existent.[30] But, like materialism, pluralism also has its own theoretical history and a range of applications to law. These applications take law beyond the state, but also offer some different approaches to thinking about state law.

At the broadest level, I take 'pluralism' essentially to refer to a way of thinking which acknowledges diversity, and does not try to reduce its theoretical object to a system or a unity. My working notion of pluralism is that it describes a situation in which incommensurable things coexist in a comparative space. The definition is far from perfect, but it attempts to grasp the fact that pluralism refers to the situation where two or more theoretical objects (persons, legal systems, values, cultures) come into contact with each other conceptually or physically, but cannot be reduced to a singular form. So, for instance, it would be possible to say that pluralism characterises the relationship between quantum physics and Western systems of musical notation. But there would not be much point in insisting on this, because the two exist in different spaces and rarely (one would imagine) come into theoretical contact. They do not *co*-exist, except in a rather trivial sense. In contrast, to use an example from Santos, the discipline of medicine might be said to consist of a plurality of different techniques and traditions[31] – in relation to a particular ailment there might be several possible treatments, but these cannot be

29 The un-hyphenated term 'natureculture', from Donna Haraway 2003, is increasingly used in science studies, ecofeminism, and new materialism to designate a continuous plane of existence. I use 'natureculture' when referring to this undifferentiated sphere, and 'nature-culture' when referring to the philosophical and socially constituted distinction, which forces nature and culture into separate idealised spaces.

30 I resist the temptation here to attempt a more analytically precise discussion of the relationship between materialism and pluralism. Suffice it to say that I see them as two interfaces for describing law (or other things) which suggest different intellectual histories and generate slightly different entry points into theory. But they possibly always co-exist. It is hard to see the material world without pluralism, or conceptual plurality without materiality (since even the concept has a material element, and a conceptual plurality arises because of this trace of materiality in even the purest concept).

31 Santos 2002, 91.

reduced to a singular form, even though a 'politics of definition' works to empower one tradition and marginalise others.

As defined by William James, pluralism is the position that there are things that are irreducible, external or totally 'other':

> Things are 'with' one another in many ways, but nothing includes everything, or dominates over everything. The word 'and' trails along after every sentence. Something always escapes. 'Ever not quite' has to be said of the best attempts made anywhere in the universe at attaining all-inclusiveness.[32]

And:

> The irreducible outness of *any*thing, however infinitesimal, from anything else, in *any* respect, would be enough, if it were solidly established, to ruin the monistic doctrine.[33]

For James, pluralism was fundamentally opposed to rationalism and idealism – approaches that, he argued, carved singular and discontinuous concepts out of the complex and continuous 'perceptual flux'. We could compare this idea to Karen Barad's view that the world becomes made and known through 'agential cuts' in the flow and movement of intra-activity.[34] The cut can produce a system or unity but this is contingent, fictional even, and should never be taken as fixed or permanent. Since nothing material is the same as anything else and since each observational perspective of the 'same' thing is different, the ideas of pluralism and monism are in one sense a question of attitude and belief, or ethos. Do you perceive system and unity, or diversity and irregularity? Or perhaps both? Is the *zeitgeist*, and current intellectual preference, in favour of plural explanations (complexity, diversity, deconstruction) or monistic ones (system, unity, continuity, structure)? In the case of law, the perception of difference that generated the pluralism of the twentieth century and beyond started from outside the discipline with the observations of anthropologists and sociologists, which stood in contrast to the internal perceptions of lawyers, which by definition start with the assumption of a singular law.[35]

Although there are other definitions, James' 'irreducible outness' provides a simple explanation that I take as a benchmark for pluralism, with the added criterion that there is really only a point to naming something 'plural' if it is composed of elements that are 'irreducibly out' but come into contention theoretically. A finite trail of 'ands' is only pluralistic in the rather banal sense that no one system of thought can capture all that is, and therefore we need recourse to other systems of thought. It ceases to be banal when there is irreducibility between different

32 James 1977, 145.
33 James, quoted in O'Shea 2000, 27.
34 Barad 2007. Cf Chapter 4, below.
35 See generally, Chapter 7.

understandings of the 'same' object or when there is a radical irreducibility within the system or concept itself, making the doctrine of monism a pragmatic fiction.

Law is an excellent exemplar for thinking about pluralism. Law has a form (or 'cut') that is often presumed to be singular and self-contained (state-based law) but that can equally be seen as both intrinsically, conceptually plural and as empirically open and interconnected with non-law in an ecological sense – by mutual reliance, interdependence, exchange, and so forth. At the same time, 'law' has many empirical manifestations – there are many types or orders of law that co-exist, though state-law insiders might not accept that these manifestations are 'really' law.[36]

Conceptual dynamism

So far in this chapter I have considered the following matters: that there could be a paradigm change going on; that it is permissible to abandon the fixation on theoretical coherence; that the crisis of subjectivity has expanded to encompass post-human beings; that theorists need to be open to plurality as well as systems; and that current theory emphasises ways of bringing materiality and meaning into a more balanced relationship. More broadly, but connected with all of these developments, we are also faced with the demands of the so-called 'anthropocene'[37] – an era in which human dominance is shaping the planet, its atmosphere and ecosphere, and the reorientation of the Western world view to a better understanding of the indivisibility of what we used to know as nature and culture. This change will have significant meaning for human society and its institutions, and theory will increasingly need to attend to its implications.

The conceptual resources of Western philosophy and theory are arguably therefore in transition as new concepts are sought that can respond in a nuanced and constructive way to this state of affairs. This transition also requires reflection about what the process of conceptualisation involves. What is a concept? Is thinking trapped by concepts? Assuming that deliberate conceptual change is possible, how can concepts be reimagined or reformed? There are enduring and unresolved debates in philosophy about these matters, and I can offer only a very selective insight into them. In general, though, I think it is fair to say – very broadly – that contemporary theory takes a good deal of inspiration from philosophers and other

36 Roberts 1998.

37 Of course, not everybody accepts the term 'anthropocene', since it seems to separate humanity from the rest of the physical world and, problematically, attributes responsibility for ecosystem and climate change to our entire species. This species-level thinking elides the massive differences in power and resource consumption between human communities and perpetuates a universalist discourse in which those who have most damaged the earth can spread responsibility, even to those who have benefited the least and suffered the most from capitalist consumption. At the same time, 'anthropocene' is a useful term, in that it makes a powerful political point about the impact of (a subset of) human beings on the earth whose insatiable desires have exposed earth's vulnerabilities. Planetary resilience is considerable, but not infinite. For an extended critical analysis see Grear 2015a.

theorists who have insisted on a conceptual dynamic that is both imaginative as well as responsive to altered world conditions. The notion that theory is somehow tied to an inherited set of concepts or even essentially about constructing a new set of enduring concepts has been questioned throughout twentieth-century philosophy.

Sometimes, new concepts are simply a joining of the old in an effort to surpass them: material-semiotic, natureculture, onto-epistemology.[38] Sometimes, they are metaphors endowed with new referents: rhizome, plateau, network, ecology.[39] They can be existing terms enhanced with thicker or figurative meanings: subaltern, actant.[40] Often, concepts are borrowed from science disciplines: autopoeisis, evolution, manifold, refraction.[41] Concepts are proving to be rather pliable though the substrate, the background of Western philosophical and cultural knowledge, is rather more difficult to shift. (As Wittgenstein said, 'I distinguish between the movement of the waters on the river-bed, and the shift of the bed itself; though there is not a sharp division of the one from the other'.[42])

Legal theory and socio-legal thought has also developed or adopted into law a range of new concepts. Within the tradition of analytical legal theory many new concepts have been proposed as fixed qualities or universals for understanding state law – such as primary and secondary rules, the *grundnorm*, or law as integrity.[43] Within critical and socio-legal research, however, new legal concepts often represent an effort to move beyond state law and/or towards a more playful, imaginative, and contingent response to the ideational dynamics of law. In this space we have seen over the years notions such as jurisgenesis, intersectionality, legal consciousness, lawscape, nomosphere, chronotopes, and many others.[44]

One preliminary observation about these new conceptualisations is that they inhabit the large space in what Nicola Lacey once called a 'seemingly unbridgeable gap' between socio-legal and critical legal research.[45] When concepts are in such obvious transition, there can be no pre-eminence of either social-empirical accounts of law (or anything else) or philosophical-critical accounts because what is in question are our very perceptions about the factual world, perceptions that are themselves an empirical-conceptual melange. Arguably, from their beginnings,

38 Haraway 1988; Latour 1993; Barad 2007.

39 Rhizome and plateau – Deleuze and Guattari 1987; network – Latour 2005; ecology – Philippopoulos-Mihalopoulos 2011.

40 Subaltern – Gramsci 1971; actant – Latour 2005.

41 Autopoiesis – Luhmann 1992; evolution – Hutchinson 2005; manifold – Philippopoulos-Mihalopoulos 2015; refraction – Barad 2007.

42 Wittgenstein 1969, s97; cf Hekman 1999. Wittgenstein said: 'The mythology may change back into a state of flux, the river-bed of thoughts may shift. But I distinguish between the movement of the waters on the river-bed, and the shift of the bed itself; though there is not a sharp division of the one from the other.' Wittgenstein 1969, s97.

43 Kelsen 1945; 1967; 1991; Dworkin 1986; Hart 1994.

44 Jurisgenesis – Cover 1983; intersectionality – Crenshaw 1991; legal consciousness – Ewick and Silbey 1992; lawscape – Philippopoulos-Mihalopoulos 2007; 2015; Graham 2011a; nomosphere – Delaney 2010; chronotopes – Valverde 2015.

45 Lacey 1998, 143; cf Norrie 2000.

much feminism and critical race theory have occupied this space in an effort to correct a conceptual universe based on sameness (of benchmark men) and difference (of everybody else).[46] This breakdown between critical and socio-legal terrains does not mean that the distinction is defunct, however, since research still exists that tends towards one or other end of the socio-critical spectrum.

Many developments beyond the discipline of law have facilitated these changes, and in particular philosophical questioning of the nature of concepts in relation to the empirical world.[47] Conceptualisation is often regarded as an exercise in abstraction or finding the general form for diverse objects that accounts for some kind of presumed identity between them. A concept unifies things and provides coherence and the possibility for cognition of the objects of the world. But a pure concept is also an intrinsically unsatisfactory and epistemologically inadequate abstraction, excluding as it does the materiality, the emotional dimensions, the dynamism – in a word, as Adorno emphasised, the *nonconceptual* aspects – of its object.[48] Essentially for this reason, it is helpful to think of concepts as experimental explanations rather than universals that would tie the thing to a determinate abstract form. This approach is perhaps most evident in the work of Deleuze and Guattari, who have said that 'philosophy is the discipline that involves *creating* concepts'.[49] They endorse Nietzsche's statement that philosophers 'must no longer accept concepts as a gift nor merely purify and polish them, but first *make* and *create* them, present them and make them convincing'.[50]

Concepts are of course as unavoidable as the 'object itself' is unknowable. However, this does not mean that they can or should be fixed. Rather than engage in the purification of existing concepts, or their modification to suit new circumstances, it is possible to think of the conceptual task of philosophy as a kind of process, narrative, or composition:

> Philosophy serves to bear out an experience which Schoenberg noted in traditional musicology: one really learns from it only how a movement begins and ends, nothing about the movement itself and its course. Analogously, instead of reducing philosophy to categories, one would in a sense have to compose it first. Its course must be a ceaseless self-renewal . . . The crux is what happens in it, not a thesis or position – the texture, not the deductive or inductive course of one-track minds. Essentially, therefore, philosophy is not expoundable. If it were, it would be superfluous; the fact that most of it can be expounded speaks against it.[51]

46 Cf McCall 2005; Smart 2009.
47 Eg Deleuze and Guattari 1994.
48 Adorno 1973, 11.
49 Deleuze and Guattari 1994, 5.
50 Ibid; see generally Gane 2009.
51 Adorno 1973, 33.

Much critical legal theory takes essentially the form of compositions that cannot be expounded. This means that theory can continue to engage with state law as a dynamic and heterogeneous entity as well as with the variety of other legalities, responding to their own 'ceaseless self-renewal' by refusing to fix their boundaries into some coherent identity. This does not de-legitimate efforts at conceptual analysis, but rather regards them always as contingent attempts at theoretical order, which must necessarily fail if their goal is some final or absolute description, but which can be perfectly good conditional explanations of an aspect of legality.

One compelling exploration of the possibilities for seeing conceptualisation as existing in dialogue with social practices is to be found in Davina Cooper's recent book *Everyday Utopias*.[52] Cooper's work engages with the creative conceptual potential of 'everyday utopias', intentionally created practices and spaces that represent an effort to enact social change in everyday life. Her carefully constructed subtitle, 'the conceptual life of promising spaces', expresses a key theoretical point of departure. For Cooper, concepts have life and social spaces can promise better futures and alternative concepts. As Cooper explains, her focus on the *conceptual* within everyday utopias is motivated by two factors. First, 'everyday utopias can revitalize progressive and radical politics through their capacity to put everyday concepts, such as property, care, markets, work, and equality, into practice in counter-normative ways'.[53] Second, they are 'hugely fruitful places from which to think differently and imaginatively about concepts'.[54] This practised counter-normativity and the different thinking that it generates are fundamental to Cooper's project. The key to Cooper's discussion is the way she understands concepts within a context in which practice, imagining, and the observer all take an active part. For Cooper, concepts are not abstract things that are merely ideational but are rather dynamic expressions that take place between imagining a thing and actualising it. Concepts are therefore materially engaged processes in which the imagination of the material has also played an essential role.

This understanding of the conceptual can be illustrated by Cooper's discussion of contemporary utopian thought and practice. As she explains, utopia can no longer be understood as an ideal or abstract construction of the perfect society. Rather, scholars of utopia now see it in more practical terms – as an attempt to practise ideas, which also incorporates the struggles and frequently conflictual relationships that go into developing and sustaining novel and counter-normative practices. Utopianism remains future-oriented, but the future is one that can be imagined and, more importantly, practised in the present. The 'everyday utopia' is in part an experimental space where ideas are tested and where new ideas emerge. There is a vision and a common purpose, of course, but the utopia is actualisation, not abstraction. In this way, the *concept* is an imagined–practised reality, not an abstraction. It is not static and its edges may not always be clear; rather it may

52 Cooper 2014; see also Cooper 2015.
53 Cooper 2014, 11.
54 Ibid.

be redrawn with changing experiences, relationships, and engagements. Concepts 'oscillate', says Cooper, between the imagined and the practised worlds – an effort to perfect and improve concepts 'pulls on what is actualized' but, at the same time, practice constrains the imagination.[55] Moreover, concepts change in response to the desire for social change. Of particular interest to Cooper is the potential that some concepts carry for being imagined and practised in ways that might help to reshape our social relations.

Prefigurative law and theory

This leads into my final point for this chapter, which is that it is possible to see theory as performative and even prefigurative. Theory is performative because it is an act and a process, as Adorno (and others) emphasised. Performances need to make sense within their context, of course: a performance that does not sufficiently cite or repeat the past is unpersuasive.[56] Legal theory is not at liberty simply to ignore the socio-cultural conditions for 'law' in the present time. Theory is therefore in many ways a response to pre-existing conditions, and it is also consolidated through reiteration. Positivism has become ubiquitous in part because of repeated acceptance of it as *the* authoritative thesis about law. However, this does not mean that theory is predetermined, or fixed, though a reluctance to refresh it and compose it anew may close it down somewhat. Performances can always challenge or contest the past, as well as repeat it.

In addition to being performative, legal theory can also be seen as prefigurative, a term I use as an analogy with activist strategies. Prefigurative *politics* is essentially about being or doing the change. Rather than waiting for conditions to be right for general social change to occur or to be instituted from above, prefigurative politics is an acknowledgement that change accumulates through repeated practices and that one part of making the imagined future real is to perform it now. Such practice, like Cooper's 'everyday utopias', is partly based on possibilities shaped by existing conditions, but is also part vision, part experiment, and part everyday enactments.

A less overtly activist variation on prefigurative politics can be seen in various efforts to test successor legalities in and around the edges of state law. In some contexts, state law itself can become an experimental space for new ideas about law. One could cite for example 'alternative' practices of law, such as alternative dispute resolution or Indigenous sentencing courts, which introduce values of negotiation, accommodation, recognition of the other, and legal plurality into the practice and meaning of law. At the margins of or beyond state law, examples might include truth and reconciliation commissions and efforts to mobilise civil society in justice initiatives, such as the Women's International War Crimes Tribunal held in Tokyo

55 Ibid, 37.
56 Davies 2012, 173; Blomley 2013.

in December 2000.[57] These instances draw on state legality but also deliberately eschew it in the interests of (in part) taking law beyond its self-defined boundaries. In a different plane, feminist judgments projects repeat and re-read the law as practised by judges, not in order to change either doctrine or form explicitly, but to inflect them with a critical feminist voice.[58]

Such practices may often be flawed in their attempts to equalise power and tentative in their imagining of a future justice. They are necessarily incomplete and can be confined to a terrain easily dismissed by formal law. Yet alternative imaginings of law do begin to prefigure and test possible future legal forms in locations where theory and practice converge. Most significantly for my purposes, prefigurative practices cross the divide between the legal present and our legal futures: they enact possible futures in the present and leave indelible traces of what is to come in the here and now.

The theoretical parallel to prefigurative politics is that theorists – like feminist judges – have many opportunities to choose our abstractions and can contribute to imagined–practised realities by repeating some threads of the theoretical context rather than others. This is particularly so where – as I have explained in some detail above – a great many theoretical transitions are taking place, where there is evident conceptual plurality, and in consequence considerable theoretical resources. Thus, the theoretical space can be seen as one arena where the future is formed, as John Law and John Urry argue:

> The issue is not simply how what is out there can be uncovered and brought to light, though this remains an important issue. It is also about what might be made in the relations of investigation, what might be brought into being. And indeed, *it is about what should be brought into being.*[59]

Theorists can potentially do what activists have described as 'being the change'. That is, it is possible to practise theory as if a projected state of affairs was already in existence. Drawing out aspects of the present that appear to provide direction for the future, and intensifying them theoretically, prefigures a world that is commensurable with the present and past, but which perhaps adds additional emphasis to those elements of it worth promoting – sustainability, for instance, rather than exploitation and consumption, relational identity, rather than atomistic individualism. It is important, of course, as Law and Urry emphasise, to recognise that this is an unavoidable feature of scholarly activity: we cannot help but intervene in the shaping of the real, so the question that remains is 'Which [aspect of reality] do we want to make more real, and which less real?'[60]

57 On truth and reconciliation, see Christodoulidis 2000; van Marle 2003; on the Women's International War Crimes Tribunal see Chinkin 2001; Dolgopol 2006.

58 Hunter et al 2010; Douglas et al 2014.

59 Law and Urry 2004, 396, emphasis added.

60 Ibid, 390.

Thinking about the history of ideas, the future-oriented nature of some theory seems evident enough. Theoretical writings such as John Locke's *Two Treatises of Government* intervened in the political conflicts of his time (in particular the Glorious Revolution) and also enhanced arguments in favour of colonialism, in which he had a personal interest.[61] His was a deliberate political-theoretical engagement drawing on and reiterating existing but sometimes inchoate developments in political theory, but one that helped to shape the Western world's future of individualism and colonialism (not single-handedly, of course). Similarly, in the history of legal theory, John Austin's work can be seen as not only a description of positive law but also a strengthening of it.[62]

Theory which is transformative is therefore not only descriptive, analytical, and critical; it is also idealistic, aspirational, performative, and sometimes utopian. Perhaps it will even misdescribe the present or over-emphasise certain qualities in order to bring out some transformative potential in the present. For John Austin, the latent positivity of law – which has become the actual positivity of law – was an important corrective to the mysticism, religious moralities, and half-baked natural law that muddled the legal process and obstructed clarity and enlightenment in legal thought. At the present moment, however, the notion of positivism in law has itself become obstructive, and the recent goal of feminist and critical theorists has been to describe other latencies within law that may also have a transformative potential. The various forms of critical legal theory have frequently been attacked for their lack of a viable alternative model of law, but such attacks neglect two significant factors: first, the desired outcome of a theoretical intervention does not need to be a model or a theory; and second (as the reception of Austin's work illustrates), conceptual change is not necessarily caused by new propositions put forward by a single theory but rather from repeated, accumulated changes in thinking across a broad spectrum of types of intervention – practical, scholarly, activist. Such changes are in all probability accelerated by changes in historical conditions (which are also, of course, themselves conditioned by cultural/discursive environments).[63]

As even the history of positivism illustrates, approaches that at once (mis)describe the present and prefigure the future existence of law can result in change. There is undoubtedly an undercurrent of such prefigurative practice running through feminist and critical legal theory.[64] Sometimes the effort to create new concepts is explicit, as we have seen in relation to Davina Cooper's work. 'Prefigurative' does

61 Locke 1967. For a discussion of Locke and colonialism, see Arneil 1994.

62 Wayne Morrison says this about Austin: 'knowledge claims are part of, and not antecedent to, his overall project. Austin is not a simple positivist in the sense that his knowledge claim has no pretence to anything other than the "thing-in-itself", for his image of positive law is one element of an overall project. . . . Austin's claims for jurisprudence are pragmatic in the sense that the demand for a clear jurisprudence arises to get something done, and that something is to create an image of law suitable for law to become a powerful and rational image of modernity.' Morrison 1997, 227.

63 Teubner 1997b, 768–769.

64 Conaghan 2001, 382–383.

not necessarily impose a general and ideal vision as a corrective to the problems raised by contemporary critiques. Rather, 'prefigurative' refers to more practical, localised, and often tentative efforts to model new forms of practical–theoretical legality. These are not just *different* legal practices or theoretical formulations but ones which specifically reach towards better ways of doing law – law practices that are more just, more flexible, and more attentive to diversity.

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Paradigm transition has been going on for my entire life as a scholar. When I started, I no doubt hoped things would be resolved or at least somewhat settled by now. This has not taken place yet. If anything the theoretical terrain has become more complicated and infinitely recursive, repeating itself in the same or different forms, with a new language here, some different insights there, steadily opening onto new fields, and never quite settling on a distinct form. Theorists are rediscovered, they go in and out of fashion, critiques are entrenched, and new forms tentatively proposed. This may not – at least for the moment (and possibly for the remainder of my career) – settle into a definite form. A question that has often troubled me is how to deal with this uncertainty as a theorist. As I have explained in this chapter, it has been useful to think of concepts as intrinsically dynamic and relational, and theoretical constructs as performative and even as prefigurative. In other words, theory itself can be understood as a practical and experimental intervention that elicits and tests potential future conceptual forms.

2 Limited and unlimited law

> To attempt to imprison the law of a time or of a people within the sections of a code is about as reasonable as to attempt to confine a stream within a pond. The water that is put in the pond is no longer a living stream but a stagnant pool, and but little water can be put in the pond.[1]

Introduction

The conceptual resources surrounding contemporary law and legal theory are extensive and extremely diverse. As I have suggested in Chapter 1, some of the factors underpinning this diversity include an anti-coherence aesthetics, an appreciation of the material basis of meaning, the dynamics of the subject, an understanding of conceptualisation as process rather than form, and the practice of anticipatory or prefigurative thinking.

But legal theory has a number of limitations of its own that need further introduction and exploration, and in this chapter I aim to uncover the plurality that is possible when specifically legal theoretical constraints are questioned. This is only the beginning of a project that will be continued throughout the book: my aim is essentially to move from a critique of theoretical constraints that reveals unformed theoretical possibilities, to a more positive focus on these possibilities themselves. As with Chapter 1, my intention in this chapter is largely to canvass a range of issues that have been evident (and growing) in legal theory for many years. They are not new critiques, but it is nonetheless important to collect and consolidate them. The point however is not to develop an alternative *concept* of law, much less an approach to law that somehow reflects its multidimensional character. There is no legal theory of everything. That would be attempting omniscience, which is clearly a theoretical delusion. Rather, my question is, simply, what are some of the possibilities often foreclosed by legal theoretical one dimensionality? How can legal theory be opened up to new modes of understanding?

1 Ehrlich 1962, 488.

Many of the issues I will consider in this chapter concern the metatheoretical presumptions of legal theory. Is there a single concept of law against which all normativity can be judged as either 'legal' or 'non-legal'? Can Western theorists abandon our fixation with describing law as some kind of totality or system and as a conceptually coherent object? In this context there is an embedded issue about what kind of thing we are talking about when we mention a 'concept' of law or a multitude of such concepts. Moreover, there are a variety of perspectives that can be opened to view beyond the expert knower or the socio-legal observer. We can develop more textured analyses of law that take into account both the fact that law is a different object in different places and that the subject/knower is not just a person on whom the law is imposed but an active participant in the life of legal meaning. Much work of this nature has been undertaken in 'law in everyday life' and law and geography scholarship, but the significance of this body of work, as well as of other empirical approaches such as legal anthropology, has not always been appreciated in legal theory.

Mobilising alternative scales, perspectives, and multiple dimensionality also makes the political attachments of law theoretically unavoidable. Despite the very extensive efforts of critical legal theorists, Indigenous scholars, feminists, Marxist legal theorists, and so forth, there remains a traditional stream of legal theory that sidelines questions of power as non-core issues. Power is seen as about the content of law, for instance, rather than its fundamental nature and character. Once we dismantle the theoretical collusion between the disinterested perspective of the legal expert and the state-based description of law, however, this attempted neutrality of position is much less plausible.

Finally, by way of introduction, I should point out that none of this really involves a rejection of state-based, insider-generated jurisprudence. It simply recognises it as one form among many possibilities. And it also insists on the fact that even state-based law is itself multidimensional and plural. To borrow a phrase from Jean-Luc Nancy, we could say that such law has a 'singular plural being' – its being is both singular *and* plural.[2] Or, to use the spatial metaphor deployed by Desmond Manderson, state law can be seen to be something like a fractal – a line or border of infinite length and complexity contained within a finite space.[3] The singular concept of law cannot be discarded as a falsity, simply because it is the paradigm within which the practical reality of law-as-Western-philosophy-understands-it is generally played out. Nonetheless, even the singular conception is meaningless without the 'playing out' or the experiential performance of law, a characteristic of law that inevitably leads to a more open-ended and textured account of 'the legal'. Such characterisations of law replace the logic of 'either/or' (that law is either singular or plural, and that it is either finite or infinite) with a logic of 'both/and' (that

2 Nancy 2000, 28.

3 Manderson 1996, 1066–1067.

law can and does encompass contradictions, including the contradictions between being at once coherent and incoherent, and being at once singular and plural[4]).

Restricted and unrestricted legal theory

Legal theorists and philosophers have often been preoccupied with the question 'what is law?' But is this a useful question, and how does it shape legal theory? Douzinas and Geary suggest that 'what is law?' leads to an essentialist and limited jurisprudence:

> once the question [about law] has been posed as a 'what is' one, the answer will necessarily give a series of predicates for the word 'law', a definition of its essence, which will then be sought out in all legal phenomena. As a result, a limited number of institutions, practices and actors will be included and considered relevant to jurisprudential inquiry and a large number of questions will go unanswered.[5]

While it is correct to say that analytical legal theory (in particular) has often been limited in both its method for answering this question as well as in the answers it gives, this does not *necessarily* flow from posing the question. Answers can be conditional, they can be inessential or plural, they can be temporally, spatially, or culturally specific, and they can also take the form of a narrative. Perhaps the difficulty is not so much with the question, but with the history of its interpretation, which *does* point to an answer of a particular type (general, essentialist, and definitive). For me, the question remains important, even if it is no longer possible to imagine conditions under which a definitive answer would be possible. It is an important question in a similar way to other 'what is' questions, whether posed in relation to politics, science, economics, history, society, or literature. Posing the 'what is' question in a critical and open-ended way permits taken-for-granted definitions to be openly tested and revised and highlights the politics of theoretical delimitations. It also may allow more future-oriented meanings to emerge and partially solidify. This does not mean there is any answer – it may be that we can only deploy a range of metaphors, stories, and rather broad descriptors in an effort to produce an image, a sense, or an intuition about law.

Much legal philosophy has not really addressed 'what is law?' at all – it has addressed a much narrower question, something like 'how can we describe and analyse Western state-based law as understood by those trained to think that law is entirely produced by the state?' Legal theory has been methodologically limited to the nation-state and therefore presumed many of the answers to its own question. It has, in other words, addressed what has been called a restricted rather than a general jurisprudence, a jurisprudence that does not challenge the state monopoly

4 Cf Fitzpatrick 1988, 97.

5 Douzinas and Geary 2005, 10.

on law and turns a blind eye to the complicity of law with power.[6] There have been several efforts to expand jurisprudence, and to move away from this restricted, state-based, self-defining preconception of law. This chapter begins my efforts to contribute to this significant conversation and is essentially an effort to identify and question some of the parameters of 'normal' legal theory, and at the same time to explore principles for a more generalised understanding of law and legality.

'Restricted' legal theory has traditionally been limited by several factors: it looks mainly at the *law of the nation-state* (while occasionally attending to the contested legal nature of international law), it constructs its theory from the perspective of an *insider to this law* but who is nonetheless regarded as capable of making objective pronouncements about it, and it takes a decidedly *Western philosophical approach* to the analysis of law. The advantage of restricted legal theory is that it theorises and adds solidity to the paradigm of legal positivism that is widely practised and has proven efficiencies. It suffers from a number of consequential blindnesses: it tends to regard any form of power as external to law,[7] it suppresses diversity of interpretations and of subjects, and downgrades or ignores non-state law.

All of these limitations, held stable in restricted legal theory, are in fact variables rather than constants. It is possible to understand law as emerging from spheres other than the nation-state, and it is possible at the same time to consider law from perspectives that are neither that of the expert Western insider nor the scientific observer. The idea of law is not, moreover, limited by the institutions and histories of Western nations. They have their role as a particular form, but do not cover the field of law. Law is multiscalar and multiperspectival, issues that I will consider further in Chapters 6 and 7. Law is also abstract and material, dynamic and static, determinate and highly mobile. It is the task of a general legal theory – a legal theory that sees law as open, living, and pluralistic – to reveal some of these possibilities in understanding law.

If legal theory is to move beyond singular analyses of national (and sometimes international) law, based on the perspective of legal insiders, it must question a number of its theoretical foundations. Some of these parameters include:[8] the notion that law can be understood as an identity and a concept, with a theoretical essence; the epistemic privilege of legal experts positioned entirely within a Western European and colonial model of law; the image of law as a reified thing that is separate from and external to the subject; the hierarchical model of law; the distinction between description and prescription, is and ought. These matters will be considered briefly in turn in this chapter, and in more depth in later chapters.

6 See generally Tamanaha 2001, xvi–xvii; Douzinas and Geary 2005, 10–11; Twining 2009, 18–21; Conaghan 2013b, ch 5.

7 Cotterrell 2002.

8 I also note here Allan Hutchinson's useful imperatives for a 'post-analytical' approach to law, which are: 'abandon legal theory'; 'get hands dirty'; 'go genealogical'; 'focus on power'; 'embrace the political'; 'be useful'; and 'act locally'. Hutchinson 2009, 162–164.

Brighton rock law

Orthodox legal theory has often assumed that it is possible to find 'a dominant master narrative of legality to unify the field of the legal'.[9] The search for a unifying concept of law was one of the key tasks of legal theory, at least until critical and socio-legal theorists started to consider the edges, the assumptions, and the empirical constituents as much as the presumed essence of law. The idea that law has a concept limits it and makes sense of it. But limits what? Makes sense of what? There is a circularity to this undertaking – after all, how can the theorist know what s/he is conceptualising, without an already existent, though inchoate, idea of law? The 'field of the legal' needs to precede the task of conceptualisation of law. The problem has been addressed by legal theorists in various ways. For Hart, for instance, the field takes the form of a common-sense and core understanding of law held by any 'educated man'.[10] 'Primitive' law and international law are non-core and obviously dubious examples of law for Hart, but he says there can be little doubt about the fact that the law of the modern nation-state is a core and commonsensical manifestation of law.

Having pre-defined the field, the presumption of conceptual unity has been very common in the jurisprudential tradition. Take a 'single' legal system – that of contemporary Canada or Australia. Does the description of law remain constant at all levels, like the words embedded in a stick of Brighton rock, the same all the way down and all the way up? Is the concept of state law a mark or imprint on all forms, all experiences, all locations, all sources, and all constructions of law? For a positivist such as Kelsen, for whom a change in position was simply a question of going lower or higher in the pyramid of legal validity, the reason for law's validity did indeed appear to be imprinted throughout all practical manifestations of law.[11] Similarly, for HLA Hart the rule of recognition was the test for validity that appears to unify *all* law.[12] However, if position, perspective, space, and authority are variables in the theory of law, and not constants, the result will be unlimited conceptual variability. Even if the object we are talking about is still state law (which is only one contingently defined form among many ideas of law) it will look very different from different perspectives and in different locations. There is no 'master narrative' and indeed little compatibility between conceptual products.[13] Put simply, there are a plurality of frames of reference as well as a plurality of critical positions or discourses, according to which positive law may be understood.

9 Cotterrell 2009a, 777. See, for instance, Dickson 2001, 17 (describing analytical jurisprudence as 'attempting to isolate and explain those features which make law into what it is').

10 Hart 1994, 3.

11 Kelsen 1967, 198–201.

12 Hart 1994, 100.

13 An analogy might be classical and quantum mechanics, which describe the physical world at the macroscopic and subatomic levels. Forces observed at one level are not observed at the other and a theory to unify the two scales has been elusive.

Only one of these 'perspectives' is the positivist theory of law that dominates the terrain of analytical jurisprudence.

Thus, it is important to ask (and remaining with the state for the moment) is 'law' in all of the following institutions the same: community justice centres that give a norm-creating role to community members; parliament; the extensive and usually hidden activities that precede the work of parliament; appeal courts; police stations; arbitration bodies and other 'alternative' dispute resolution mechanisms; specialist tribunals; truth and reconciliation commissions; Indigenous sentencing processes; thousands of lawyers in thousands of offices working on specific problems for everyone from multinational corporations, to governments, to schools, newspapers, and individuals? Is law the same for me (an academic) as it is for my partner (a government lawyer)?

Undoubtedly there is a sense in which all of these quite diverse institutions and locations of law refer to and rely upon an idea of law as connected to certain state mechanisms, but that relationship cannot exhaust the idea of law in those contexts because the practice and performance of law are different everywhere. After all, once it is appealed, even a simple case can become something quite unrecognisable to its first instantiation as a case. That difference might be explained by strategy, by visibility, by misreading or reinterpreting the facts, by the culture of the courts and tribunals, by personalities, and any number of other factors that – though undoubtedly part of the 'field of the legal' – are ordinarily excluded from the process of conceptualisation of law itself because they are predetermined as tangential to it. The difference in the conception of legality is even more obvious if we compare participatory processes for resolving disputes to parliament, for instance.

It is problematic to assume that a core concept of state law can be distilled from all of these diverse practices, and that some are more central than others. It might feel safe to assume that the appeal court is a more central representative of a concept of state law than an Indigenous sentencing court, a traffic police officer, or myself as I go about endeavouring to be a law-abiding citizen. But it is equally plausible – though perhaps not as theoretically safe – to see all of these instances as *performances in a dispersed and ultimately non-unified field of state legality*. There need not be an 'underlying' or ideal concept of state law at all. Socio-legal theory has given us a very rich account of such institutions and practices, but the theoretical understanding is less developed – for instance, of how normativity is produced and reproduced at different scales and by different legal actors, of what the boundaries of 'law' are in any given context, of how divergent scales of law interact, of how knowledge about the law is constructed, of the relationship between law and the human subject, and other matters of concern to legal philosophy.

The descriptions of law offered by state law theorists are plausible analyses of law at that scale and for the purpose of understanding Western state law from the secure position of legal insiders.[14] But it is perplexing to say the least that many

14 Dworkin did focus his reflections explicitly on Anglo-American law but Hart, Kelsen and others have had universal aspirations: Dworkin 1986; see also Raz 2005.

legal theorists have tried to hold *at once* the view that law is a social phenomenon *and* that there can be a universal or even a general concept of law. Sociologists of law have long understood that a concept of law is contextual and that empirical analyses of law must be undertaken by reference to 'provisional' ideas of the legal.[15] Once we move beyond the state, the disunity in ideas of law becomes even more apparent. Imposing a 'master narrative of legality' in socio-legal enquiry would only obscure the empirical diversity of legal regimes. 'No wonder', says Brian Tamanaha, 'that the multitude of concepts of law circulating in the literature have failed to capture the essence of law – it has no essence'.[16]

Unrestricted, general, or unlimited legal theory need not be constrained by the thought of unifying a legal field: as discussed in Chapter 1, accepting that legality is plural, potentially unlimited, and in conceptual flux means that the theoretical project becomes akin to composition,[17] experimentation, or an oscillation between forms of practice and an ideational narrative.[18] Concepts are best regarded as contingent and dynamic constructions, formed and reformed in changing circumstances, with the future as well as the past in mind. Theoretical practice based on conceptual dynamism might bear different fruits in relation to different forms and different locations of legality. As indicated above, state law itself can be regarded as conceptually plural and unstable. There are in any case many different expressions of 'the legal' and indeed of 'law' outside or in hybrid forms with the state.

Historical and cultural exclusions

The very possibility of the 'single master narrative of legality' is predicated upon a number of exclusions, some of which are of particular significance in the history of legal theory. I will only mention them briefly here by way of introduction – they have been extensively dealt with elsewhere. I will return to them in Chapters 3 and 4 with the objective of imagining an expansive theoretical field for law in which these exclusions have been dismantled.

First, the parochialism of the Western tradition of legal theory has been much commented upon.[19] This parochialism is illustrated clearly in the comments made by HLA Hart mentioned above. While Hart claimed to be pursuing a 'general' jurisprudence in the sense of one that was applicable to all legal systems and not just those of Western Europe, he nonetheless began by excluding international law and 'primitive' law as 'doubtful' cases of law, as seen by the 'educated man'. But the exclusion of the 'primitive' has much older origins, in the Enlightenment construction of universal knowledge and reason, and its associated exclusion of a chaotic and pre-modern savage.[20] The pre-modern is delimited by both time and

15 Tamanaha 2001, ch 7; Cotterrell 2009a.
16 Tamanaha 2001, 193.
17 Adorno 1973, 33.
18 Cooper 2014.
19 See eg Fitzpatrick 1992.
20 Fitzpatrick 1992; Nunn 1997.

space as reflected in pre-Enlightenment Europe and in Europe's primitive outside. Although it is impossible for any theorist to recognise and address all of their own cultural conditioning (much less step outside it), unselfconscious and uncritical parochialism is of course very problematic: Ronald Dworkin is one theorist in the analytical tradition who recognised this and confined his theory to Anglo-American law, arguing that a theory of law cannot be separated from legal practice, which differs from place to place, and through time.[21] The idea that there can be *a* theory that explains what law *necessarily* is,[22] is these days controversial even among analytical legal philosophers.[23] For critical and socio-legal theorists it is generally seen as an impossibility, with the construction of *a* theory of law being replaced by more generalised and fluid (non-necessary, localised in time and place) legal theory.

Second, and related to the issue of parochialism, is that a 'methodological statism'[24] has dominated legal theory and jurisprudence, and even to some degree critical legal theory. Methodological statism in legal theory is simply the assumption that law is tied to the nation-state (as modelled on the states of Western Europe), and that therefore the task of legal theory or jurisprudence is to describe and analyse the law of the state. Kelsen indeed argued (against Schmitt) that law and state were indivisible or unified.[25] (Schmitt did not dispute that law was strongly tied to the state, but did dispute that they were the same thing – the state being political and having a sovereign who was beyond law, or operating in the space of the exception.[26]) Austin 'determined' the province of jurisprudence as the command of a sovereign, distinguishing this from divine law, positive morality, and the laws of non-human nature.[27] Others cemented the association between law and state via empirical means. For instance, Hart's presumption about law is that we (or at least an 'educated man') would know it when we see it.

Third, the parochialism and statism of restricted legal theory has often been entrenched by virtue of the fact that it is seen to be practised and pursued by legal insiders. The 'knower' of mainstream legal theory is not a sociologist, anthropologist, or even philosopher, but rather someone who knows the law from the 'inside' (bearing in mind the metaphorical nature of such a position), who is trained in and accepts the dominant legal paradigm. Kelsen's 'pure' theory of law, as he insisted, was not a theory of pure law (whatever that would be) but rather a theory 'free of all foreign elements' with which it had become mixed 'in a wholly uncritical

21 Dworkin 1986. Despite my agreement with Dworkin on this matter, I endorse Brian Leiter's assessment of other aspects of his work: Leiter 2004.

22 Raz 2005.

23 But note the existence of more flexible variants on a concept or descriptor of law offered by some recent theorists. Melissaris develops a 'thin' concept of law which, though a concept, applies differently in different situations, while Tamanaha avoids any such conceptualisation with his argument that the term 'law' varies according to context. See Tamanaha 2001; Melissaris 2009.

24 Social scientists have critiqued the 'methodological nationalism' which is 'found when the nation state is treated as the natural and necessary representation of modern society': Chernillo 2011, 99.

25 Kelsen 1945, 191.

26 Schmitt 1985.

27 Austin 1832.

fashion'.[28] These exclusions, however, lead to a one-dimensional understanding of law. Jurisprudential 'knowers' are not only legally trained scholars with a passing interest in philosophy: they occupy a range of positions and address questions other than those pre-authorised by an internal view of law. It is no more 'true' to say (for instance) that 'whether a given norm is legally valid . . . depends on its sources'[29] than it is to say 'the affective and aesthetic dimensions of law and governance are not merely superstructural or incidental',[30] or (of Australian courts) 'they are constructs of the colonizer, making the rules of the rulers, and they are interpreted by the rulers through a white-supremacist euro-centric lens'.[31] Each description is of the same system and each carries explanatory power. They are plural statements – not reducible to an overarching system or reconcilable in any way.

The commonsensical delimitation of law and its theory to the boundaries of the Western state as known by its trained knowers (aka lawyers) is very difficult to contest. Even those positioned outside of or on the margins of state law know it when they see it, since it is historically and ideologically entrenched, and reproduced in countless ways as the core case of 'law'. But it remains nothing more than a powerful naming of law as belonging to the state, coupled perhaps with an insistence on disciplinary demarcations[32] – necessary for legal practice and education, but less so for scholarship. There is nothing necessary about the association of law and state, and no justification for limiting *all* of legal theory to law generated by states. Moreover, knowledges and perspectives other than that of the lawyer can generate provocative and usefully explanatory *theory* of law, in addition to the empirical knowledge generated by sociology, anthropology, and geography. Indeed, as I have mentioned in Chapter 1, the process of conceptualisation is increasingly regarded as a dynamic process responsive to everyday material life.

Beyond law as reified subject

The subject who knows law is not just a human being, but a subject of something, in the context of this book a subject of law. Who or what is the *legal* subject and what is their relation to law? As part of my objective is to democratise and split open the idea of law so that it is not uniquely represented by state hierarchies, I

28 Kelsen 1934, 477; see also Hutchinson 2005, 68–69.

29 Gardner 2001, 199.

30 Valverde 2015.

31 Watson 2015, 132.

32 In 2003, legal geographer Nicholas Blomley, commenting on being asked whether he is trained as a lawyer (and not being asked whether he is trained as a geographer) wrote: 'There is, clearly, a hierarchy at work here. Viewed from geography, law appears as an immensely self-confident field that is sure of its importance, history, and its disciplinary identity. . . . Given its closure, law vigorously polices knowledge, with a suspicion of that deemed to lie outside its boundaries. External influences, such as geography, are thus admitted – if they are admitted at all – on law's terms. Geography, conversely, tends to buy into this view of law. Law is something that only lawyers do.' Blomley 2003, 21. Blomley acknowledges that disciplinary shifts were transforming both fields, and clearly this contestation of boundaries has continued.

need to ask what precisely is the legal subject a subject *of*? In the broad and pluralistic sense, as I will explain in later chapters, the legal subject is the entity subjected to, formed by, and engaging with, the multitude of forms of legality that exist. Subject and law in this sense are, however, indistinct – law arises from the multitude of relationships, habits, practices, and performances *of* subjects. It is possible to say that human subjects relate to each other and that law is produced in different forms from these interactions. It is also possible to say that there are a variety of relationships, entanglements, and what Karen Barad calls intra-actions,[33] which give rise to subjects and objects of law, legal forms, and other congealed entities. In other words, an endlessly dynamic circulation of matter and meaning can be cut up into different legalities, different agents, and variable subjects and objects.

In the narrower sense of state law, the legal subject is in many ways coded as the law writ small. Equally, the state–law unity is the subject writ large. The Enlightenment subject and its law-state are mirror images of each other – sovereign, self-determining, autonomous.[34] They both in a sense are scaled down versions of a monotheistic god.[35] This turns the law-state into a reified and self-contained abstract thing with agency of its own.[36] It is common enough, even in critical writing, to read of a person or subject being acted upon, shaped, or constituted by law, and to read of law as an 'it', a hypostatised thing that acts and speaks. Although law in its positivist-statist form is entirely a formalised subset of human society, it is also frequently reified and given a separate existence, as though it is itself an agential thing.[37] These idioms can be understood as shorthands for a more complex rendition of what law is or, alternatively, they suffice as a placeholder for an imagined thing that like the *grundnorm* has no identity and cannot be defined – in the words of Althusser, speaking of 'Christian religious ideology', 'I shall use a rhetorical figure and "make it speak", i.e. collect into a fictional discourse what it "says"'.[38] Translating Althusser's comments about ideology into law, the legal subject is interpellated by an imagined and reified Law – the law that speaks and acts. This holds subjects in place as subjects of law even though, as he says, the subjects collectively 'work by themselves'.[39]

Figurative language is often helpful in theory.[40] However, I make a literalist exception when writing of 'law', and endeavour to avoid idioms that give law its own persona and agency. I feel that 'making law speak' would involve a

33 Barad 2007.

34 Fitzpatrick 1992, 64.

35 Cf Schmitt 1985.

36 Kelsen associated personification with the state, and criticised the argument that law and state were a duality (rather than unified) as 'an animistic superstition': 1945, 191 – as it presumes animation behind the law, just as a dryad animates a tree. However, unifying law and state does not solve the problem – the law–state unity is infused with spirit, rather than this existing behind the law.

37 For an extended discussion see Manderson 1996.

38 Althusser 1994, 133.

39 Ibid, 135.

40 See generally Chapter 8.

dilution of my argument. Law does not *do* anything or *say* anything itself, and it is not even an identifiable thing – all of these are shorthands for the actions of human beings enmeshed in material contexts who use an imaginary of law to relate and engage.

Reified law is also often understood as a *system* – a self-contained whole of coherently co-ordinated rules and norms, with its own limits, and differentiated from other systems and from its exterior.[41] 'Law' is regarded as part of a 'legal system' and it is the boundary of the system that determines what is law and what is not. Associated with a state and with an orderly conceptual hierarchy in the manner of Kelsen, 'system' has been seen as a necessary correlative of 'law' – system provides the line that differentiates law from non-law, legal from non-legal.[42] Defining or alternatively critiquing the boundary have been seen as key tasks of legal theory. But does law need to be organised systematically in order to be law? Again, such a presumption often replicates a statist and modern Western image of law,[43] and diverts us from finding law in (for instance) human identity, the land, habitual social practices, narratives, songs, dances, pictures, myths. As Manderson says, '[w]e must go beyond understanding law as a system (like positivism), a clash of systems (like pluralism), or even as the interaction of sub-systems (like autopoeisis)'.[44]

Lawspace

The abstract 'master narrative' of law is, as indicated above, a dematerialised and dephysicalised idea. It is not located, but purports to run through different manifestations of law, like a Platonic idea. It has been confronting for legal theorists to find legal geographers asking not *what*, but rather '*where* is law?'[45] The question does something unexpected to legal theory. By asking us to place law, it opens up the traditional 'what' question: as soon as we ask whether law is in (for instance) lawyers' offices, or courts, or people's homes, or the street and cityscapes, or the womb,[46] or the high seas, or a remote desert location, or a university classroom, or physically imprinted on our minds and bodies, law becomes something different from an abstract set of rules that are the same in many contexts. Rather, the context, the location, and the performance of law in space are important – space is not just a *tabula rasa* (either in or out of the mind), nor is it just a neutral medium. Rather law becomes *what* it is, *where* it is[47] – in material locations as performed in and by subjects who are both recipients of law and conveyors of it.

41 Raz 1970; cf Luhmann 1992.
42 Raz 1970.
43 The 'system' of systems theory is not, however, aligned with the state: Luhmann 1992; Pottage 2012.
44 Manderson 1996, 1064.
45 Delaney et al 2001, xiii.
46 See Delaney 2010, 61.
47 Cf Manderson 2005, 1.

The physical law–space connection is a rich and complex one.[48] In its more abstract forms, law is of course also regularly represented through spatial metaphors, in ways that are quite familiar and that I will consider in more detail later in the book. As in other fields, this representation has at times implied a quite static understanding of law as a concept, system, or structure. The normal representations of law's spaces are essentially about forming insides and outsides. Most familiarly in its theoretical idiom, the conceptual being of law has been traditionally constituted by the exclusion of the social domain and, more specifically, by the exclusion of individual people, their actual relationships with others, the physical world, and events, specific decisions, and performances. In other words, law as a *concept* has been constituted by the exclusion of any materiality or physicality, and any factual presence. Despite their connection to an *idea* of place, the extensive use of territorial metaphors may facilitate the exclusion of the inessential from conceptualisation by framing law as a network of detemporalised insides and outsides.

Critical theory has produced an extensive appreciation of the ways in which law's conceptual boundaries are actively constructed and performed, and how they are intrinsically dynamic. However, as I have indicated, clearly the law–space connection is about more than simply the ways in which law is conceptualised and represented. It is also about the co-constitution of space and law, for instance, in the definition of things such as public and private spaces, types of real property and how these translate onto physical space, urban planning systems, behavioural norms in specific places, transit routes, physical zones of inclusion and exclusion, and socio-spatial networks. David Delaney calls these representational and material angles of the law–space entanglement 'space in law' and 'law in space'.[49] The representational and physical spatialisations of law seem intuitively to be connected, but how? How are images of the outside world internalised and translated into a concept? Is it coincidental that something mapped onto physical space is *imagined* as spatial? Or are the internal and external mappings continuous and even coterminous? Moreover, and more disconcertingly, thinking of human bodies and material objects as entangled legal agents in spatial formations is one thing, but the consequences of (for instance) questioning the limit represented by skin is another. Arguably, the *where* of law is not just external space. What we experience as internal space may be equally the physical location of law – as neurological pathways, for instance, formed, like sheep tracks, by repeated action across a physical terrain. Moreover if we think of mind as epiphenomenal, an illusion or effect of material

48 See Delaney 2010; Graham 2011a; Philippopoulos-Mihalopoulos 2015.

49 Delaney 2003, 68–71. The term 'entangle' evokes quantum states. As Karen Barad explains, 'quantum entanglements are generalized quantum superpositions, more than one, no more than one, impossible to count. They are far more ghostly than the colloquial sense of "entanglement" suggests. Quantum entanglements are not the intertwining of two (or more) states/entities/events, but a calling into question of the very nature of two-ness, and ultimately of one-ness as well. Duality, unity, multiplicity, being are undone. . . . One is too few, two is too many.' Barad 2010, 251. See also Hodder 2012.

entanglements, and therefore as extended and embodied,[50] the physical and conceptual limits of law become decidedly different from the neat conceptualisations of past theory. I will explore some of these issues in Chapters 5, 6, and 8.

Vertical and horizontal

The presumption that law is *necessarily* hierarchical is another area where legal theory has been under pressure over the past decades. The hierarchical view of law runs through both traditional legal theory and some critical theory: the legal mainstream has often seen hierarchy as a necessary feature of law while critical thought has seen it as a point of weakness susceptible to deconstruction, or manifested as law's oppressiveness in particular to marginalised groups. In positivism, law takes the shape of a pyramid, or consists of commands given by political superiors to political inferiors,[51] while in natural law theory there is an objective morality that transcends and informs human constructions.

However, it would be misleading to suggest that mainstream legal theory always posits a unidirectional top-down image of law. Positive law is always *constituted*, and its constituents – officials, the community, those with a 'habit of obedience'[52] – are present at some stage of law creation even though they do not necessarily have an ongoing role in it. So, for instance, Jeremy Waldron has written that Hart

> insisted that the key to jurisprudence is not the notion of command or the notion of a sovereign, but the notion of the members of a group accepting a rule. This seems less hostile to pluralist possibilities than traditional positivist theories, inasmuch as it is less vertically structured than they are. Instead of sovereign power, it placed a sort of customary practice at the foundation of a legal system.[53]

Hart limited those whose recognition of law was relevant to 'legal officials' and so the 'customary practice at the foundation of a legal system' is extremely limited and intrinsically undemocratic. The question begged here is why the recognisers of law should be confined to officials when everybody in a political community, and beyond it, has a stake in the identity and nature of law. Opening up the subjective sources of law recognition beyond officials of a particular system may seem dangerous – it reveals potentially a plethora of laws, rather than a controllable and definable legal system (not to mention the plurality of ideas such subjects might have about the one, state-based legal system). The fact that these alternative knowledges of law are not officially sanctioned does not make them less real or valid.

50 See Varela et al 1991; Rowlands 2010; Malafouris 2013.
51 Austin 1832; Kelsen 1945.
52 Austin 1832.
53 Waldron 2010, 139.

Some may feel that Dworkin also at least partly expanded the role of people in holding up the law by arguing that a coherent interpretation of law, 'law as integrity', relies on a personified legal community.[54] Here, in order to come to the 'best' and most coherent, most principled, interpretation of law, judges take into account existing law as a baseline, and read it in the light of values held by a legal community and understood from the point of view of an ideal judge. Of course, there are few people in Dworkin's account, let alone a real community with its divisions, controversies, and sub-groups. Nonetheless, formal law is not simply on top, though this idealised 'integrity' *is* determinative of social life.

In critical legal theory, law often appears to have a similarly hierarchical presence: it is often seen as *imposed* on landscapes, and on subjects, transforming, objectifying, or at least constructing them in particular ways. Law thus operates through force or violence, albeit often a constructive force. The critique of sovereignty, recently given a boost with the work of Agamben and the revival of Schmitt, also emphasises law's verticality. This is done in the spirit of critique and with the intention of exposing and casting doubt on the narrative of legal closure – it brings into the foreground the necessarily political underpinnings of law and illustrates its intensification in sovereignty. It deconstructs the distinction between legitimate and illegitimate violence. However, it may also naturalise and take for granted one particular tradition in law and political theory at the expense of other possibilities:[55] in this sense it is useful as critique but limited in its ability to perceive alternative legalities.

By contrast, bottom-up and 'flat' conceptualisations of law have for many years been promoted by socio-legal and pluralist scholars, leading theorists to seek alternatives to hierarchical and centrist views of law. There are many variations on the idea that law emerges from below – whether it is through norms circulating around semi-autonomous communities,[56] narratives generated within sectarian communities,[57] micro-interactions that lay down everyday norms,[58] or legal consciousness.[59]

'Critical legal pluralism' is essentially an effort to amalgamate the critique of foundations, sources, and closure with socio-legal insights about the material plurality of legal forms. This development in pluralist thought has argued not only that 'pluralism' is found where different legal orders exist within the one territory but also more importantly in 'the very nature of law'[60] and in the social and political dialogues that are constitutive of law.[61] In this sense, a critical pluralism is just as much related to legal theory and jurisprudence as it is to legal pluralism – it is more

54 Dworkin 1986.
55 See generally Jennings 2011.
56 Cover 1983.
57 Ibid.
58 Falk Moore 1973.
59 Ewick and Silbey 1992.
60 Melissaris 2009; Anker 2014, 5.
61 See Kleinhans and Macdonald 1997; Anker 2014.

than just a variety of legal pluralism; more accurately it is a variety of legal theory or critical legal theory. It represents a convergence (though not a unification!) of the empirical and sociologically informed elements of legal pluralism with the anti-essentialism and conceptual innovations of critical legal theory. Such an approach characterises legal plurality as a process, not as separately identifiable systems of law: law is open-ended, interpretable, in flux, formed by everyday relations, and contextual. It is both personal and dialogical; it is practised, and reduced (albeit contingently) to a finite form. It thus occurs subjectively, as well as intersubjectively, and interculturally:

> [critical] legal pluralism is something hosted by human selves: there is not a clash of two distinct systems in a social field, but a permanent interplay of ideas and principles in peoples' minds, gleaned from innumerable sources, that resolves into 'the law' for any one person in any one situation.[62]

Critical legal pluralism is a powerful and positive contribution to legal theory because it reimagines law in part from the bottom up, as a practice engaged in by human societies, rather than as a mere determinative limit to action or externalised set of rules or principles. I will have more to say about this and other subject-centred approaches to law in Chapter 7.

Is and ought

Many legal theorists have seen the task of theory as descriptive – to describe the nature, character, or essence of law, that is, to say what law is, not what it ought to be. Legal positivists were at the forefront of insisting that legal theory and jurisprudence must be descriptive only,[63] and must aim primarily for explanation of law. The presumption of such a position is that theorisation operates in a single direction, from the raw material of law to its contemporaneous theory, and does not shape its object. Having said this, Bentham in particular did have a reformist objective underlying his insistence on description: essentially, only by having an accurate description of law would it be possible to identify with any clarity what needed to be changed about it.[64] The *concept* of law had nonetheless to be deliberately constructed so that this descriptive project was possible. Since Austin, positivist legal theory has distinguished 'law as it is' from 'law as it ought to be'. What law

62 Anker 2014, 187.

63 For an interesting recent discussion of the possibility of descriptive jurisprudence, see Hutchinson's critique of Leiter: Hutchinson 2009, 97–98, referring to Leiter 2007.

64 According to Schauer 'although Bentham was undoubtedly committed to the development of a descriptive account of law – insistently distinguishing what the law is from what it ought to be – his descriptive project was developed in the service of his normative [ie reformist] one'. Schauer 2015, 961–962. Julie Dickson makes a similar point: 'for Bentham, the moral aim of censorial jurisprudence provided the motivation for engaging in expositorial jurisprudence, and rendered this latter an essential precursor to the vital task of law reform', Dickson 2001, 5. See also Campbell 1996.

is for positivist theory is strictly in the present, not in some imagined future, or in some extrinsic morality which may or may not at some point in time be incorporated into law. Positive law is divided from general or specific ethical imperatives.

As I have indicated in Chapter 1, one modality of the critical reimagining of law is temporal, deliberately blurring the separation between law's present and its possible futures. Contemporary critical thought has challenged the is–ought distinction,[65] emphasising in particular the 'ought' that is contained in a descriptive 'is'. Descriptions of law are not normatively neutral; they are not devoid of normative content: rather the statement that something 'is' implies a directive that we should see it as such and delimit it in a particular way. The simple temporality of the is–ought distinction, dividing the past/present from the future and the descriptive from the normative, is complicated and derailed by this insight. An 'is' is never entirely of the past or present but also constitutive (and therefore indicative) of what can come next. This is because a description – of a political event, of an artistic work, of a law – participates in a collective discourse that sets possibilities for the future. The point can be illustrated by reference to the genesis and reception of Austin's own work. When Austin described law 'properly so called' in terms of a command of a sovereign, habitually obeyed, he was not undertaking a pure description of law.[66] The description did not capture the essence of law as it then was. It contained also an aspirational element: this is how law ought to be, in particular how it ought to be understood and theorised and (therefore) how it ought to be regarded in practice.[67] Austin protested the separation of is and ought, but his theory was also instrumental in establishing the present positivity of law: by imagining and describing law as a positive phenomenon, the positivists have helped to constitute it as a legal reality.

Two related insights are therefore crucial: first, that an 'is' may contain an 'ought'; and second, that any concept of law is not an essence, but is performative (like the process of conceptualisation as discussed in Chapter 1). The first of these premises is fairly straightforward: if I say 'law has the qualities a, b, and c' that is to say that you should not regard something without those qualities as law. It is normative as well as descriptive because it lays down a rule of interpretation.[68] If said compellingly and reiterated sufficiently often, the description prescribes the thought (law is separate from merely social norms), and the thought influences subsequent action (for instance advice that an action is immoral, but perfectly legal, or a judgment to the same effect). To put this in the language of the philosophy of science, all observation is 'theory-dependent' and, to add a postmodern-ish gloss, 'theories' or world views do not just turn into frameworks for thought because they

65 The distinction has also been challenged in analytical philosophy. See Hage 2006, ch 6 'What Is a Norm?'

66 Austin 1832, Lecture 1.

67 Duncanson 1997, 138–141.

68 Merchant 1980, 4; Davies 1996, 51–55. Julius Stone refers to the 'tendency of the human mind to graft upon an actual course of conduct, a right or even a duty to observe this same course in the future': Stone 1966, 550.

make sense, but because they are backed up by the power of reiteration through culturally prescribed pathways.[69] Description is also discipline.[70] Descriptions and analyses of law are dependent on a theory or paradigm of what law is – in most cases, legal positivism – which remains persuasive because it has become ingrained in the legal conscience. Secondly, law is performative in that its concept is derived from the repeated events that make up the law, rather than a universal essence. The performance of law as not necessarily connected with morality has made it that way for late-modern Westerners. Positivism has become the predominant paradigm – a conceptual and practical reality. But it is not the only possibility.

The norm

Underlying much of what I write in this book is an expansive understanding of normativity. Broadly speaking, a norm is a guide for behaviour, including thought. Legal philosophy has focused on three types of norm: custom, command, and moral standards.[71] Custom is essentially repeated behaviour that has crystallised over time into an identifiable set of place-specific standards for a community. The notion of custom was especially significant in pre-Austinian common law theory and indeed the common law itself was at one time regarded as an extended type of custom, albeit in later times dislocated from its English origins through colonialism. Command on the other hand is a specific act of will, of a sovereign or parliamentary law maker, and throughout the nineteenth and twentieth centuries represented the central idea of normativity that made up a legal system.[72] The norms created through judicial decision making have been regarded as lying somewhere between these two, depending on what position is taken on whether judges make or find the law.

A third type of norm in traditional legal theory are the norms of 'morality' and of so-called 'natural' law[73] – shadowy, unspecific, and unidentifiable in their nature and origins as objective moral norms, though reasonably conceptually cogent in so

69 Cf Cooper 2001.

70 See generally Foucault 1980.

71 Fortescue 1997, 26–27; Kelsen says 'a norm can be created not only by an act intentionally directed to that effect, but also by custom, that is, by the fact that people are accustomed to behaving in a certain way'. Kelsen 1991, 2.

72 Austin and Bentham both thought of law in terms of a command from a political superior to a political inferior. See eg Austin 1832, 18–19.

73 I qualify 'natural' because as I have said previously I do not regard classical 'natural' law theory as being anything of the sort. It is not about the *natural* world at all, but rather presumes a universal morality, often of divine origins, the existence of which remains undemonstrated. While it is true that human nature is often at the basis of natural law, this remains a presumed rather than demonstrated foundation. This idea of there being norms immanent in nature needs to be clearly distinguished from the turn toward a 'naturalistic jurisprudence', which has nothing to do with classical natural law theory and is, by contrast, a post-Quinean approach which insists on empirical and sociological methods, avoiding any transcendental claims about the 'real'. See eg Leiter 2007; 2011.

far as they actually refer to the accepted norms of a community or group (and in this sense 'morality' is indistinct from 'custom' and may encompass norms that are racist, colonialist, patriarchal, xenophobic, exploitative, and homophobic, as well as more inclusive attitudes). The language of morality has often been problematic in legal theory, not only because of its religious associations, but because it suggests that there *is* a set of standards, either separate from or enmeshed with positive law, that can be identified in human or physical 'nature'. The moral or 'natural' norms deployed in legal theory are therefore either essentially contingent community norms of a specific time and place and therefore similar to what earlier writers referred to as custom, or they are the indemonstrable oughts of god or nature. This does not mean that I think there are no arguable ethical or moral standards, just that they cannot be demonstrated to be timeless universals as claimed by certain types of natural law theory. And it also does not mean that physical nature is irrelevant to human normativity. As the Western world is only just beginning to realise, the physical environment *demands* engagement and care – law arises in relations between humans and also in relations between humans and the non-human world and, in this sense, the 'environment' or 'nature' is critical to law rather than marginal. I will come back to this in Chapters 3 and 4.

As will become apparent, one of my objectives in this book is to rehabilitate the notion of custom or usage in legal theory, but to think of it more expansively in terms of the repeated behaviours and discursive patterns from which law is solidified. It is true that custom is often associated with conservatism, especially where it has been formalised and even institutionalised. But the core value and mechanism of custom – that of repetition – as is well known these days, can be equally about sameness *and* difference, conservation *and* change. Replacing the language of custom with the language of performativity, narrative, and iteration promotes (I hope) a more materialist and embodied image of the ways in which law emerges from social relationships, an image in which law is embedded in a huge number of micro-actions, *iterated* incessantly, and never in the same space or the same time. It also allows law to be placed in locations where it is not normally seen – in the physical and neural pathways created by repeated movement, in cultural narratives such as liberalism, in signification and language, in the material bodily actions (including verbal communications) that are the necessary condition for all 'legal' and other events, and, as mentioned, in our relationships with the non-human world.

A revitalised understanding of usage, understood as performativity and iteration, is therefore central to my understanding of normativity. This means that, *contra* Kelsen,[74] there *is* a norm in normal. As many who are marginal will attest, the normal is a convergence of behaviour, of discourse, of meaning, symbolisations, or of actions, which exerts a gravitational pull on surrounding events and meanings, and is often read into them as an unquestioned presumption. (These points repeat the critique of the is–ought distinction that I mentioned above.) Such normativity cannot be reduced to a system or even a set of identifiable prescriptions because

74 Kelsen 1991, 3.

it is complex, dynamic, and multi-layered. For instance, buried within all of the forms of law identified by classical jurisprudence is what Rosi Braidotti refers to as 'human normativity':

> The human is a normative convention . . . The human norm stands for normality, normalcy, and normativity. It functions by transposing a specific mode of human being into a generalized standard, which acquires transcendent values as the human: from male to masculine and onto human as the universalized format of humanity. This standard is posited as categorically and qualitatively distinct from the sexualized, racialized, naturalized others and also in opposition to technological artefact. The human is a construct that became a social convention about 'human nature'.[75]

Turning to human 'others', to relational selves, and to performativity have been the first steps in the exposé and transformation of the human norm. Western thought is still in the process of finding an appropriate and adaptable posthuman normativity – a normative world where humans are understood as situated in a natureculture continuum rather than merely in human culture, which speaks to the material, ecological situation of humans in the world.

Defining 'law'

None of this is to discredit Western, insider-generated, statist legal theory, though we need to remember its limitations, including its ethnocentrism and its complicity in colonialism and in the maintenance of a male-centred society. It is a theory of existent, constituted structures of law that emphasises core meanings and accepted views. But this is obviously not all of the useful theoretical knowledge about law: it rests on very specific perspectives, and does not envisage legalities that do not take this form. At the same time, and to make a final point, the recognition that law is not necessarily tied to a state, that it is not an objective thing, that it operates horizontally, that we make it as we know it, has led to anxiety about the use of the term 'law' and the possible confusion generated by applying it more generally. Confining 'law' to the state provides an easy remedy to these anxieties, but such a move excludes many other forms of order not determined by a state. Many years ago, Sally Engle Merry famously expressed the problem with terminology in this way:

> Why is it so difficult to find a word for nonstate law? . . . Where do we stop speaking of law and find ourselves simply describing social life? In

75 Braidotti 2013, 26. Drawing a subtle distinction, Claire Colebrook has spoken of a 'shift from the normative to the normal', that is, a move from a model of right to similitude based on normality: 'If behavior is based not so much on (even implicit) regulatory ideals regarding the proper life that one ought to live, but more on some preceding and determining *life*, then the mode of decision or axiology shifts from self-determination to alignment – bringing human existence into accord with the life of which it is an expression.' Colebrook 2014, 47.

> writing about legal pluralism, I find that once legal centralism has been vanquished, calling all forms of ordering that are not state law by the term law confounds the analysis. The literature in this field has not yet clearly demarcated a boundary between normative orders that can and cannot be called law.[76]

The assumption that it is possible to find a conceptual distinction between things that are law and things that are not has also characterised (indeed defined) legal positivism. A more mobile and responsive understanding of law, one that does not tie it to a specific set of institutions, need not share such an assumption. Certainly, in some fields, theoretical clarity is aided by such a distinction and many will find it helpful to be able to contain 'law' within a specified set. But as Santos pointed out:

> It may be asked: Why should these competing or complementary forms of social ordering . . . be designated as law and not rather as 'rule systems', 'private governments', and so on? Posed in these terms, this question can only be answered by another question: why not?[77]

As Santos goes on to point out by way of analogy, alongside Western medicine, there are a large number of other forms of medicine: 'traditional, herbal, community-based, magical'. There are also forms of politics that are not national state-based politics, forms of economy that are not capitalist, and so forth. In each case there is clearly a 'politics of definition at work'.[78] The politics of defining law as limited to state law is composed of a number of factors: the alignment of capitalism with statism; the colonialist downgrading of non-state law; the gendered imagining of law as a man writ large and of legal subjects as mini-sovereigns; the insistence on disciplinary separation; and other matters that serve to isolate law from its social and relational foundations. While definitions may assist in generating concepts of law that are useful for particular purposes and in specific contexts, it is imperative to keep the associated politics in view. As my own purpose in this book is to explore the inherent openness and emergent qualities of law in a human–non-human continuum, I endeavour to avoid definitional stasis in the meaning of 'law' (though not necessarily other terms). Although this approach risks a lack of clarity in exactly what 'law' means it hopefully generates a sense of an extended and interconnected 'legality'.

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76 Merry 1988, 878–879.

77 Santos 2002, 91. Tamanaha counters Santos' question in this way: 'The short answer is that to view law in this manner is confusing, counter-intuitive, and hinders a more acute analysis of the many different forms of social regulation involved': 2008, 394.

78 Santos, ibid.

Much classical and arguably some critical legal theory has been unable to see beyond the dualism of lawful versus lawless, a place of singular state-based (deconstructable) law or a lawless state beyond governance. There is not really an in-between or a third possibility to this dualism. But there are other ways of framing law – not as something imposed, or created by a state or sovereign, or that is uniform and coherent, or that concentrates power in specific institutions. My methodological point of departure for general legal theory involves setting aside Merry's anxiety over where law stops and social normativity starts. This concern unduly limits legal theory to questions of definition, and prevents an expansive and experimental approach to understanding law's multiplicity. It may well be necessary, in some contexts and for certain purposes, to adopt a provisional definition of law – state-based ideas of law are arguably the best example of such provisionality, accepted and assumed for the purpose of regulating large and complex populations. But provisional and practical definitions do not exhaust the idea of law: the remainder of this book represents an effort to explore law's other possibilities.

3 Legal materialism and social existence

> People meet together in a hall, make speeches, some rise from their seats, others remain seated; that is the external process. Its meaning: that a law has been passed.[1]

> Before rules, were facts: in the beginning was not a Word, but a Doing.[2]

Introduction

Knowledge has often been seen as representational – that is, its purpose is to discover and represent 'reality'. Building on this, the purpose of theory is to form abstractions and categorisations so that the 'real' can be understood in a general sense, not only in its particularity. This has never been a complete model of knowing for human-constructed realities such as law (and society, politics, history, culture) where there is no 'truth' apart from that which is constantly being made in human interrelationships and where, in consequence, reality cannot be separated from language, theory, and history.

In formal accounts of state law, the process of shaping human relationships through governance is at least partly deliberate – law is enacted, declared, decided, and/or gazetted. However, law's norms also emerge from social meanings built up over time and drawn into law through its processes of interpretation and application. The practice of law does rely on and reproduce prior representations and assumptions about the world and about itself, including theoretical representations. But at the same time, practices of law also constitute social relations and social subjects by describing and overtly determining them in particular ways. In short, law does not simply represent, describe, and categorise social relations because such relations also make law. Law is embedded in its practices, whether these occur in practitioner offices, courts, other institutions (medical, educational, corporate), in homes, on the street (so to speak), or anywhere else. In other words, law is inseparable from its material practices.

1 Kelsen 1934, 478. I will discuss this statement of Kelsen's further in Chapter 4.
2 Llewellyn 1931, 1222.

Through the 1980s and 1990s many forms of theory emphasised the *constituted* nature of the social and legal spheres. The constitutive factors in these constituted worlds were often seen to be discursive because everything about law and society that can be known is known in language and in the rhetorical and theoretical edifices constructed in language. The physicality and materiality of the social practices constituting law were sometimes neglected in what has become known as the 'cultural' or 'discursive' turn, though this neglect was partly based on sidelining the demonstrated materiality of both culture and language/discourse. In the neo-Marxist thought of Althusser, Gramsci, Lukács, and others for instance, law and other cultural edifices were not simply superstructures produced by an economic base, but dynamically integrated with the contexts of social production.[3] Moreover, the 'founding' writers of postmodernism, influenced by neo-Marxism, existentialism, and phenomenology, emphasised the materiality of language and culture.[4] Notwithstanding this, in Anglo critical theory in particular, culture and language took on a decidedly ideational and non-material aspect.

By contrast, the 'new materialism' that has emerged in recent years aims to critique the dominance of discourse and language in theory. The purpose is to bring matter and facts more strongly into the theoretical arena.[5] One type of justification for the new theory is that an emphasis on discourse, and on the constructedness of reality, has distorted theory so that it is under-attentive to the physical and factual dimensions of our existence. A thorough interrogation of the human subject in its social complexity has resulted in the neglect of the object.[6] Epistemology has swamped ontology. And therefore, in order to re-balance theory, we need to critique the object, and re-value ontology. It is undoubtedly true that objects, matter, ontology, and the outside world deserve more attention. However, what is centrally at stake in much recent theory is not so much a turn outwards, and to things, but more interestingly a questioning of these very distinctions: in particular, subject–object, inner–outer, concept–fact, and epistemology–ontology. The most challenging (and paradigm-contesting) of the new materialist theory grapples with these very distinctions and introduces new conceptualisations in an effort to move beyond them.

This chapter and the next look at law and legal theory in the light of this renewed emphasis on the material basis of concepts and knowledge. It poses some challenges for the conceptualisation of law. The first challenge of materialism for legal theorists is to the essentially abstract view of law that dominated legal theory in the twentieth century – this view, reflected especially in natural law theory and legal positivism, removes law from daily interactions in the interests of finding a generalised and unified idea of law. The predominantly abstract approach of legal positivism in particular has been fairly comprehensively countered by feminist

3 For a discussion of Lukács' later thinking about social ontology and law, see Varga 2012.

4 See in particular Coward and Ellis 1977.

5 See eg Barad 2007; Coole and Frost 2010a.

6 Coole and Frost 2010b, 2.

theory, critical race theory, and other approaches. Criticisms include the fact that the purely conceptual approach to law relies upon selective abstractions and therefore misrepresents whole sectors of social engagement and, second, that it attempts to erase the human elements involved in interpreting and applying abstract legal principles. In addition, socio-legal thought constantly reminds us that law emerges from the agonistic and complex substratum of human interactions and that it is made concrete by iteration. It is solidified and often rendered in a highly abstract, immaterial, and *un-real* form (as state-based law) by institutional processes. While this makes such law susceptible to being conceptualised as somehow distinct from the diversity of human relationships that support it, such abstractions are nevertheless contingent, if not fictional.

A second challenge posed by the renewed materialist theory, however, is more provocative and potentially more disruptive to mainstream Western legal thought. It relates to the emphasis in the new materialist theory on critique of the subject–object distinction, and other associated dualisms such as nature–culture and mind–body. This offers opportunities for new imaginaries of the place of human society in the physical world. Can law be understood beyond a subject–object distinction when it has, historically and conceptually, been so committed to such a framework? As human beings have normally been seen as the sole source of law, is there any sense at all in which law can be understood as emerging out of a subject–object dynamic? Can tangible stuff be anything other than an object of law's interpretive gaze? Can law move beyond the human into a posthuman territory? Can it realistically dissolve the nature–culture separation?

This chapter reviews existing legal theory in the light of its materialism. My aim is to show that, although they are not often named specifically as such, many of the counter-traditions of legal theory of the twentieth century did in fact revolve around materialist concerns. I take 'abstract' approaches to be represented predominantly by the 'core' traditions of jurisprudence: natural law and positivism. The material approaches include realism and legal sociology, as well as some of the critical approaches that have challenged the credibility of legal abstractions. In this context I also restate the materialist credentials of certain styles of postmodern thought: postmodernism has often been understood as (and deployed as) a highly abstract and anti-material intervention. In the following chapter I turn from these more general questions to ask what *matter* itself means for law and legal theory – how is the stuff of bodies, of objects, and of the earth of significance for legal thinking?

I use the term 'materialism' very broadly, sometimes to refer to the Marxist and neo-Marxist tradition of dialectical materialism, but more frequently in a less specialist sense, to include any approach that tries to grasp the inseparability or 'entanglement' of matter and meaning.[7] This includes therefore work that seriously disrupts distinctions such as nature and culture, practice and theory, and mind and body – 'disruption' means not inverting or reversing the distinction

7 Barad 2007.

or valuing one pole rather than the other, but bringing them together in a single plane of existence. In short, I use 'materialism' to encompass several ideas: that material factors *produce* law as an effect; that there is a *dynamic relationship* between a discursively separated law and the social sphere; and that *law is essentially material*.

Law's abstractions

As I have outlined in Chapter 2, legal theory has traditionally taken the position that an essence or nature of law can be distilled from its many variant forms. As an object of theoretical inquiry, law has traditionally been situated in the realm of the immaterial, rather than the material. State law is conceptualised as essentially abstract – not identical to cases or even legislation, but derived from them by a process of reading, interpretation, and reasoning. There are material *sources* of law, and then there is law, which is something different, an abstract set of principles – but what is it, then, as an abstraction? How in particular does it relate to social life?

Many legal theorists have not paid a great deal of attention to the intrinsic relationship between law and social existence and have largely assumed that social behaviour is shaped by, follows, or reflects an abstract law. The presumption seems to be that law is separate from and indeed precedes the acts through which it is made manifest. Hans Kelsen, however, directly addressed the issue that – outwardly at least – law appears to have a material as well as a meaningful dimension. In the first pages of *The Pure Theory of Law*, he posed a puzzle – that 'law' has both a natural and an abstract dimension:

> If we differentiate between natural and social sciences – and thereby between nature and society as two distinct objects of scientific cognition the question arises whether the science of law is a natural or a social science: whether law is a natural or a social phenomenon. But the clean delimitation between nature and society is not easy, because society, understood as the actual living together of human beings, may be thought of as part of life in general and hence of nature. *Besides, law – or what is customarily so called – seems at least partly to be rooted in nature and to have a 'natural' existence.* For if you analyze any body of facts interpreted as 'legal' or somehow tied up with law . . . two elements are distinguishable: one, an act or series of acts – a happening occurring at a certain time and in a certain place, perceived by our senses: an external manifestation of human conduct; two, the legal meaning of this act, that is, the meaning conferred upon the act by the law.[8]

Clearly, Kelsen was not referring to 'nature' in the sense utilised by natural law theory (that is, as human nature or universal moral law): this is evident from the fact that he spoke of legal acts as occurring in a specific time and space. They are concrete happenings. The 'external fact whose objective meaning is a legal or

8 Kelsen 1967, 2, emphasis added.

illegal act is *always an event that can be perceived by the senses* (because it occurs in time and space) and therefore a natural phenomenon determined by causality'.[9] On the other hand, legal *meaning* 'is not immediately perceptible by the senses' – it cannot be felt or weighed.[10] In Kelsen's universe, the natural world is the world that can be seen and touched, whereas social and legal meanings are imperceptible in this way. Law appears to have both a material/natural and an immaterial/abstract existence. After all, law is *only* evident in external facts. So what is it?

Kelsen solved his puzzle (perhaps too quickly) by arguing that the legal meaning of the factual set of circumstances was 'derived from' a norm, itself created by an act (for instance a decision or enactment), which gets its own legal meaning from another norm (and so on). Kelsen was responding to what he saw as Ehrlich's conflation of fact and norm, society and law, and ultimately sociology and legal science.[11] As a whole, Kelsen's idea of law is that it is a 'scheme of interpretation',[12] a cognitive construction of the external world. In this sense, Kelsen's thought was Kantian, dividing nature from cognition.[13] Ultimately, this view gives the impression that law either precedes or transcends the factual domain and is *not* ontologically enmeshed with it. Facts do *exist* in legal thought – law interprets them, shapes them, regulates them, influences them, but is ultimately regarded as separate from them: 'Interhuman relations are objects of the science of law as legal relations only, that is, as relations constituted by legal norms'.[14]

Rather than presuming that acts are shaped by norms, however, we can equally argue that norms are derived as abstractions from acts. It is relatively easy to see how this might be the case if the 'acts' we are talking about are already inflected with meanings derived from human interactions – whether these interactions are the relations of production theorised by Marx, or other interhuman connections interwoven with and constitutive of taboos, normalities, symbolisms, narratives, and so forth. It is more difficult to see how norms are derived from acts if the only act in evidence is an 'external fact' in time and space with no meaning. Without needing to say which came first, matter or meaning, we might say that the act and the norm, nature and society, are ultimately indivisible, or only conditionally divided in particular modes of understanding.

Within the common law consciousness, legal doctrinal abstractions can be described as mutable and arguable responses to legal sources, including the social

9 Ibid, 3, emphasis added.

10 Ibid.

11 Van Klink 2009.

12 Kelsen 1967, 3.

13 'The neo-Kantians, as they came to be called, distinguished between two kinds of science: the natural sciences (*Naturwissenschaften*) and the sciences of the mind (*Geisteswissenschaften*) or culture (*Kulturwissenschaften*) . . . the former were to be concerned with material facts, the latter with meanings; or the former with regularities, the latter with individual events. In terms of separating "is" and "ought", the former were to be concerned with material facts, the latter with values.' Stewart 1990, 275.

14 Kelsen 1967, 70.

substratum. The process of interpreting a statute, for instance, may be necessary to determining the abstract law on an issue, and this often relies at some point on identifying the intention of parliament – itself a fiction assumed to reside in the second reading speech, or deduced from the intertexualities of parliamentary debate. Variables in the process of interpretation – including time, concrete context, identity of the interpreter, social values – lead to variable abstractions, which might be different for another interpretive event. Similarly, the *ratio decidendi* of a case consists of a somewhat mysterious relationship between facts and reasoning process leading to the outcome of a case – it is a highly abstract inference, highly variable, and not a solid or identifiable thing.[15] Thinking in this way, we often presume that law lies behind text and the practice, never identical to it, or reducible to it. Yet as an abstraction, doctrinal law within common law systems is always *becoming*, never fixed. It responds to circumstance, and is constantly changing, always contingent. In this sense, the realm of applied and applicable law, as understood from the rather narrow perspective of the legal doctrinalist, is formed by material and practical engagements, some of which have a top-down character, but many of which take place in the everyday acts of courts and their advocates.

It might be supposed that in asking a question that sounds entirely ontological – 'what is law?' – legal philosophers as well as lawyers would necessarily be attentive to its material and factual dimensions. After all, even the most prosaic description of law – as a set of institutionally accepted rules for ordering human society – brings the social dimension of law into play, a dimension that – as Kelsen said – is always at some level observable and concrete. Despite the inherent dynamism in doctrinal law, the generalised philosophical *concept* of law has often been regarded as a static universal explaining the distinct nature of law that, because of its universality, transcends the everyday physicality of legal actions and practice. As a theoretical abstraction, it has been described in a formal way – not a process, but a reified thing, albeit an ideational thing. Many efforts have been made to identify a (singular) 'concept' of law – an abstraction that is fixed, and that does not exist in dynamic interplay with materiality, but rather underpins it and explains it. The most famous such conceptions in twentieth-century legal philosophy are abstract criteria for policing the boundaries and validity of 'law' – a *grundnorm* or rule of recognition.[16] But even the more sociologically informed approaches have at times tried to pin down a framing concept, or what Melissaris calls a 'thin' concept, that allows different empirical contexts to be captured within the domain of law, without necessarily specifying the content or precise shape of that 'law'.[17]

The move towards such fixed abstractions or unifying definitions within legal philosophy is troubling for a number of reasons. Most significantly, perhaps, it

15 The classical analysis is Stone 1959.
16 Kelsen 1945; Hart 1994.
17 Melissaris 2009; cf Tamanaha 2001.

dematerialises law and attributes to it a transcendent and quasi-theological meaning, out of step with its empirical complexity. Law becomes detached, simplified, and unified, rather than intrinsically grounded, dynamic, and plural. Of course, any process of conceptualisation is (by definition) a dematerialisation and to that degree a misrepresentation. Facticity is often regarded as exterior to abstraction, and radical matter is an absolute outside to the world of knowledge. However, as I have indicated in Chapter 1, this is not necessarily a problem if conceptualisation is regarded as a process, and as responsive. Concepts of law understood to be a contingent response to differently patterned manifestations of law in time and space do not fix law conceptually – they engage and respond.

By contrast, much of the twentieth-century history of the concept of law is characterised by what Bourdieu calls the 'theorization effect' or, in his typically dense idiom, 'forced synchronization of the successive, fictitious totalization, neutralization of functions, substitution of the system of products for the system of principles etc'.[18] In more everyday language, N Katherine Hayles speaks of a 'Platonic backhand' – an inductive theoretical response to empirical conditions, which is then taken as a fixed schema:

> The Platonic backhand works by inferring from the world's noisy multiplicity a simplified abstraction. So far so good: this is what theorizing should do. The problem comes when the move circles around to constitute the abstraction as the originary form from which the world's multiplicity derives. The complexity appears as a 'fuzzing up' of an essential reality rather than as a manifestation of the world's holistic nature.[19]

As the more critically and materially grounded traditions in legal thinking illustrated over and again throughout the twentieth century, the 'noisy multiplicity' appears everywhere that law is to be found. The noise and plurality of law consist not only of the social matter that state law ends up being applied to. It is also to be found in the interference between so-called 'law' and non-law, in the substratum of human relationships that constitute law and normativity, in alternative legal systems marginalised by the monopoly of state law, and in the factual evidence of social life that contradicts law's abstractions (such as stereotypes sometimes relied upon by decision makers). Indeed it is hard, when speaking about law, not to reproduce the language of law's 'core' and its penumbra or margins, its inside and outside. But all of this is a theorisation effect, a 'forced synchronisation' of what is temporal, and a 'fictitious totalisation' of what is plural. To reduce law's polyphony to a single concept of law seems theoretically perverse – such a concept *must* obscure much more than it explains, and imposes unity where there is none.

18 Bourdieu 1990, 86.

19 Hayles 1999, 12; see discussion by Massey 2005, 74–75.

The real, the material, and the socio-legal

By contrast to the largely abstract ideas of law promoted by natural law theory and positivism, the counter-traditions of the twentieth century promoted a much more grounded view of law and a more 'materialist' one, taking that term in its broadest sense. The legal realists and their sociologically oriented companions and successors have often paid attention to the factual substrate of law as something that is not separate from law but entangled with it, indeed even definitive of law. Roscoe Pound's distinction between 'law in the books' and 'law in action'[20] inspired an entire century of thinking about the modalities of state law and the different ways in which it could be understood, as abstract and rule-bound, or as something necessarily translated into everyday situations with all of their imperfections and uncertainties. The distinction continues to provide a preliminary opening into understanding that the term 'law' cannot be confined to formal doctrinal sources, but is essentially adaptive to broader social and historical situations. It is, at the minimum, something that must be put into action – and the action of applying and interpreting law in everyday situations is 'law in action'. Pound's distinction was, however, essentially about translating or operationalising abstract law – in this sense it concerned the movement from abstract to everyday, rather than the ways in which law arises in everyday behaviour.

Following Pound, legal realists developed a strong critique of the 'transcendental nonsense' of the law in favour of recognition of its purposive, social, and 'real' existence.[21] Oliver Wendell Holmes had declared that 'the actual life of the law has not been logic: it has been experience',[22] though as Dewey pointed out some years later, Holmes' model of 'logic' was formal and deductive, rather than experiential and experimental.[23] A responsive and forward-looking logic, as Dewey argued, was altogether more appropriate for understanding law. Realists saw facts and practice as the benchmark for and foundation of law: Karl Llewellyn famously said, 'Before rules, were facts: in the beginning was not a Word, but a Doing', and that realists 'want to check ideas, and rules, and formulas by facts, to keep them close to facts'.[24] Llewellyn and others argued that law had become dissociated from its factual, practical basis and ought to be returned to this reality in order to become more real. The realists enthusiastically railed against the extreme abstractions of legal formalism and their use in obscuring the politics of law creation and application. Nonetheless, their account of the relationship between facts and legal meanings was perhaps theoretically underdeveloped, because it neglected the dynamics of abstract and material in the constitution of reality.[25]

20 Pound 1910; Nelken 1984.
21 Cohen 1935.
22 Holmes 1881, 1.
23 Dewey 1924.
24 Llewellyn 1931, 1222–1223.
25 New versions of legal realism utilise a more sophisticated approach to the 'real': see Erlanger et al 2005; Merry 2006.

Even more radically for the theory of law, in the early twentieth century Eugen Ehrlich defined 'living law' as the law that actually circulates in social settings, to be distinguished from the official law of the state and bureaucrats.[26] Ehrlich's sociological understanding of law brought the social normativity of groups into the sphere of the legal. His work, together with the work of legal anthropologists,[27] laid the foundations for several generations of legal anthropologists and sociologists to study non-state-based legal orders such as Indigenous and customary law, social normativity, and the everyday practices intersecting with state law that help to define it. The pluralist scholarship that arose in consequence of this work has been immensely significant in generating the empirical resources needed for a more expansive view of law.

Critical legal theory has also at times had materialist inclinations, with different heritages drawing on both legal realism and Marxist theory.[28] Most significantly, forms of critique that focus on legal marginalisation of disadvantaged groups have usually been grounded in the undeniable and often neglected facts of social oppression. Feminist legal theorists have often insisted upon both the materiality of knowledge and the need to understand law as thoroughly grounded in social relations and social distributions of power. This famous passage from Catharine MacKinnon makes the point:

> The objective world is not a reflection of women's subjectivity . . . Epistemologically speaking, women know the male world is out there because it hits them in the face. No matter how they think about it, try to think it out of existence or into a different shape, it remains independently real, keeps forcing them into certain molds. No matter what they think or do, they cannot get out of it. It has all the indeterminacy of a bridge abutment hit at sixty miles per hour.[29]

The inspiration for standpoint epistemology was explicitly Marxist but it was subsequently developed through extensive debates about objectivity, in feminist science studies in particular.[30] Avoiding the dualistic bluntness of MacKinnon's admittedly polemical summary, more elaborate accounts of standpoint epistemology emphasise the contextual nature of power differentials and, thus, of the epistemic privilege brought by the view from below. Such knowledge recognises its own embodied and ultimately physical foundation – all knowledge is of course embodied and situational, but reflectiveness about perspective is not always built into knowledge (not even – or especially – by Descartes, despite Western philosophy's enduring image of him sitting in his winter dressing gown by the fire). As Haraway said,

26 Ehrlich 1962; Nelken 1984; see generally Hertogh 2009.
27 See eg Malinowski 1926.
28 Hunt 1986; Douzinas and Geary 2005, 230.
29 MacKinnon 1989, 123.
30 Hartsock 1983; Harding 1986; Haraway 1988.

'Knowledge from the point of view of the unmarked is truly fantastic, distorted, and irrational' – a 'god trick'.[31]

Feminist legal theory has disputed the god trick of legal objectivity in a number of ways, for instance by exposing the situatedness of legal knowers, by illustrating discrepancies between 'neutral' abstract law and gendered social life, by calling out legal stereotypes and myths about women, and by importing alternative narratives into legal discourse. Moreover, alternative norms, notably the ethic of care, have been inferred from material differences in gendered selves. Bounded individualism has been tempered by relationality. In feminist legal thought, material social life therefore serves not only as a corrective to abstract individualism and biased 'neutrality' but also as a source of inspiration for new normative forms. Normalisation of difference means, in this context, *making norms* out of lived experience. Feminist thought generally is based in an understanding that social (and legal) norms are indissociable from material conditions – in the field of law, that there is a dynamic interplay between legal abstractions and material life.

One of the most paradigm-contesting aspects of feminist theory has been its attention to the body as constructed and as generative not only of other bodies, but also of knowledge and social meaning. One way in which dualistic thinking has contributed to the subjugation of women is through the idea that women's subjectivity is tied to nature, the body, and reproductive capacity. Since Cartesian matter is passive, the alignment of women with their bodies and men with culture and the mind has meant a degraded subjectivity for women. Many feminists have contested this dualistic structure in many ways, most notably by understanding subjectivity as necessarily embodied and promoting non-dualistic accounts of existence that question the distinctions of subject–object, nature–culture, and so forth.[32] In legal feminism, it has been important to challenge any distinction between law and the body (that is, that they exist in different spheres),[33] and to illustrate the ways in which bodies are regulated and written on by the law, but also, more positively, that material bodies are generative of law, and indeed connected throughout material social networks.

These heterogeneous counter-narratives about law have all been based at least in part on the embeddedness of law in material social life. Law has not only been seen as an abstract force for shaping the material world, but in an important sense is regarded as emerging from it. Two further observations are worth making here. First, the ontology of the matter – meaning connection is still often under-theorised in many of these heterodoxical approaches. Sometimes they promote a view of law as material, but all too often it is still abstracted and reified as a separate ideational element, shaping and constructing matter, mismatched or misrepresenting material life, or read off it in some way. Second, the term 'materialism' has not been widely used to describe these critical and socio-legal counter-traditions (and it is

31 Haraway 1988, 587.

32 See in particular Plumwood 1993; Grosz 1994, 13–19.

33 Grbich 1992.

true that I am using it in an extremely broad sense). Possibly, the term has been too closely associated with its Marxist heritage to be widely adopted as a descriptor of *legal* thinking. Yet in so far as they emphasise relations between humans in actual social environments, and understand law as embedded in those relationships, these alternative traditions have challenged the view that state law has its own abstract sphere, and is essentially self-contained.

Postmodernism and materialism

The critique associated with postmodernism, which arrived a little later in the twentieth century, was often understood as (and sometimes took the form of) a rejection of the tradition of economic and dialectical materialism, rather than a reconstruction of it.[34] Modernism was associated with essentialist understandings of the physical and social worlds, whereas postmodernism is sometimes understood to involve a rejection of that entire reality as meaningful in itself. Alaimo and Hekman, for instance, state: 'Although postmoderns claim to reject all dichotomies, there is one dichotomy that they appear to embrace almost without question: language/reality'.[35] Late twentieth-century critical thinking, with its anti-foundational emphasis on social and linguistic constructions, and its rejection of simplistic objectivist notions of 'reality', seemed the antithesis (though not in a dialectical sense) of a materialism based on real social structures.[36] The *material* constituents of meaning, culture, and law were often repressed in postmodern theory – in 2007 Joanne Conaghan commented that:

> Materialism as a political and theoretical approach has become so strongly associated with the Foucauldian rejection of 'totalizing' narratives that it has become increasingly difficult to make arguments that attempt to draw connections between economic and cultural, or between local and global, phenomena.[37]

However, aside from the rejection of grand narratives, postmodernism and materialism (even in the form of Marxism) were never entirely at odds. For a start, as I have said, feminists and race theorists, whether postmodern or not, have maintained an emphasis on material conditions for the simple reason that materially experienced oppression is at the basis of these critiques. Standpoint epistemology with its Marxist inspiration did appear essentialist and totalising in early forms where women were an entire class of knowers, but it quickly transitioned into a responsive methodology that could be adapted to plural and incommensurable

34 Fraser 1997; Norrie 2000; see Conaghan 2013a, 31–32.

35 Alaimo and Hekman 2008, 2; see also Gunther Teubner's comments comparing autopoiesis to postmodernism: 1991, 1444.

36 See generally Butler 1997; Fraser 1997.

37 Conaghan 2007, 460.

contexts. Of course, numerous debates within feminism about an alleged, and actual, retreat from the material world kept the question alive throughout the 1990s and beyond.[38] The perceived opposition between materialism and postmodernism that arose at this time was the result of several factors, at least some of which might be put down to changing scholarly fashion and the reassertion of idealist scholarly habits. This resulted in a selective and increasingly narrow reading of key post-structural and postmodern texts, a limited association of materialism with Marxism, the assumption that Marxism had in fact been discredited by political events, and a gradual forgetting of neo-Marxist thought. Postmodernism and materialism have therefore often been seen as inconsistent and it is true to say that much postmodern-influenced theory has been oriented toward the ideational and conceptual, rather than the physical and material. But that is not the whole story: materialism never entirely receded, and postmodernism is not intrinsically antithetical to it.

The broadly materialist credentials of some early postmodern writings have more recently been reaffirmed.[39] Early postmodern thought was clearly concerned with the materiality of language.[40] Derrida, for one, building on and critiquing Saussure, insisted on the materiality of the sign. This was first and foremost to be seen in the inseparability of signifier from signified, that is, it was not possible to separate the ideational element of meaning from the physical marks and sounds of language. There are no meanings and no concepts beyond or before the material elements of language, because signs necessarily refer to other signs, and are not a container for pre-existing meanings.[41] The material element of language is intrinsic to meaning, not exterior to it as some kind of medium. Thus, the emphasis on *text* in deconstruction was – at least to begin with – an emphasis on materiality as the coming together of abstract and physical. Derrida insisted that iteration was a physical process, introduced concepts such as trace and gram to express the physical remains of language,[42] and emphasised the physical qualities of writing and speech. Despite this, the use of Derrida in theory and in particular legal theory (I include myself in this assessment) did often de-emphasise matter and its role, and fixate on more abstracted notions of text, force, deconstruction of binaries, and so on.

Barthes' semiology was similarly defined by connection between the sign and materiality. His work addressed the interventions of discourse and signification in constructing and mediating reality and the specific role of the *materials* from which myth is made – signs in the form of words and images, objects, consciousness. For instance, in *Mythologies*, he aimed (among other things) to illustrate the ways in which the 'natural' and the 'real' are produced in language and through myth, and

38 Butler 1997; Fraser 1997; see generally Sheridan 2002; Swanson 2006.
39 See eg Cheah 2010; Chow 2010.
40 See generally Coward and Ellis 1977.
41 See eg Derrida 1981, 17–29.
42 Derrida 1974.

to show that these constructions serve ideological purposes. One such ideological purpose is to create the perception that the material structures of capitalism are given and incontestable, rather than contingent and political.[43] There is no clear division here between the mythic and the real. Rather, as Coward and Ellis put it, the 'mechanism of myth is the way that habitual representations tangle themselves up in everyday objects and practices so that these ideological meanings come to seem natural'.[44]

Similarly, Althusser's 'ideological state apparatuses', organisations such as educational institutions and the law, that produce and reproduce ideologies and construct subjects as subjects of ideology, were firmly situated in the material realm, not just in the realm of ideas.[45] But more than that, ideology itself was not simply a set of ideas. It was material. For Althusser, ideology was not just a state of mind, 'false consciousness', or the 'Beautiful Lies' of powerful deceivers.[46] This posits a simple dichotomy of ideal and real, and a disjuncture between economic conditions and the illusory abstractions that misrepresent them. Rather, ideology first of all concerns the way in which the relationship between the subject and the system is imagined, but secondly it is material – it is inscribed in material practices and rituals, performed by material subjects, and governed by material institutions.[47] Subjects are interpellated as subjects of ideology and they transmit it through being inserted in a material sense into the practices of institutions. The imagining of the subject in the world is key, but so are the material practices that embed and reproduce the subject. As Rey Chow explains,

> By emphasizing the notion of the imaginary, what Althusser intended was not (simply) that ideology resides in people's heads but, more important, that its functioning is inextricable from the intangible yet nondismissible, and therefore material *psychosomatic mediation* involved in subject formation. Ideology works because, in the process of coming to terms with it, people become 'interpellated' – are hailed, constituted, and affirmed – as socially viable and coherent subjects, as who they (need to) think or believe they are. This process of interpellation, a process in which body and soul imbricate each other inseparably, lies at the heart of Althusser's formulation of materialism/materiality-as-practice.[48]

The process of becoming a subject through interpellation is a bodily, a social, and a psychological experience – these aspects of the subject's materiality, so often differentiated, emerge together as the subject imagines, produces, and relates herself with others.

43 Barthes 1972.
44 Coward and Ellis 1977, 28.
45 Althusser 1994, 125–127; Chow 2010.
46 Althusser 1994, 123–124.
47 Ibid, 127.
48 Chow 2010, 224–225.

Many of the 'source' writers of postmodernism and post-structuralism were, therefore, not only attentive to materiality, but insistent that the philosophical dichotomy between the ideal and the material was in fact itself constituted. Their explorations in ideology, language, myth, and signification were in part about showing the co-existence of matter and the ideal, the social body and its abstractions, and the shaping of cognition and of the world through material-semiotic processes. However, among legal theorists this did not always lead to a careful analysis of the ways in which the real emerges as both an ontological and epistemological product. Rather, it was often taken as a demonstration merely of the contingency, the unreliability, and therefore of the fallibility of the real and material – thus reinforcing the distinction, rather than contesting it.

It might be interesting to speculate why a movement that in some senses grew out of, and in its early forms was integrated with, a materialist agenda ended up contributing to the dematerialising trend in theory, rather than promoting a sense of the entanglement of matter and meaning, or of epistemology and ontology.[49] It is true that Derrida's work does seem far removed from historical materialist accounts of labour and capital. It is also true that the 'matter' that postmodernism dealt with in the 1990s extended well beyond the 'social matter' of human relationships, labour, and economic relations, to texts, signifying systems, and bodies. This work did often take a highly abstract form, emphasising the constructedness of all forms of social life rather than its physicality: as Conaghan comments in relation to Judith Butler's *Bodies that Matter*, the 'approach does not invite engagement with the *stuff* of bodies . . . [and] forecloses exploration of what bodies *do*'.[50] Like many feminist theorists, Butler's work of this period did at least take the materiality of the body seriously, even if it tended to theorise it in a highly abstract and disembodied way.[51] By contrast, many other writers de-emphasised the body and material relations altogether, and while linguistic, postmodern, or cultural preoccupations did not exactly make materialist engagement impossible, they certainly did neglect it.

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This chapter has surveyed a range of ways in which the empirical world has entered into the theoretical understanding of law. The tradition of legal theory has tended to imagine law in an abstract and reified way – as an ideational *thing*, which sits above the social sphere and influences and shapes behaviour. Alternative theoretical accounts see law as intrinsically connected to and even emanating from social relations. It would be overstating things to refer to all of these approaches

49 Rosalind Coward and John Ellis' book *Language and Materialism* (1977) was published in Britain at a time when scholars in the Anglosphere were just starting to come to grips with postmodernism and psychoanalysis. It embeds postmodernist writers within Marxist thought in a way that might not have been comprehensible 15 years later, to a slightly different audience, or outside Britain.

50 Conaghan 2013a, 40.

51 See Butler 1997; 2015, 17–35.

as 'materialist', as not all of them are based on the insight that material factors produce law as an effect, that law is essentially material, or that there is a dynamic relationship between law and social relations. Nonetheless, they all do regard the theoretical *understanding* of law as inseparable from an understanding of its material context. At a minimum this is because doctrinal law does not reflect or take account of real social conditions.

Despite its heritage, postmodernism is sometimes understood as having eschewed materialism in its focus on discourse, subjectivity, and texts. The 'new' materialism is therefore described as a corrective to the overemphasis on language in postmodernism. To summarise it rather simply, the 'new materialism' is much more broadly about the interactions between humans, non-humans, and all matter in social dynamics. New materialism is in part a reaction to the cultural and discursive turns in theory. The following chapter will consider the physicality associated with new materialist thinking, and its application to law, in more detail.

4 A new legal materialism

> [T]he image of dead or thoroughly instrumentalised matter feeds human hubris and our earth-destroying fantasies of conquest and consumption.[1]

> Positing the world as a complex field of human and nonhuman agency and material-discursive intra-actions and practices, offers us an approach which is not reducible to any simple matrix of reality represented or representation made real. . . . Most importantly, it invites a conceptual, ethical, and contextual refocusing of feminism, including legal feminism, around material discursive practices, their intra-action, and their concrete consequences in terms of how they impact upon people's lives.[2]

Introduction

Coward and Ellis claimed that 'Althusser's notion of the materiality of ideology reveals a rather distorted view of materialism' because it 'relies on the so-called "concrete" and empirical'.[3] In twentieth-century philosophy the term 'materialism' was more or less identified with Marxism and, through Marxism, with forms of human society, human beings in economic relationships, and the ways in which these material social conditions were reproduced. Engels, for instance, famously described materialism as based on the view that the 'determining factor in history is . . . the production and reproduction of social life' including the production of things we need for existence, as well as the reproduction of ourselves.[4] The material world of Marxism is essentially about human economic realities, for instance that class is produced in part by the expropriation of labour and control of the labourer's body. It also concerns the consequences of the economic conditions for the well-being of human bodies in a material sense: access to food, to shelter, and so forth. It is true that Althusser extended the definition of materiality beyond the

1 Bennett 2010, ix.
2 Conaghan 2013a, 48.
3 Coward and Ellis 1977, 73.
4 Engels 1972, 35.

forms and consequences of productive relationships to include the human being performing rituals and following certain mandated practices – these materialities performed by subjects become the bridge between a system and its ideational form that allows it to reproduce itself.

More recent 'new' materialism has gone much further than Althusser did in taking materiality into the realm of the concrete and the empirical, emphasising not only material human relations but also the relations of physical things. Most radically, it has offered renewed critiques of various foundational dualisms, including mind–body, subject–object, ideal–material, and epistemology–ontology. It is true that these dualisms have for many years been thoroughly critiqued and deconstructed. They continue to reassert themselves, but are well understood as constructions, held in place by discourse and by habitual patterns of thought with a lengthy collective history. It is also true that materiality has continued to hold a critical place in feminist theory, partly because of feminist recognition that knowledge is materially situated,[5] partly because gender differences are so obviously material differences,[6] and finally because gender is reproduced materially.[7]

So what is new about the 'new' materialism? One of its most important facets is the shift toward thinking about objects and matter *in their physicality*, and as interactive. What has broadly been termed 'thing theory' or 'object-oriented ontology' is about raising the profile of the physical world as an integral part of the social. The key point of departure is a questioning of the distinctions between the natural and the cultural, humans and animals, and humans and technology,[8] matter and meaning,[9] and humans and things.[10] In various forms of network thinking,[11] physical things can be seen to have an 'agential' dimension – rather than simply being seen as inert stuff shaped entirely by human intervention and human knowledge. The matter of human bodies is part of these networks, not distinct. As subjectivity itself is corporeal, the human and our systems of meaning are seen as fully enmeshed in the physical world.

Whereas the emphasis in some millennial theory has been upon the so-called 'epistemological' work done by human discourse in reading and interpreting the world, new materialist and new empiricist accounts emphasise that an object itself might exercise a kind of agency, not an intentional agency to be sure, but nonetheless having reactive force in human and non-human networks. On the one hand, this statement seems somehow trivial and obvious. How can we *not* engage with material things and, therefore, how can they *not* have an impact upon us?[12] But the

5 Hartsock 1983; Harding 1986.
6 Conaghan 2013a.
7 Butler 1997.
8 Haraway 1988
9 Barad 2010.
10 Bennett 2010.
11 Actor Network Theory is clearly the most well known (Law and Hassard 1999; Latour 2005); Ingold has also promoted the term 'meshworks': Ingold 2007.
12 Haraway 1988; Latour 2005, 70–72; Bennett 2010; Hodder 2012.

issue is deeper than this. It concerns how 'society' is understood as an assemblage of relations, but also how human subjects as knowers understand themselves. Are we, to draw (probably simplistically) upon Heidegger, separate from the world, looking at it and making sense of it as a set of physical things *out there*? Or are we intrinsically and ontologically *in it*?[13] Do human entities precede the world as subjects, or are they created by it and existentially inseparable from it?

Legal theory has addressed this 'new' materiality, this physicality, of law in several ways. Perhaps most prominently and most consistently, legal geographers have situated law in space. Law can easily be seen as shaping or influencing spatial environments, as in property, planning, and environmental law. More interestingly, law can be seen as embedded in space – emerging from the specificities of place and out of the situated and material connections of human beings with their environments. Universalised conceptions of law have often been responsible for displacing or erasing placed-based law, for instance in the enclosure movement and in colonial expansion.[14] However, there remains a sense in which law is entangled with space and localities, and I will consider this angle of law's materiality in Chapters 5, 8, and 9.

Law's materiality is, however, also about the interconnection of *everything* to everything else,[15] with no limits and only contingently drawn insides and outsides. Once we refuse the distinction between non-human nature and human culture, a refrain in feminist and other forms of critical theory for some decades now, there is no justification for detaching law from the material or natural world.[16] Thus Andreas Philippopoulos-Mihalopoulos speaks of an 'open ecology' that 'combines the natural, the human, the artificial, the legal, the scientific, the political, the economic and so on, on a plane of contingency and fluid boundaries'.[17] 'Ecology' is a powerful metaphor for a materialism that aims to contest separation and bring everything (essentially) into relation – it requires an appreciation of diversity, of mutuality, of porous boundaries, and of constant movement in different temporal scales (from the 'time' of oxygen–carbon dioxide exchange or seed germination to the 'time' of evolution). It also has the merit of tapping into an increasingly strong environmental consciousness across the world. To return to my earlier discussions, law could be situated within such a materially connected framework as a semi-autonomous or contingently bounded terrain – as in positivist state law – and it can also be understood as emerging in plural forms across the entire field of natureculture. It is easy to imagine that such a field of material interconnection is outside the subject, but this would be already to draw an unnecessary boundary in it. Rather the subject, her mind, identity, sense of agency, are all produced in (but not determined by) material engagements.

13 Heidegger 1962; 1977.
14 Graham 2011a, 53–55.
15 Commoner 1971, 33.
16 Grbich 1992.
17 Philippopoulos-Mihalopoulos 2011, 10–11.

In this chapter I introduce new materialism, and make some observations about the prospects for a reorientation of legal theory beyond a merely human framework.

Thinking and things

Before beginning, I want to mention one important theoretical question that has the potential to complicate things, possibly beyond the limits of utility. I do not particularly want to enter too far into this complicated terrain or make it foundational to my further comments. But mentioning it cannot be avoided (and nor should it be).

Whenever theorists start driving down into the issue of materialism, distinctions *within* matter quickly arise, though they are not always clearly or consistently delineated. Imperfectly aligned with Kant's distinction between *noumena* and *phenomena* (things-in-themselves and things as they appear to us), the following distinctions have been deployed: things and objects, matter and materiality, substance and matter, radical exteriority and the symbolic, and, more recently, matters of fact and matters of concern.[18] On the one hand, and to simplify somewhat, there is physicality (variously referred to as matter, things, substance) that is inaccessible and beyond any system of human meaning and therefore unknowable though it remains *there*. The gumnut as such is completely inscrutable, despite efforts to imagine what it is like to be one.[19] On the other hand, there are objects and connected things that are material, that mean something, and that are defined in relation to subjects. The gumnut is not just physical resistance but is a material object, something that exists in relation with other things, and is therefore a thing with meaning. Utilising a Heideggerian thing–object distinction, Bill Brown describes things as 'the amorphousness out of which objects are materialized by the (ap)perceiving subject' and that which 'is excessive in objects, as what exceeds their mere materialization as objects'.[20]

Physicality as such is troubling for theorists. We do not know (still like Kant) quite what to think of it, though there is no point in denying it. (One could, of course, but there would be no point in doing so.) Quantum/social theorist Karen Barad's 'agential realism' understands matter as a *process*. 'Substance' lurks in the

18 I am leaving aside Heidegger's difficult distinction between things and objects, which Latour says was 'justified by nothing except the crassest of prejudices': 2004, 234. Ingold, on the other hand, accepts the distinction: see Heidegger 1971; Ingold 2012. A subtle account of the complexities of the distinction is to be found in Brown 2001; on matter and materiality see Philippopoulos-Mihalopoulos 2014; on fact and concern see Latour 2004.

19 Gumnuts are the endlessly fascinating seed pods produced by gum (eucalyptus) trees. They were famously personified as the gumnut babies Snugglepot and Cuddlepie by May Gibbs 1946; cf Frow's comments on a pebble: 'to be so purely a thing, so deeply withdrawn from capture by others, is to pass into that mode of irreducibility and unknowability that we call the subject', Frow 2001, 272.

20 Heidegger 1971; Brown 2001, 5.

background as physical stuff, but the domain of matter-meaning emerges from a dynamic of relationality in which contingent 'cuts' stabilise – at least momentarily – the real so that it *is* something and has meaning. She therefore distinguishes between substance and matter:

> In an agential realist account, matter does not refer to a fixed substance; rather, *matter is substance in its intra-active becoming – not a thing but a doing, a congealing of agency. Matter is a stabilizing and destabilizing process of iterative intra-activity*.[21]

As I will explain in more detail later in the chapter, Barad speaks of intra-action, as opposed to interaction, to emphasise the fact that material engagements do not take place between pre-existing units. Rather, movement or 'iterative intra-action' produces meaningful units (you, me, the gumnut, a nanoparticle) as material.

Others use terminology and draw distinctions somewhat differently. In the process of eventually questioning the purity of the distinction, Andreas Philippopoulos-Mihalopoulos speaks of matter as a medium that appears to be prior to materiality (ie materiality is matter that matters, so to speak):

> we touch upon a fine but pivotal point, namely the difference between matter and materiality: it is important to understand matter as the space on which materiality emerges. Materiality is the way matter flows into agentic, systemic assemblages. In law, materiality is the way matter is organised in material considerations. In that sense, materiality is sense-making. To take this even further, all sense-making is material and continuous. . . .
>
> To sum up, matter is a medium and as such remains inaccessible.[22]

Both Barad and Philippopoulos-Mihalopoulos carefully avoid any suggestion that concrete stuff as such is just a blank canvas or inert plane upon which human meanings are inscribed. It is not so much radically exterior to meaning, as it is always implicated in the dynamics in which meanings (and agency) emerge. Substance or matter is brought into a relationship in which it is material but it is not simply prior and certainly not passive or dead.

Nonetheless, there is a sense in which the *noumena* or thing-in-itself, to use the Kantian terms, remains inaccessible to human thought and meaning. We know it is there (or have this faith) and are ourselves utterly interconnected with it in a physical sense. There is flow between our bodily molecules and those outside us – in a physical sense we may feel as though we have edges, but we are also porous and unfinished. In association with matter, meanings constantly emerge to give shape to matter. The issue for theorists of natureculture is not so much the stuff of which we and everything else is made, the inscrutable elements of interconnection, but rather the connections themselves and what they come to mean: theory

21 Barad 2007, 151, emphasis in original.

22 Philippopoulos-Mihalopoulos 2014, 404, 405.

therefore emphasises the forms of relationality – resistance, mutual reliance, exclusion, mimicry, parasitism, autopoiesis, exchange, coupling, parallelism, dominance, subsumption, foreclosure and so forth – out of which in the human world subjects and objects are made as such.

Creating subjects and objects

Some of these issues can be elaborated by reference to a paragraph in *The Parasite* by Michel Serres. He writes of a 'quasi-object', the interactive dynamic object that defines subjects and keeps us together as a 'we'. The theory of the quasi-object has been very influential in Actor Network Theory in particular. The quotation from Serres is lengthy, but worth reproducing in full. His example is of a ball in a game:

> A ball is not an ordinary object, for it is what it is only if a subject holds it. Over there, on the ground, it is nothing; it is stupid; it has no meaning, no function, and no value. Ball isn't played alone. Those who do, those who hog the ball, are bad players and are soon excluded from the game. They are said to be selfish [*personnels*]. The collective game doesn't need persons, people out for themselves. Let us consider the one who holds it. If he makes it move around him, he is awkward, a bad player. The ball isn't there for the body; the exact contrary is true: the body is the object of the ball: the subject moves around this sun. Skill with the ball is recognized as the player who follows the ball and serves it instead of making it follow him and using it. It is the subject of the body, subject of bodies, and like a subject of subjects. Playing is nothing else but making oneself the attribute of the ball as a substance. The laws are written for it, defined relative to it, and we bend to these laws. Skill with the ball supposes a Ptolemaic revolution of which few theoreticians are capable, since they are accustomed to being subjects in a Copernican world where objects are slaves.[23]

In the first instance, the ball is in fact inert, without function, without value, nothing, and stupid. In a sense the ball *represents* matter as radical exteriority. It 'represents' this, but it is not in fact any such thing – in Serres' account it is already a ball, not a nothing. As I have indicated (and perhaps contrary to the suggestion of the passage) we can be aware of the existence of the thing beyond or outside the sphere of knowing, before it is drawn into some entirely human game. But we do not need to fixate on this prior or outside matter.

Having been picked up and brought into the game, the ball becomes something, but it does not become something for a single person – the person who plays ball alone is a 'bad player' and soon ostracised. Similarly, the person who just tries to control the ball is also a bad player, since the ball cannot be controlled so easily. It has its own movement and its own dynamics. (In another context, and many years

23 Serres 2007, 225–226.

ago, my hockey coach reminded me to 'read the ball' and 'read the game', rather than awkwardly try to direct the ball and the game.)

Rather, 'the body is the object of the ball: the subject moves around this sun'. Playing ball involves making oneself an object, serving the ball, and acknowledging that *it* is the subject. It involves a Ptolemaic revolution. As Serres says, this is a difficult move for a theorist who is used to being the subject. Moreover (and further on from this passage) Serres continues the analogy by pointing out that the person with the ball is marked as a potential victim, because by the rules of most games s/he is the one who can be tackled or challenged. In situations of danger, the ball becomes a 'hot coal' that needs to be passed very quickly.[24] Constant movement of the ball between the players as 'possible victims', and constant substitution of one victim for another, makes the game and the subject–objects who play the game.

> The ball shuttles back and forth . . . weaving the collective, virtually putting to death each individual. . . . The ball is the quasi-object and quasi-subject by which I am a subject, that is to say, sub-mitted. Fallen, put beneath, trampled, tackled, thrown about, subjugated, exposed, then substituted, suddenly . . .[25]

There are several notable aspects of this entire passage concerning the ball game (from which I have admittedly omitted some significant elements). First, the subject and object are in a sense contextual and interchangeable and the players are in the first instance objects and bodies rather than subjects. This means, second, that their subjectivity is given to them through the game and thirdly, that the collective is woven by the constant movement between them. The constant movement, passing, and substitution, creates the collective of subjects and objects, rather than being a consequence of them. The collective is therefore not a simple addition of 'I's into a 'we' (a thought that Serres describes as 'idiotic and resembles a political speech') but an abandonment of individuality where '[e]veryone is on the edge of his or her inexistence'.[26] And finally, in a wry comment: 'Philosophy is not always where it is usually foreseen. I learn more on the subject of the subject by playing ball than in Descartes' little room.'[27] Philosophy is an active and not merely reflective and contemplative process. Serres plays and learns – he does not sit and learn.

'[S]itting by the fire, wrapped in a warm winter gown', Descartes famously distinguished between thought and matter as separate substances.[28] Matter – the extended and objective world – proved a problem for Descartes precisely because

24 Ibid, 226.
25 Ibid, 227.
26 Ibid, 228.
27 Ibid, 227.
28 Descartes 2008, 14; see also Butler 2015, 17–35. Descartes developed the distinction between corporeal things and mind throughout the *Meditations*. Descartes sees both mind and matter as derivatives of God.

of what he conceived of as the thinking and perceiving mind – it is essentially the mind that is certain of its own existence that throws matter into doubt. It is true, Descartes did not exactly describe his method as *mind* creating doubt about the physical world, though what else can we make of his imaginings of an evil spirit intent upon deluding us about everything, or the thought that we are at this moment dreaming?[29] Descartes' material world is not only doubted by mind, it is also dead, inert, and passive – precisely because it is different from mind. In our Cartesian world, the human mind represents the active, subjective, and agential side of being, while matter – including the human body and everything beyond it – is just worked upon and at best (if alive) mechanical.

Serres' ball game provides an introductory illustration of some of the difficulties with the Cartesian separation between mind and body. In particular, it illustrates that the subject is at least in part an effect of the game, and cannot be seen as an atomic individual acting alongside others to create meaning. The meanings generated in the game emanate from the engagement of bodies – human bodies and objects – in a dynamic process. The game has a 'material-semiotic' character because the meanings cannot be abstracted from the physical dynamics. We could object, of course, that in this example it is a group of humans who, having decided to pick up the ball and play a game, are responsible for its shape, its rules, its definitions of success. But as an allegory for a social environment, there is no original decision and no beginning (except as mythology).

The material dynamics of such a game have much in common with, and indeed inspired, aspects of Actor Network Theory, which posits flat networks of interactions between 'actants', entities that include human subjects, non-human animals, and inanimate things.[30] The most interesting of such assemblage thinking downplays any thought of stable relation, and emphasises the movement that constantly creates and recreates situations.[31] But what does this mean for objects and subjects, or things as *things*?

Intra-actions

Serres' ball game illustrates a form of dynamics between entities, creating some as subjects and others as objects. In the game, subjects and objects exchange position, and through the movement of the ball none occupy their position permanently. However, the game does *start* with entities – one of them picks up the ball and tosses it to her co-player. The game is of course allegorical and so I do not want to read too much into this moment. In fact, it is the *movement* that creates the entities as subjects and objects. Nonetheless, the sense is created of finite and pre-existing units that relate.

29 Descartes 2008, Meditation I.

30 Latour 2005.

31 Philippopoulos-Mihalopoulos 2015; Barr 2016.

By contrast to Serres and many network accounts of meaning, Karen Barad argues that movement, or what she calls 'intra-action', is primary.[32] There are not entities that relate, rather the entities emerge from relation. Connection is primary, not separation. Action takes place in the spaces between inchoate things, which then congeal, through the action, into entities: subjects, objects, balls, and so forth. One explanatory image (not one used by Barad to my knowledge and probably naïve in the context of quantum physics) might be to think of the swirling masses of undifferentiated matter some time after the Big Bang, which then coalesced into particles and atoms, and then planets, stars, and galaxies. But instead of locating this notion in a cosmic scale and billions of years in the past, it is ongoing, cross-scalar, social, and ecological. The objects and forms emerge from the movement and from existing potentialities.

Barad's approach is not only about the physical world, but about the co-emergence of matter *and* meaning. Inspired by the physicist Nils Bohr, Barad contests the atomistic view of the world in which indivisible and separate units relate, for instance (in representation) as observer and observed. Instead, she proposes the ontological priority of 'phenomena', which are not entities but 'relations without pre-existing relata'.[33] Observer and observed are inseparable both epistemologically and – more provocatively – ontologically: what separates them is a 'cut' or agential intervention in entangled substances. Barad summarises her 'agential realism' in this way:

> the primary ontological units are not 'things' but phenomena – dynamic topological reconfigurings/entanglements/relationalities/(re)articulations of the world. And the primary semantic units are not 'words' but material-discursive practices through which (ontic and semantic) boundaries are constituted. This dynamism is agency. Agency is not an attribute but the ongoing reconfigurings of the world. The universe is agential intra-activity in its becoming.[34]

Without entering into the quantum theory upon which Barad's work is (partly) based,[35] in an abstract sense her explanation has immediate appeal. It emphasises that the world is formed through action and that therefore there can never be any sense in which a human being is not enmeshed in it; we are necessarily and fully part of existence, not outside. This does not mean that we are not, in some of our iterations, separated from the world, and that we cannot construct a human-centred existence. The Western philosophy of separation has participated in the production of such a sphere, in which the belief in human exceptionalism, and conceptual distinctions revolving around this belief, have produced a style of social existence in which (we believe) humans can control the world. Despite this, ontologically we are materially integrated and always emergent. (But nor are humans

32 See generally Barad 2007, in particular 137–141.

33 Ibid, 139.

34 Ibid, 141.

35 Like Joanne Conaghan, I am 'sadly ill-equipped' for such a task: Conaghan 2013a, 39.

'doings' rather than 'beings' – the point is that humans and other entities emerge from actions in the world, not from actions of their own creating.)

A significant final point about Barad's theoretical approach, and one also drawn from her analysis of physics, is that the ontological and epistemological angles of philosophy cannot be separated. Things are brought into being as meaningful, meanings are embedded in formations of matter, and there is therefore no sense in which knowing and being are separate (again, except in so far as they are constructed as separate by Western thinking). As she puts it, '[t]he world is an open process of mattering'[36] and the philosophical intervention is 'onto-epistemology' rather than either ontology or epistemology. Again, this is a compelling point because it helps theorists to move past controversies about which discipline is prior – ontology or epistemology – and whether things precede human knowledge about them. We can think of the entirety as a kind of (lumpy, not undifferentiated) plasma which, to use her terminology, comes to matter in different forms.

Humans as beings

Accompanying theoretical efforts to understand a posthuman world in which all entities are materially connected and produced, many commentators have also focused their attention specifically on things. So-called 'object-oriented ontology' and 'thing theory' concerns things as things, in themselves rather than for human beings.[37] Some of this theory may reinstate the ontology–epistemology and subject–object distinctions, by insisting on the prior reality of objects as such, rather than (as Barad argues) seeing objects and meanings as co-emergent from dynamic relations. But it does nonetheless serve to reorient attention away from faith in human subjectivity as the focal point of existence and, importantly, challenge the Cartesian preconception that matter is inert and passive. Rather, objects can have their own 'vitality' and capacity for activity, relationality, and resistance.[38]

One element of these various new materialisms, and one that reiterates long-standing feminist themes, is to understand humans as beings with physical existences that are fully interrelated in the world of substances. Humans are physical things, just as leaves, air, and concrete are. This has been a significant point of departure for eco-feminism, for instance,[39] but also for many feminists concerned to move beyond the dualisms of Western philosophy. For several decades, feminists have critiqued the gendered aspects of distinctions between nature and culture, objects and subjects, mind and body, where women (and non-European peoples and animals) are invariably aligned with the object, the natural, and the embodied world. Some of the feminist response to this gendered thinking has been about challenging the association of women with objects, nature, and bodies, or re-valuing

36 Barad 2007, 141.
37 See eg Brown 2001.
38 Bennett 2010.
39 Plumwood 1993.

the devalued arm of the distinction. However, much feminism has instead critiqued the dualistic presuppositions upon which the gendering is based, and instead made efforts to understand humans as bodies living in a fully interconnected world.[40]

One example of this feminist thinking, which emphasises corporeal existence and the relationship of human bodies (to each other) as physical substance, is to be found in Chris Beasley and Carol Bacchi's notion of 'social flesh'. The idea is deceptively simple – humans are interconnected in their corporeality and social arrangements always operate within this substrate of flesh:

> By drawing attention to shared embodied reliance, mutual reliance, of people across the globe on social space, infrastructure and resources, the perspective of social flesh offers a decided challenge to neo-liberal conceptions of the autonomous self and at the same time removes the supposedly already given distinction between 'strong' and 'weak'.[41]

This last point is important: Beasley and Bacchi do not deny the existence of vulnerability, or that 'all of us are physically vulnerable and need care'.[42] But their emphasis is on 'embodied co-existence' as a starting point for politics and ethics.[43] Bacchi and Beasley do not focus a great deal on the interconnections between humans and the non-human world: their focus is on human sociality and human-constructed materialities. However, it is only a short extension of their thinking about mutual reliance to see that it is consistent with a broader posthuman understanding of material connectivity. Human organisms are, after all, only identifiable by their physicality in the world and can only live and relate through their reliance on other material substances.

Materialism and law

So far in this chapter I have, rather selectively, introduced a few ideas associated with a 'new' materialism. The common element, to summarise, is a focus on situating the human, including human meaning and human subjectivity, in a material world where all matter, living and non-living, is related, where objects have their own vitality and resistance, and where agency emerges in relation rather than as an existing quality. All of this may seem to be extremely remote from law. It is easy to see how a materialism of *human* social relations can form the basis of an understanding of law, and I explored some of these possibilities in Chapter 3. It is perhaps not as obvious that a materialism that brings the entire human and non-human realm – from the cosmos to gumnuts, physical places, krill, everyday objects, and interconnected flesh – is of use to legal theory.

40 See generally Plumwood 1993, 37–39; Grosz 1994, 15–24.
41 Beasley and Bacchi 2012, 107.
42 Ibid.
43 Ibid.

Part of the difficulty of imagining a materialist legal theory is that law seems so obviously to rely on a differentiation of its subjects and objects. It tries to define and hold steady a privileged group of subjects, who have rights, interests, powers, duties, and obligations.[44] Objects are also defined by law, for instance as property. There is some well-known leakage between the terms (with corporations and ships having legal personality), but the framing system, *the law*, which defines these subjects and objects is itself seen essentially as the effect of social relations between natural human subjects. Human beings are the sole source of law while objects are simply objects – passive Cartesian matter.

Yet, as we have seen, the 'human' as a category and hence everything that flows from the human is under challenge from new materialist thinking and 'object-oriented ontology' which emphasise not only the significance of physical objects in human relationships, but also the 'vitality' and agency of the material world – as well as the thing-ness of human life.[45] Can a concept of law move beyond the human into this posthuman territory? Are there ways of understanding the legal world that take into account the interactions between subjects and material objects, and the intra-actions that bring them into being in the first place?[46] What are the possibilities for developing a theoretical approach to law in which the philosophical concepts are attuned to the dynamics of making and re-making subjects and objects, abstractions and matter? Where would we place 'law' itself in such a conception?

In the first instance, it is perhaps important to point out that the abstract nature of law is itself an appearance, a narrative about law, which reinforces an ideological story in which law transcends the world, is objective, and is separated. Andreas Philippopoulos-Mihalopoulos has put it like this:

> Law presents itself as immaterial, abstract, universal, non-geographical. This is of course one of law's greatest tricks: the dissimulation of its matter is both convincing and necessary, for otherwise the law could not claim access to that cudgel of cudgels, impartial, blind, objective justice. And so the myth goes. In that way, law has managed to dissimulate the fact that it is material through and through. That the law is not just the text, the decision, even the courtroom. Law is the pavement, the traffic light, the hood in the shopping mall, the veil in the school, the cell in Guantanamo, the seating arrangement at a meeting, the risotto at the restaurant.[47]

Law is everywhere, and it is in fact easy to see *how* it is everywhere in human-constructed domains, because pavements, traffic lights, shopping centres, schools, prison cells, and risottos are shaped by a variety of laws – about property, planning,

44 Naffine 2009.
45 Bennett 2010.
46 Barad 2007.
47 Philippopoulos-Mihalopoulos 2014, 410.

traffic rules, food production and safety, tax, retail, education, rights, security, and other areas. Nonetheless, even in situations where physical things are so obviously marked by law and bear its imprint, the sense still persists that law is *not* the object or somehow contained *in* it, though it may give form to the object in a kind of legal hylomorphism.[48] The law can easily retreat into an entirely immaterial domain, where it might be enshrined in a piece of legislation or a judgment (but is yet not the text itself). This immateriality is somehow essential to law's 'objectivity' – not in the sense of being *of* the object, but in the sense of being distanced from it.

It is more difficult to see how matter as such might engage in law production, how it is something other than a recipient for law's inscriptions, or how it is not merely formed by a determining law. Law is constitutive of matter. Can matter also be regarded as constitutive of law? Or is it at least *a* constituent? Are the traffic lights, the risotto, the pavement, and the veil merely recipients of law, or do they constitute it? From an idealist perspective, the question appears bizarre. But is it? Can we think, for instance, of neural pathways as normative – as a material-semiotic merging of law? Neural pathways are, after all, the material consequence of repeated movement of the body through space and of repeated thoughts making synaptic connections. They govern the thinkable and the doable. In a more everyday sense, can we think of landscapes as normative in the same sense – with pathways inscribed on the ground, showing the right way to go?[49] For that matter, aren't all usages – customs, clichés and figures of speech, language – the normative products of a co-emergent matter and meaning? I will return to these particular issues in Chapters 5, 8 and 9, but for the rest of this chapter I simply want to review the journey of the previous two chapters, and outline a few thoughts concerning law's materiality.

At the beginning of Chapter 3, I mentioned a puzzle posed by Kelsen in his early writing about the apparent physicality of legal acts. Kelsen observed that law always has an external manifestation: the 'external fact whose objective meaning is a legal or illegal act is *always an event that can be perceived by the senses* (because it occurs in time and space) and therefore a natural phenomenon determined by causality'.[50] His examples are drawn from state-based law, notably those relating to parliamentary procedure, sentencing, contract, and homicide, as indicated in the quotation in Chapter 3, above.

> People meet together in a hall, make speeches, some rise from their seats, others remain seated; that is the external process. Its meaning: that a law has been passed. A man, clothed in a gown, speaks certain words from an elevated position to a person standing in front of him. This external process means

48 'Hylomorphism' is drawn from Aristotle's explanation of the relationship between *hyle* (matter) and *morphe* (form). As Tim Ingold explains the concept, 'making begins with a form in mind and a formless lump of "raw material"'. He points out that in its modern (Cartesian) iterations the idea became 'increasingly unbalanced' because '[f]orm came to be seen as actively imposed, while matter – thus rendered passive and inert – became that which was imposed upon.' Ingold 2012, 432.

49 Cf Keenan 2015; Philippopoulos-Mihalopoulos 2015; Grear 2015b; Barr 2016.

50 Kelsen 1967, 3, emphasis added.

> a judicial sentence. One merchant writes to another a letter with a certain content; the other sends a return letter. This means they have concluded a contract. Someone, by some action or other brings about the death of another. This means, legally, murder.[51]

In Kelsen's imagining, the law vests these scenarios with meaning: their materiality is a vehicle for expression and transmission of the law, which exists elsewhere. As I indicated in Chapter 3, Kelsen does not dwell for very long on the conundrum of the inevitable physicality of law. He treats the law rather as an abstract framework that allows interpretations to be given to acts and facts.[52] One act becomes a statute, another a sentence, a third a contract, and a fourth a murder. External facts are understood by law, and invariably shaped by law, but their physicality is not *of* the law. At the same time, materiality is absolutely necessary to the law, even indistinguishable from it. Enacting, sentencing, contracting, and murdering are inconceivable without interrelated bodies passing through time and space in particular ways. Objects and locations – the hall, the seats, the gown, the elevated position, and the letters – also play an integral part.

It is clear therefore, even from what Kelsen says, that *there is no law without acts*. Law can *always* be perceived by the senses – and even if it does not become performed or read into bodily movements, it must be heard, read, discussed. Where is the law that is not tangible? Where is the piece of legislation, for instance, that has not been through the parliamentary process? Whether this is emotion-charged and agonistic, or routine, it still requires a number of bodies doing specific things in a specific place. State-based law is nearly always written or 'evidenced in writing',[53] while social normality materialises in the patterns of human relationship in the world. The *process* by which law materialises, of course, is normally seen as tangential, as a mere medium for the creation of an immaterial law and itself determined by pre-existing abstract laws (these are also constituted by physical acts, of course).

Arguably, however, the behaviours and acts that are indicative of law, that are coded and understood as 'legal' cannot be divided neatly into an external physical aspect and an immaterial, cognitive, and 'legal' aspect. While our dualistic ontology might demand that they be so separated for certain purposes, there is in fact no law and no idea of legality that is not thoroughly imbricated with physicality and the relationality of things – 'things' in this context can refer to textual and digital forms, human bodies and brains, landscapes and objects, and the whole sphere of perceptible things. The everyday practice of law, legal consciousness, law in action, as well as the ways in which law is understood culturally are all part of the

51 Kelsen 1934, 478.

52 See in particular Stewart 1990; Van Klink 2009 for a discussion of the fact–norm distinction in Kelsen.

53 'While the law codes and law books are not the only form of law, they are certainly in historical terms a frequently repeated one; the law is promulgated in books and found in books and it is, we will suggest, of the essence of legal power to take a written form.' Goodrich 1986, 21.

matter of law. Law is visible and material, not abstract and reified, and it cannot exist without this materiality.

Kelsen's attempt to remove the science of law from the natural and social sciences therefore has to be understood as a theoretical choice (or as Barad might say, a 'cut') which delimits law and jurisprudence in a particular way, but does not cover the field of legal theory or (as he terms it) legal science.[54] In consequence, the abstract disciplines of legal theory, legal philosophy, and jurisprudence cannot be separated (except artificially) from disciplines which are founded in the intermeshed nature of law and society: socio-legal studies, feminist legal theory, legal pluralism, critical race theory, legal realism, and others. As I indicated in Chapter 3, however, these disciplines have sometimes not specified the means by which material constituents become law and what kind of law they constitute. They emphasise social factors, and tend to downplay the interconnectedness of all physical things. This extended materiality is, admittedly, not easy to conceptualise, given the idealist tendencies of legal thinking, but I think there are some emergent themes in legal theory that give some strong indications of the materiality of law. In the final section of the chapter I introduce a few of these ideas, but they are elaborated more fully in the remainder of the book.

Legal bodies in spacetime

First, and most importantly, the matter and meaning of law can be seen as co-emergent rather than separately constituted. Law's meanings always appear in material (f)acts and indeed cannot be extracted from such. Even a newly enacted legal norm appears in a physical form, text, and projects future materialisations. It might be tempting to stop here and say that (therefore) law's materiality is extremely thin, consisting essentially of text and possibility. However, as Kelsen's illustration shows, the newly enacted law emerges from material connections and performances in specific times and places, all of which are themselves enmeshed in broader practices, conventions, and networks. In addition to newly enacted norms, there are endless iterations, declarations, decisions, and interpretations through which law emerges. The act (the homicide, the formation of a contract, the negligent surgery) is not only framed and given meaning by an abstract law, it appears with its legal meaning because it is embedded in an extended material context that constitutes our legal relationships.

Second, it is relatively easy to see that therefore law is essentially performative in the sense that it is manifested in and reproduced by the repeated actions of social

54 At this point, I am tempted to say that from a materialist perspective Kelsen's baby has been thrown out with the bathwater. And moreover, there is no point in trying to remove the baby, because it is part of the bathwater. But the analogy instantly leads to difficulty – perhaps there is no baby, only bathwater?

actors in their innumerable connections to the objects and places around them. Performativity may take the form of an iteration of a pre-existing role, an interpretation perhaps of an abstract principle, and there is certainly a strong element of this in state law. Every time we follow a rule conveyed in text or speech, we are interpreting it for a material context. But performance is also in itself constitutive, and law is nothing more (or less) than the performances of a large number of social actors, often but not always mediated or consolidated by text. These performances can of course take place in courtrooms, in lawyers' offices, and in parliament, but also extend throughout the social domain as the everyday activities that support the law, keep it in place, interpret it, and constitute the elaborate cultural fabric that is needed to make sense of state law.[55]

This means, thirdly, that the subject (situated in its world of places and things) participates in law creation as opposed to simply being the passive recipient of law. Contrary to classical accounts of law, which remove the living human being and all materialities from the concept of law and regard them simply as its recipients, materialism identifies law as embedded in social relations, which are themselves already in part constituted discursively. Agents of law are human beings expressing and performing that law in particular locations and contexts. Law is also to be found in the connections, or intra-actions, between humans and non-humans. It is worth reiterating at this point that 'law' is not a singular thing or a definable concept. It is a plurality of relations established and practised by human beings in a material world and in their relations with each other. This means that, while it is undoubtedly possible to reify law so that it is a discrete and abstract thing with (admittedly permeable and contestable) edges, this separated law is only ever an approximation of the plural normativities constructed and experienced by people. Law is also personal, written in our bodies and lived in our own distinctive way. I will explore subject-centred notions of law in Chapter 7.

Fourth, living and experiencing law necessarily occurs in material contexts, in relation to places, objects, and landscapes with their own distinctive histories and meanings. Just as law is conventionally disembodied from its human beings, so is it often dephysicalised from its places and its animate and inanimate surroundings.[56] A materialist understanding of law will endeavour to reconnect law, place, and physical things. Even without a specifically object-oriented theoretical motivation, socio-legal, legal geography, and legal anthropology scholarship of recent decades has done much to see law as produced in time, place, and in connection with physical environments. This work has provided an expansive world of ideas regarding the emergence of legal realities in particular contexts, and legal theory is starting

55 For instance, Keenan 2015 elaborates upon these networked bodily relationships in relation to the constitution of property as a socio-spatial practice.

56 See in particular Graham 2011a.

to build on this to conceptualise further the what, where, why, and how of material legalities.[57] In this context, close attention to the many forms of relationality that govern human interactions with our environmental physicality and our own (diversely constituted) corporeality is important: these relationships are broadly ecological, and can be characterised by exchange and mutual reliance, reactivity and resistance, parasitism, dominance, autopoiesis and/or mimicry.

Fifth, as I will explore in Chapter 9, iterative practices in time and space create metaphorical and literal pathways that can themselves be regarded as a form of law. Such pathways exist in urban places, and across the countryside; they may look like routes, or they may be more subtle modes of being. It is also possible to think of neural pathways, formed by repeated bodily actions, as a form of law generated by usage which makes possible and shapes virtually everything that we do as human beings. In this sense, law is embedded in our bodies, but more generally it is the effect of 'material-semiotic' practices[58] – that is, habit-forming practices of humans in the world that generate meanings and norms.

Finally, therefore, a materialist legal theory has the potential, in my view, to take the living planet and its ecological characteristics seriously. Materialism foregrounds the undivided space of natureculture in which everything subsists – as with the material–discursive distinction with which it is related, nature–culture collapses as a distinction when we see that existence is constituted by a highly mobile relationality between humans and the entire non-human world. A theoretical objective would be to find concepts of law that are part of this space rather than entirely abstract. This is not only a question of devising law or a theory of law that enshrines, for instance, an ethic of ecological care or the values of stewardship, though these strategies are important. Rather, it involves reorienting ideas about the origins of law so that law can be regarded as emerging from non-hierarchical relationships between persons and things. It is not a task that I can undertake in this book; however I will have a little to say about it in the remaining chapters.

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It follows from this and the previous chapter that there is a space for thinking of law as enmeshed with the physical world including the human bodies that are part of that world. And, not only can we imagine law running through the physical world and leaving its mark there; legal meanings also emerge from concrete human relationships as well as from the dynamics of human–world engagements. This is as true of state law as it is of general social normativity, though perhaps the causal links are less obvious for state law. Because social normativity is the material basis for state law, it is impossible to conceive of state law without this

57 Eg Philippopoulos-Mihalopoulos 2015; Grear 2015b; Barr 2016.

58 The term 'material-semiotic' has often been used by Haraway and Latour in particular and, more recently, Barad.

material support. But state law is only ever evident in its materiality – whether that is its written or spoken physicality, and/or in bodily performances. Put at its simplest, Kelsen's image of the 'natural' existence of law, the 'happening occurring at a certain time and in a certain place, perceived by our senses'[59] cannot simply be erased or removed from law. The meanings of law cannot be separated from its matter(s).

59 Kelsen 1967, 2.

5 Inner and outer space

> What term should be used to describe the division which keeps the various types of space away from each other, so that physical space, mental space and social space do not overlap? Distortion? Disjunction? Schism? Break?[1]

Introduction

As a result of the material dimensions of law discussed in the previous two chapters, it becomes pertinent to ask, as legal geographers have, does law have a place? What *kind* of thing is it? *Where* is it?[2] Is law in texts, like cases and legislation? Is it in institutions, such as courts and parliaments? Is it essentially in people's actions, or is it in our heads? Is law some kind of field or terrain, or is it 'all over'?[3] Does law even have a location – does it make sense to ask *where* law is? The very question opens up some fissures in the way law is often understood. On the one hand, as we have seen, law is often understood as abstract, conceptual, and resolutely non-spatial and non-physical – moveable from one place to the next. On the other hand, it is so often spoken about, casually or deliberately, in spatial metaphors – as having boundaries, limits, frontiers, horizons, terrains, insides, and outsides. Such metaphors are not false, or illusory: as I will discuss in more detail in Chapter 8, metaphorical associations are integral to cognition. The fact that law is so often constructed in this way – as essentially spatial and despite its unlocated conceptualisation – is instructive. It is only if we identify an actual physical thing as law – the wall that cannot be crossed, the path that shows the way – that we can sense some concrete, located, and non-metaphorical being of law and point to it – *there*, that is the law.[4] If law is inscribed in the earth, like the songlines and animal trails that I will discuss in Chapter 9, we may be able to identify its spatial co-ordinates and

1 Lefebvre 1991, 14. See generally Butler 2005, 14–16.

2 See Delaney et al 2001.

3 Sarat 1990.

4 I am reminded of Wittgenstein's thought at this point: 'A rule stands there like a sign post. – Does the sign post leave no doubt open about the way I have to go? Does it shew which direction I am to take when I have passed it; whether along the road or the footpath or cross-country?' (1958, §85).

its materiality. But law is normally understood and theorised as *non*-material, even though its abstract nature is understood in largely spatial terms. Nevertheless, it does have its own spatiality and a materiality.

This chapter explores psychospatial and geographical dynamics of law playing out on both metaphorical and physical planes of meaning. I focus in particular on the inside–outside dichotomy. Inside–outside is a very common distinction in legal discourse – it is used in relation to rules and their interpretation, jurisdictions, the entire legal domain and the concept of law, and to spaces – such as the private sphere – carved out by law. However, while I will have something to say about these constructions (and will come back to them in later chapters[5]) they are not my primary focus here. I am interested rather in the inside–outside distinction as it relates to the human self. That is, I am interested in the ways in which – in a Western world view – the law is seen to be outside the individual, and how this separation between the self and the law has been challenged by critical and socio-legal approaches to law. I aim to draw out the theoretical implications of this work for a rethought concept of law – one that acknowledges the continuities between the life experienced and constructed as 'internal' and the domain of the legal, via the medium of relationships between people, and between people and the physical world.

It is not especially unusual to speak of 'law' that can be located in the body, the neurons, the psyche, the understanding: different discourses from psychoanalysis to philosophy have commonly used such terminology. However, such 'internal' law is downplayed, or entirely ignored, in many forms of legal theory, which views 'law' as something outside the self – it is seen to reside in social space, institutional space, and geographical space, in actions, in books, in the state. Its traces and symbols are beyond the skin, part of the observable world and its cultural narratives. Interestingly, and despite the externalisation of the law as an object, even traditional legal theory often does allude to – and sometimes explicitly addresses – the fact that law is inevitably and integrally connected to each person's interior being in their relationships with others and the external world. This is illustrated, for instance, in Hart's discussion of the internal attitude to law, in Austin's idea that law requires an intelligent addressee, or in Kelsen's insistence that all norms are acts of will.[6] The realists moreover observed and promoted an idea of judicial responsiveness to social dynamics and grounded justice, thus connecting law to the interiority of particular decision makers. The theoretical implications of the self–world–law connections have been recognised and studied in critical and socio-legal theory, for instance in Ewick and Silbey's work on legal consciousness.[7] In other words, rather than see inner space as tangential to an external law, it is possible to theorise the connections between inner and outer legal space, as well as challenge this as a constitutive distinction in Western law. These internal images of law are themselves

5 I will discuss boundary images in Chapter 8.
6 Austin 1832, 4–5; Kelsen 1945; Hart 1994.
7 Ewick and Silbey 1992.

constituted first by the law we enforce on ourselves as a mélange of objective norms, beliefs, ideals, values, and so forth and second by what we imagine the external 'objective' law to be – our constructions and consciousness of it. I will come back to these subject-generated images of law in Chapter 7.

In this chapter, I focus centrally on the *existence* of the inside–outside distinction and its significance for legal theory. The distinction is, in part, a time–space distinction based on the presupposition that the temporal but self-contained individual, a thinking and changing being, moves around in and controls static external space. The externalisation of law occurs alongside its spatialisation – in the Western understanding, law is removed from unreliable subjects and their interactions and in the same moment takes on a spatial and finite form. In contrast to this view, an understanding of law that acknowledges that it is never *only* a thing but always in the process of becoming needs to question this alliance of internal–external with time–space. It also must allow law to traverse these distinctions rather than be held captive to immobile external space.[8] As I will argue, one way in which law can be understood to traverse the inside and outside of human space is by thinking of the mind as 'embodied' and 'extended'.[9] Mind is an effect of actions engaging the person with the physical world and with other people, and normativity emerges from embodied action as much as from any mental source.

In later chapters I will take up in more detail other matters concerning space and law. Chapter 6 will consider the question of scale. Chapter 8 will look at the representation/reality of space in law. In Chapter 9 I will consider the (literal and metaphorical) image of law as a path, indicating that in some senses within Western law we can see a physical track or path as a kind of law. Neither the path itself nor my subjective attitude to the path (that I believe it is correct to follow it) can be solely indicative of law. Rather, law is the repeated movement through time and space along a particular trajectory (as well as a variety of other things). 'Movement' here does not only refer to gross bodily actions, but noticeably also includes speaking, writing, and relating, and indeed all of Llewellyn's 'doings'.[10] A 'trajectory' is not only a pathway embedded in the earth or in space, but is also the multitude of tracks and circuits that make up our social-material networks. This essentially performative understanding of normativity does not displace other notions, for instance that it can take the form of a singular directive imposed by a legislature or by some other political superior. I see it as additive, and a means of accessing theoretically a variety of self–society–law–world entanglements that are both spatial and temporal.

In this chapter I begin to explore these possibly rather speculative notions, with the aim of breaking down the conventional inside–outside and law–place separations. Underpinning everything here is the non-static nature of space.[11]

8 Cf Grosz 1994; Massey 2005; Keenan 2015.

9 Varela et al 1991; Lakoff and Johnson 1999; Rowlands 2010; Malafouris 2013.

10 Llewellyn 1931.

11 Massey 2005.

The inside–outside and law–place relationships cannot be comprehended within the paradigm of a rigid and immobile space – indeed it is the fixed notion of space that has informed the separation of spaces inside and outside the self, as well as an abstract notion of law different to the place in which it is lived and expressed. Immobile space can be carved up and categorised, whereas this is more difficult if not impossible with space that is never itself, and always shifting. A dynamic and mobile understanding of space – a spatio-temporal mélange – brings into focus the exchanges and relationships that constitute and challenge the distinctions between inside and outside, and law and place. Some of these points are illustrated in Kafka's *The Trial*, and I begin my discussion with some brief comments about this book.

Headscape

> Every man has a conscience, and finds himself observed, threatened, and, in general, kept in awe (respect coupled with fear) by an internal judge; and this authority watching over the law in him is not something that he himself voluntarily makes, but something incorporated in his being. It follows him like his shadow, when he plans to escape.[12]

As I have said, law is assumed to exist in outer, reified space, the space outside the self, yet it is increasingly in post-liberal theory also rightly seen as constitutive of human relationships and subjects – our inner space. Under the influence of Foucault in particular, but also other theorists such as Althusser, legal and governance frameworks are often understood as constitutive of subjects. In one sense, outer space law structures our inner space. However, external law does not exist in and of itself, but is itself constituted and given power by the actions of agents. This dynamic is seen in the threefold law of Franz Kafka's *The Trial*. K is subject to his inner law, but also to the material law of relationships between people, and finally to a projected, inscrutable, and inaccessible (state-like) law. Law in *The Trial* is everywhere and nowhere, while one of the many enigmas of the book is that it implies without explaining these connections between inner and outer.

Kafka used the spatial imaginary of the urban gothic to describe a legal world of irrationality and existential insecurity. *The Trial* depicts law as unknowable, inaccessible, quasi-religious, and full of paradoxes. The book describes a state law that can appear to be extremely bureaucratic and inconsistent. But the book also elicits a great many other mysteries, associated with a shadowy parallel system that seems to be a psychological externalisation of the law inside our heads, as well as having a materiality of its own.

In the beginning of *The Trial*, the everyman protagonist Josef K is interrogated before breakfast one morning and ordered to face an investigation for a crime. Knowledge of the nature of the transgression as well as the nature of the law

12 Kant 1991, 233.

under which he is to be tried elude both K and the reader throughout the entire narrative. By contrast, other characters in the novel are better informed about both the crime and the law. K is constantly surprised that others seem to know about his case, while he remains in the dark. Some of these knowing others are court officials, some are informal advisers, and many appear to be complicit in K's situation, though the nature of their exact involvement is never revealed. All K knows is that he has been arrested, and is under investigation. His situation seems beyond resolution, full of impossibilities and contradictions: he is entirely defined by his engagements with the law, though it is also occasionally suggested – in one of the many contradictions of the book – that he could walk away from the law.[13]

The Trial's most famous and probably most commented upon passage is its story within, also known as 'Before the Law'. In this sub-story (or perhaps meta-story)[14] a priest – also a court official – relates a parable in order to illustrate K's 'delusion' about the law, though the exact nature of this delusion is unclear. A man from the country seeks to be admitted to the law. The doorkeeper refuses him entry at that moment, indicating however that he will possibly be admitted in the future. The man peers through the door, and is told by the doorkeeper that this is only the first door of many, that he is only the lowest of the doorkeepers, and that each becomes more powerful than the last. The man waits for many years but is never admitted to the law. He becomes childish and his vista narrows to minutiae such as the fleas on the doorkeeper's collar. His eyes dim to the point that all he can see is the radiance streaming from the law and he shrinks physically with age. Eventually, on the point of death, he asks the doorkeeper why no-one else has sought to be admitted to the law, and the doorkeeper's answer is completely inscrutable: 'this door was intended only for you. I am now going to shut it.'[15]

The man from the country appears to have complete faith in the law and, rather than learning from reiterated disappointment, continues to hope until this is all that remains. This is because, as Cixous says, 'he was in the law without knowing it' and 'of course, it was his own door, his own law'.[16] One difference between the man from the country and K is that the man from the country has gone in search of the law, whereas K has been sought by it. Both, however, desire access to law. There is a related set of characters in Dickens' *Bleak House*. Gridley, the man from Shropshire, has been destroyed by a Chancery case being visited upon him: 'he began by being

13 For instance, early in the narrative, during his visit to the court, K has the perception that recognition of the law is within his power – 'it is only a trial if I recognize it as such': Kafka 1953, 49. Later, when the priest is interpreting the parable of the law with K, he states that the man from the country is not bound to the law: 'When he sits down on the stool by the side of the door and stays there for the rest of his life, he does it of his own free will; in the story there is no mention of any compulsion' (241).

14 As Derrida points out, the story creates a *mise en abyme*, a formal doubling of the larger story inside it: Derrida 1992, 217.

15 Kafka 1953, 237.

16 Cixous 1987, 5.

a small Shropshire farmer before they made a baited bull of him'.[17] His character is a warning about Chancery, but one not heeded by Richard Carstone, who is hoping to get rich from the Chancery suit he is involved in. Whether they have chosen this illusory law or been chosen by it, makes little difference – all of these characters who become fixated by law are literally destroyed by it. In *Bleak House* they are contrasted with several characters who are also parties to various cases, but who are able to avoid an obsessive attitude to law and continue to live their lives almost as normal. Kafka intensifies relationship to the law in *The Trial* through the character of K and his case which consumes the narrative as it consumes him. We hear about many other cases but they are entirely incidental to K's seemingly inevitable trajectory.

There are many interpretations of *The Trial* and in particular many plausible views about both K's guilt and the character of the law. There are interpretations that draw out the connections between the book and the Austro-Hungarian law that Kafka was trained in.[18] There are interpretations that elicit the psychoanalytic meanings of the book, in particular emphasising Kafka's relationship with his father as the source of a sense of guilt or fear and an internalised law.[19] There are many attempts to unravel the symbolic and metaphorical meanings of the law under which K is arrested and charged as well as philosophical and scriptural-theological interpretations.[20]

I am not going to engage with the extensive literature about Kafka and *The Trial* here. I simply want to use the work to make a few observations about the spatial dimensions of law. In *The Trial* law is everywhere and nowhere – as the painter Titorelli says, there are 'Law Courts in almost every attic',[21] and yet meeting the highest judges, knowledge of the law, and even knowledge of the particular wrong, are all quite out of reach. As many have commented, the law both exists as an idea and yet does not exist. Access is not promised, only implied, but in the end the 'inside' of law appears to be an elaborate illusion. There is no inside, or at least none that we can be sure of.[22] Rather, law is to be found in the interstices of the gothic cityscape that is so intricately represented in *The Trial*: the court is hidden away in a poor and decaying neighbourhood, its offices are reached through seemingly endless corridors, doors reveal in turn everyday and absurd scenes.

The 'inside' – the mystery – of law therefore seems to be little more than a projection, a hope. Gaining access to the inside, even if it did exist, would in any case surely mean death: the closer K gets to law – that is, every time he visits the offices or courts – he is physically overwhelmed by the airless and stale atmosphere. On several occasions K comes close to fainting – it is as though upon coming into

17 Dickens 1971, 398.
18 Robinson 1982; Banakar 2010.
19 Cixous 1991; cf Deleuze and Guattari 1986; Douzinas and Geary 2005.
20 See also Benjamin 1968, 111–140; Derrida 1992; Gasché 2002.
21 Kafka 1953, 182.
22 See in particular Cixous 1991, 14–19.

contact with the law you cannot breathe. It apparently cannot sustain everyday life, though for those who are 'of' the law the fresh air outside their offices is equally intolerable.[23] One of the most evocative, and visceral, of the many similarities between Dickens' *Bleak House* and *The Trial* is the way in which each novel constructs an atmospherics of law. In *Bleak House* the fog in London is dense and 'everywhere', but it is at it thickest in Lincoln's Inn Hall where the Lord High Chancellor sits 'at the very heart of the fog'.[24]

The spaces of law in *The Trial* moreover seem to shift shape, and even bend time. The interrogation chamber, found within a building of tiny residential flats, is only a medium-sized room, yet it is filled with what appear to be a large number of people and things, including a long table, raised gallery seating, and factions of people seated in rows. Later in the story, in the lumber room of his own bank, K comes across two bank employees being subjected to corporal punishment. Re-opening the door a day later, K finds exactly the same scene, where he had previously left it.

Reza Banakar says that Kafka 'combined internal and external views of the law',[25] or perspectives generated by his own insider knowledge of the law as well as by an appreciation of its incomprehensibility and irrationality when viewed from the perspective of an outsider. This is undoubtedly the case. The story of K is the story of an outsider to the law: he is entirely ignorant of it and flounders in all of his efforts to understand what is happening to him. At the same time, the authorial voice, while somewhat detached and neutral, conveys an insider's knowledge – if not of the precise law under which K is tried, at least of the obscurities, complexities, and absurdities of law generally. These insider and outsider views roughly line up with the traditional legal philosophical view and sociological views of law: we see both an account of the nature of law (though without it being capable of reduction to a 'theory') as well as an outsider's factual engagements with law. However, rather than show any orderly system, Kafka exposes the irrational nature of law as experienced from these perspectives. The insider's view shows a contradictory and incomprehensible legal world with yet more secrets than even an insider can imagine. The outsider perspective, far from capturing the behavioural regularities of those associated with the system, reveals them to be unpredictable, though not entirely random.

In addition to the insider's and outsider's views of law, Kafka also wove into K's *singular* experience encounters with a law internal to the subject and events determined by a purely external law. The law appears to move in and out of K's psyche/subjectivity and the external world. It traverses his mind and body, but is also intrinsically of the external physical and social environment. Law really is everywhere and nowhere – in *all* of the attics, whether they are symbolic, bodily, or in real houses. *The Trial* is striking for this sense of continuity as well as rupture

23 Kafka 1953, 84.
24 Dickens 1971, 50.
25 Banakar 2010, 482.

between the legal process inside K's head – his 'internal court'[26] – and the outside law, whether it is natural law, religious law, or some other mysterious system operating alongside the 'ordinary' state law. We see a law that transgresses bodily and psychological boundaries – the law is inside us, shaping us, constructing us, and also shaped and constructed by us in our personal and social identities – and also beyond us, as the medium of the social world, in this case a dystopian world that is also entirely ordinary. This is not to say that K's law is purely imagined – but it is a projection from inside to out and vice versa.

Thus, although it is true to say of *The Trial* and 'Before the Law' that 'the law is not just unknown, it is absent' and 'the law remains temporally and spatially deferred',[27] Kafka's law is also in the here and now. It slips away but is nonetheless right in front of you and is part of your existence.

In this way, the psychological, corporeal, material, social, and mystical elements of law are all knotted together in *The Trial*. Law is the kind of conceptual tangle that can be unravelled only by pulling tentatively at a single strand, a process that nonetheless tightens the remaining threads. There is great stability in such a mass, but little possibility of total comprehension. Trying to reduce this legal knottiness to a stable set of parameters let alone a system becomes impossible when we perceive that law is both an external object and also, most intimately, psychologically and relationally enacted. To find the law, we need to know ourselves from moment to moment but, in order to do that, we need also to understand and represent the law. It slips away but is right here. We are living it, being it, breathing it.

Western legal theory has tried to stabilise such unsettling dynamics through the externalisation, dephysicalisation, and spatialisation of concepts. In order to be represented and made graspable, concepts are removed from the self and subjective experience and made into objects. They are abstracted from physical locations and from their material media (including the human body). And they are imagined through the metaphors of space, a rendering that, as Doreen Massey argues, is designed to immobilise concepts so they can be grasped but that in the process misrepresents space as static.[28]

Thus although law is lived *in* physical space and bodily performances, it is often understood theoretically as an object in spatial terms. It is displaced from the self and all of our relationships, and objectified, allowing it to be rendered in essentially static terms – holding still any troubling psychic topography. This does not mean that law is ever really understood as existing *in* the physical world; rather, it is removed from the self and objectified as an abstraction, and in the process it is loaded up with spatial imagery which solidifies its externality. Rendering concepts as consisting of boundaries, limits, fields, domains, and territories is not so much

26 Kant 1991, 235.
27 Douzinas and Geary 2005, 357.
28 Massey 2005.

an internalisation of spatial categories (though it might be that), but rather an externalisation of concepts.

These three dimensions of an abstract concept of law – that it is imagined through spatial images, that it is essentially immaterial, and that it is external to the self – are themselves difficult to disentangle. As I have already considered the issue of materiality and immateriality in Chapters 3 and 4 (and will return to issues of location, place, and performance in later chapters), in what follows I look briefly at spatial imagery and the locations of law inside, outside, and between its human subjects.

Lawspace

As Delaney comments, 'liberal legal discourse is an embarrassingly rich source of spatial tropes and metaphors. And these, it can be argued, are not incidental to how law is presented and perceived but are foundationally constitutive of liberal legality as such.'[29] Some of the spatial images of law are extremely well known. They include a multitude of boundary metaphors delimiting law, norms, areas of law, jurisdictions, the constitution, and the self as well as representations of global or national law through maps and via the concept of scale.[30]

In its representation through spatial imagery, law is no different from many other concepts, such as 'society',[31] the emotions, and even time.[32] In general, and as is well known, concepts, representation, knowledge, and entire disciplines are also frequently removed from any subjective identification and represented through spatial metaphors. Foucault, for instance, commented upon the complicity of geographical and legal metaphors in constructing knowledge as political, noting that to speak of knowledge in terms of 'region, domain, implantation, displacement, [and] transposition' opens up an analysis of knowledge as power, since there is 'an administration of knowledge, a politics of knowledge, relations of power which pass via knowledge'.[33] The division of knowledge into fields and terrains is political – it allows (and is done for the purposes of) administration and governance – for instance to ensure that it takes a particular form, is under specialised control, and contains conduits and pathways for dissemination of itself and for transmission of approved messages.

Thomas Gieryn illustrates the active construction of spatialised knowledge in a quite practical domain, describing the 'boundary work' of scientists: this consists of efforts on multiple fronts to maintain the credibility of science by ensuring that non-scientific work, such as astrology and alchemy, remains outside the domain of

29 Delaney 2003, 69.

30 On boundaries and law generally, see Holder and Harrison 2003, 6–9; for a discussion of the boundary metaphor as it pertains to the concept of the self, see Nedelsky 1990; Naffine 1998; for a selection of work on jurisdiction see McVeigh 2007; and for cartographic and scalar representations of law see Santos 1987; Goldstein 2003; Valverde 2009.

31 Bourdieu 1985; Silber 1995.

32 Boroditsky 2000.

33 Foucault 1980, 69.

science. He describes the utility of spatial metaphors, and mapping in particular, in terms of understanding the multiple relationships between elements of knowledge:

> Maps do to nongeographical referents what they do to the earth. Boundaries differentiate this thing from that; borders create spaces with occupants homogeneous and generalized in some respect . . . Arrangements of spaces define logical relations among sets of things: nested, overlapping, adjacent, separated. Coordinates place things in multidimensional space, making it possible to know the direction and distance between things.[34]

Understanding knowledge cartographically is helpful because of the symbolic power of maps. Their visual referents are easily seen and translatable into schemas and taxonomies. Nonetheless, it is important not to forget that the borders and domains are actively produced, and that they are the channels and determinants for expressions of power.[35] Scientific credibility, as Gieryn illustrates in depth, is produced by active and repeated interventions into this process of border maintenance.

It is hardly a surprise that the constitution of the political field is similarly structured by various delineations and terrain-marking exercises. Liberal thinkers, as Michael Walzer famously said, 'preached and practiced an art of separation. They drew lines, marked off different realms, and created the socio-political map with which we are still familiar.'[36] These lines included those between religion and the state, the political sphere and civil society, and the public and the private realms. The resulting cartography of liberal political society has proved highly resilient, shaping not only normative ideals (politics should be free from religious influence, the state should keep out of the private domain) but also often misguided socio-political perceptions (politics is free from religion, private violence is not criminal).

In *For Space*, Doreen Massey argues that the spatial representations of philosophy often reduce space to a static category. 'Through many twentieth-century debates in philosophy and social theory runs the idea that spatial framing is a way of containing the temporal. For a moment, you hold the world still. And in this moment you can analyse its structure.'[37] The problematic issue identified by Massey is not that representation is spatialised but rather that space is then understood as fixed and static, rather than dynamic. One very explicit instance of such thinking is to be found in structuralism, which is based on the idea that things can be understood in their relationship to each other in the absence of time. The synchronic in structuralism is framed as spatial (largely because it holds the system still), while the diachronic element crosses time.[38] As Massey argues, space in structuralism is

34 Gieryn 1999, 7.
35 Pinder 1996.
36 Walzer 1984, 315.
37 Massey 2005, 36.
38 See eg Saussure 1966.

conceived essentially as the negation of time, meaning that 'such structures rob the objects to which they refer of their inherent dynamism'.[39] They close space rather than leave it open and in process.

One key contribution of post-structuralism and in particular deconstruction is, as Massey says, the 'dynamisation and dislocation of structuralism's structures'.[40] This is especially evident in the work of Derrida, who insisted that the spatialised elements in a structure had to be understood as *produced*, as actively held apart, and as reliant on iterability – that is, the *possibility* of being repeated at some future time, a repeating which might purport to be of the same thing, but that would nonetheless be different – at least in time and in its particularity.[41] Structures – and the spatial imaginary informing them – could never be understood as static. The *différance* that makes language possible contains both differing (a dynamic space) and deferring (a spatialised time) or, as Derrida put it, 'a becoming-time of space and the becoming-space of time'.[42] Saussure's mutton is different from his lamb, not just because one is here and the other is over there, but because the terms are produced and practised as different, their difference is actively maintained, and because this act of maintenance presupposes a future iteration of the difference (which may or may not occur, but which will never be entirely identical). An *appearance* of stasis may be created by this productive effort, this holding apart and practice of difference, but any appearance of stability glosses over the differing and deferring of meaning that is always intrinsic to the system. It is important to emphasise that this production or performance *involves physical action by persons* – discursive reiteration for instance, or some tangible corporeal act.

Abstract concepts – including the concept of law – are, then, often comprehended as external to the self through spatial metaphors while space in turn is often seen as immobile. The consequence is that spatialised concepts and representations are themselves seen as solid, limited, and fixed. Theory disrupts this fixity in a number of ways, in particular by emphasising that the stability of any space-structure is produced and reliant on ongoing maintenance and constituted exclusions, and that there is always a dynamic reference forwards and back in time, and an indeterminacy between inside and out, which is part of any act of differentiation. But it is also possible to go further and question the boundary between the interior experience of selves and the spaces in which they exist.

Beyond inside and out

As indicated earlier in this chapter, spatialisation of concepts is also often accompanied by an insistence on their exteriority and (hence) objectivity – removing the concept from the lived experiences of the self. As Grosz explains by reference to

39 Massey 2005, 38.
40 Ibid, 42.
41 Derrida 1982; Davies 1996, 111; Massey 2005, 49–54.
42 Derrida 1982, 8.

Irigaray and Kant, the space–time dualism is aligned with exterior and interior, and body and mind: space is often understood as exterior to the self, while time is seen as interior to subjectivity.[43] Not coincidentally, they are gendered – time aligning with the masculine knowing subject who is part of culture, and space aligning with the female object of knowledge who is part of nature.[44] As many feminists have argued, this knowledge matrix dictates that only the subject can possibly know anything, and what *he* knows are objects (including women and other non-subjects).[45] At the same time, embodied subjectivity and any self-reflection this might encourage is erased, meaning that knowledge is figured as a disembodied, floating object without any explicit connection to selves. Bringing knowledge (and law) back to the self – re-embodying it – has long been a key task for feminists and others excluded from paradigms of knowledge construction.[46]

As illustrated in *The Trial*, the experience and being of law is both internal and external to the self, as well as both behavioural/material and abstract. Law traverses internal and external space. It crosses the abstract and material elements of being, the particular and the general. Although 'the law' as a positive social construction is framed and understood as external to the self, yet at the same time as an abstract construct, it is equally to be found in the relationships between people, the attitudes and intentions we have towards ourselves, the social narratives we construct, our fictive projections, and our physical environments. Such law arises from various forms of custom or usage, from socio-cultural messages and mythologies, and from political authorities. For some people, it is connected to their understanding of religion or an interpretation of 'nature' or morality. For individualised Westerners, law may not exactly be 'who we are'[47] (as if we knew) but it is nonetheless lived and experienced. This living of course is not necessarily straightforward – there is no unity or concurrence of inside and out. Rather – as for Joseph K – experiences of law are often complicated and antagonistic.[48]

43 Grosz 1995; see also Massey 2005, 57.

44 'If Irigaray is correct in her genealogy of space-time in ancient theology and mythology, space is conceived as a mode (indeed God's mode) of exteriority, and time as the mode of interiority. In Kant's conception too . . . space is the mode of apprehension of exterior objects, and time a mode of apprehension of the subject's own interior. This may explain why Irigaray claims that in the West time is conceived as masculine (proper to a subject, a being with an interior) and space is associated with femininity (femininity being a form of externality to men). Woman is/provides space for man, but occupies none of her own.' Grosz 1995, 98–99. See also Lefebvre, who speaks of a 'schism' between mental space, social space, and physical space. He attributes this in part to philosophical notions such as Descartes' *res extensa* – external and absolute physical matter. See Lefebvre 1991, 14.

45 MacKinnon 1987, 55.

46 See eg Grbich 1992.

47 'The law is who we are, we are also the law': Watson 1997, 39; cf Graham 2008.

48 Henri Lefebvre says of 'archaic societies' that 'they obey social norms without knowing it – that is to say without recognizing those norms as such. Rather, they live them spatially: they are not ignorant of them, they do not misapprehend them, but they experience them immediately': 1991, 230. I am not entirely sure what he means by 'archaic societies' here (though it appears to refer to the local scale), but I would argue that the same point can in fact be made of modern societies – there is

There are several aspects of this entanglement of the 'interiority' of the human subject and external manifestations of law. By extracting the law–subject interface from various types of theory, we can perceive some of the sources for a multifaceted account of the continuities and discontinuities between the person's subjective experience/being and the external realm of material legal relationships. At the modernist end of legal theory, some positivists have emphasised the role of willing individuals in the process of law creation, system recognition, and norm interpretation. However, critical and socio-legal theories provide many more methods for analysing this interface, and illustrate the mutuality and interdependence of embodied selves and normative environments. A focus on embodied subjectivity, narrative and discourse, intentional or networked agential interventions, consciousness, or performance can be deployed in the search for an understanding of subject–law dynamics, both for expert knowers of state law and for non-expert plural knowers of multi-modal normativity. Chapter 7 will return to the many ways in which state and non-state law can be said to be imagined, lived, and constituted by subjects and agents – through narrative, habits, relations, performances, mythologies, and so forth. In the remainder of this chapter, I want to look at perhaps a more problematic challenge for legal theory coming from philosophical approaches that contest the edges of the body and the internal–external distinction by extending the mind into the physical world, or by insisting that mind and knowledge are co-emergent.

As we have seen, and as many others have noted, the strong hold that Cartesian dualism has on our understanding of the world means that Western theory and philosophy has a tendency to oscillate between emphasising matter and emphasising the mind and its ideas. It is difficult to find a way beyond Cartesianism, such is its reach in forming a world view. Broadly (and simplistically) speaking there are a number of alternatives to the ontological view that mind and matter are separate substances. These are nihilism (nothing exists); monism (only one form of substance exists); and pluralism (many types of substances exist). Within monism, several types are possible. The first is monistic materialism, where everything is composed of matter.[49] The second is a monistic idealism, where everything is essentially mental.[50] And the third is a monism that refuses to differentiate between mind

much law that we live and experience without necessarily understanding that it is law or needing to pay attention to that fact.

49 Mary Midgley says that this version of materialism is a rejection of mind: Midgley 2014. It is important to distinguish what is sometimes referred to as 'materialism' (or 'physicalism') in the analytical philosophy tradition, which reduces mental objects to matter, from the materialism of Marx and continental philosophy.

50 Elizabeth Grosz says: 'To reduce either the mind to the body or the body to the mind is to leave their interaction unexplained, explained away, impossible. Reductionism denies any interaction between mind and body, for it focuses on the actions of either one of the binary terms at the expense of the other.' Grosz 1994, 7.

and matter, and that attempts to describe a world in which matter and meaning are part of the same plane of existence.[51]

These ontological positions can be combined with various epistemological positions (there can or cannot be certain knowledge; anti-foundational foundationalism; relativism; and so forth). As I have indicated in earlier chapters,[52] I prefer not to be drawn into any absolute distinction between ontology and epistemology, though I may use it by way of fiction from time to time. This is because being and knowing are inextricably linked and, because the result of this linking (things that matter) are located, emergent, and temporal, they are necessarily plural. Moreover, there are arguably many more modalities at stake than being and knowing (doing, having, playing, performing, and presumably many others beyond the constraints of the English language) and it is difficult to see why theory needs to be so limited. Nonetheless, it has to be conceded that the mind–body distinction and its consequences for what we think we know are discursively and politically extremely powerful. It is therefore important to consider theory that deploys the distinction in an effort to overcome it.

The philosophy of Spinoza is perhaps the best known of the non-dualistic and anti-Cartesian approaches to mind–body – Spinoza's thought has been influential for philosophers wishing to find a way past the dualisms that have not only been so problematic in theory, but have also led to a limited and 'unbalanced' approach to philosophy.[53] Although Spinoza's belief in an infinite substance, entirely identified with God-Nature, may seem unpalatable to the twenty-first-century atheist consciousness, as well as sounding suspiciously medieval, it contains a useful core sensibility about the indivisibility of things. Rather than reduce mind to matter or vice versa, Spinoza saw them as derivatives of a monistic substance: it is not that mind and matter do not exist, nor that one is reducible to the other. They are the same thing and indivisible, but 'modes' or 'modifications' of substance.[54]

Twentieth- and twenty-first-century thinkers have not felt it necessary to place God behind or within the material world and our cognitive understanding of it, though this does not necessarily mean that the matter–meaning relationship is any less mysterious. New ways of understanding the mind–body and matter–meaning relationships have emerged in recent decades, which are based on an appreciation of the co-emergence of cognition and physical experience. Mind cannot exist but for engagement in spatial, temporal, and material contexts. This is not to say that mind is reducible to such contexts, rather that there is a mutual reliance or co-dependence between mind and body, mind and matter, in human existence. Theory of the extended mind, and more recently material engagement theory,

51 See discussion of Spinoza, below.

52 Karen Barad's notion of onto-epistemology is, as I have already explained, significant here: Barad 2007.

53 See comments by Gatens 2009, 1–2, on the 'unbalanced, and partial' nature of the philosophical tradition. On Spinoza, see the essays collected in Gatens 2009 as well as Deleuze and Guattari 1994; Grosz 1994, 10–13; Colebrook 2000.

54 Grosz 1994, 10; Spinoza 1996.

places the 'mind' in the extended (or spatial–physical) world.[55] Such theory represents a non-Cartesian view of mind–body because, instead of distinguishing between these as different substances, they are rather seen as co-existent. The mind is, as Rowlands explains, '(1) embodied, (2) embedded, (3) enacted, and (4) extended'.[56] This means that mind emerges in material contexts or, as Lambros Malafouris says, 'mind and things are co-constituted in situated action'.[57] And '[t]hinking is not something that happens "inside" brains, bodies, or things: rather, it emerges from contextualised processes that take place "between" brains, bodies, and things'.[58] Thus, ideas about the extended, embodied, and engaged mind essentially externalise it or place it in continuity with the physical world. This is not to say that it does not exist, rather that it exists in relation with physical things and is not simply internal.

By taking the concepts of mind and self out of the individualised body and placing them in a material setting, it is possible to begin to perceive how normativity – social and legal – arises through relationships that are ecological, discursive, and irreducibly plural. Rather than thinking of norms as essentially mental or intentional constructs, we might see them as products of engaged actions – whether this is (for instance) the repeated actions that become usages and customs, intentional agreements, or more subtle iterations in language and cultural mythologies.

Being-in not being-and

Western thinking exteriorises law as a concept and, in the same moment, spatialises it. Many concepts, including the large categories of disciplinary knowledge and representation itself, are also spatialised and – because space is regarded as static – turned into immobile abstractions. Understanding that space is dynamic, it is constituted and plastic, assists us in mobilising concepts and seeing them as responsive and dynamic rather than comprising solid boundaries and fields.

In addition to being somewhat static, the fundamental spatial construction of law is that it is other to and different from the self. The person is bound by law, guided by law, and our identities and relationships are formally defined by law. The law exists in outer, reified space, outside the self. The liberal *person* on the other hand is traditionally seen to be pre-social and pre-legal, free except for the necessary imperatives of law. Even where – after the critique of the subject – the self is understood to be relational, constituted in social settings, gendered, raced, and emergent from a dynamic interaction with the social and material environment, 'law' tends to remain stubbornly outside the constitution of the self.

However, as I have suggested, a *general and unlimited* legal theory, like *The Trial*, cannot be constrained by this idea of the outward realm where the subject is

55 Varela et al 1991; Lakoff and Johnson 1999; Rowlands 2010; Malafouris 2013.
56 Rowlands 2010, 3.
57 Malafouris 2013, 77.
58 Ibid, 77–78.

simply a human citizen, actor, agent subsisting in relation to some external system of norms. A general legal theory can also consider the dynamics of subject–law and object–law, normativity in inner and outer space, and the constructed law that appears to circulate in social environments. It can appreciate the co-emergence of mind and matter and the contingencies involved in maintaining as given the limits of the human body.

The discussion above suggests just a few of the many ways in which the internal–external or subjective–objective distinction can be mobilised and disrupted in legal theory. Even in what is often referred to as the 'mainstream' legal theoretical tradition, the subjective attitude has often appeared as a significant precondition for the existence of law.[59] Law does not exist in and of itself, like a rock. (Which is not to say that it is not physical, as I argued in Chapter 4.) In mainstream legal theory an attitude to law is intuited and universalised by the theorist, rather than based on any understanding of human embodiment, differential experience, and the effects of social power. Feminist and socio-legal theory helps to correct this error by placing experience, relationality, and consciousness at the basis of law's being and our knowledge of it. There are many other instances where critical and socio-legal theory has illustrated the entanglement of subjects who know, experience, and enact law, with the relational networks that consolidate these enactments into the objectifiable things that we call social norms or laws. I will come back to them in Chapter 7, with a greater emphasis on the performing and narrating subject (rather than her internal life).

The 'forgotten path' described by Irigaray between inside and outside, subject and object, can in this way be deliberately and openly trodden in our understanding of law.[60] This is not only the path from inside Plato's cave of subjective partial representations to the outside world of true knowledge; it equally goes the other way – in fact it is a constant traversal in and out, so much so that the once clear delineations of our subjectivity and the external world begin to recede.

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How do we understand law theoretically then? As a provisional statement, I would say that law is discursive, performed, assumed, located, relational, and material. It is emergent in social space – through performances, intra-actions, and material relations, and also through the imaginings, narratives, and self-constructions that inform and are informed by these things. Law is inside and outside the self, material and immaterial, immanent to mind and body, and in natureculture. It is intrinsically plural – differentiated by different knowledges, subjectivities, locations, performances. It is also solid and fluid – predictable, merely probable, but also contestable and transient.

59 For further discussion of this point, see Chapter 7.

60 Irigaray 1985, 246.

6 Scales of law

> *[N]omos* is a matter of the fundamental process of apportioning space that is essential to every historical epoch – a matter of the structure-determining convergence of order and orientation in the cohabitation of peoples on this now scientifically surveyed planet. . . . Every new age and every new epoch in the coexistence of peoples, empires, and countries, of rulers and power formations of every sort, is founded on new spatial divisions, new enclosures, new spatial orders of the earth.[1]

Introduction

In previous chapters I have tried to expand radically the potential reach of legal theory. My aim has been to give a sense of the unlimited nature of law and the multifaceted ways it can be known and brought into being in its plural and material contexts. Important themes here have been the emergent nature of law, its materiality, and the inseparability of questions about law from questions about human subjectivity and identity. My aim in each of the remaining chapters is to narrow the discussion to a particular frame of reference. Each chapter considers a specific entry point into legal theory and, although these are all loosely connected, I do not attempt to draw a unified theory of law – it is more of a composite image where only a few of the possible elements have yet been considered.

I start in this chapter by looking at some of the ways in which formal and informal law can be differently delimited in a geographical sense, using the frequently discussed concept of scale. My purposes are relatively simple, primarily to highlight the dynamism of scale and its consequent role in generating legal complexity, legal plurality, and the multiple axes of subjectification to law. Thinking about scale offers insight into the movement of law between sub-national to transnational and international spaces, and underlines the need for an expansive and mobile view of what law is, or might be. At the same time, it is necessary to keep a firm view of the fact that the onto-epistemological constitution of law occurs in subjective engagements *with* law as well as in the reflective and objectifying stance resulting in a mapped system. Thus, Chapter 7 returns to the question of subjects creating law

1 Schmitt 2003, 78–79.

in various modalities. Chapter 8 considers metaphor as an aspect of the relationship between language and materiality in understanding law. Chapter 9 narrows this further by considering the pathway as a metaphorical and material instantiation of law.

Satellite and street views

When you walk out of your door in the morning or, even before that, when you get out of bed, your experience of the world is that it is flat. You know better of course. You know that it is spherical, or roughly so. But most of the actions performed by most people on an everyday basis are premised on the experience and perception of flatness. This experience of flatness is an effect of physical size. Compared to a real-life human being, the earth in its actual size is immense, and it is only when some form of scaling-down is applied and our size relative to the earth is increased – for instance, by space travel, by mapping, or by means of the conceptual measurements of science – that it is possible to understand the sphericity of the earth. A change of scale makes the object of perception larger or smaller, for instance by changing the physical or conceptual distance between the thing and the person who perceives it. Often, this is done via some visual representation, for instance in the form of a map or a globe. But the application of distance can take many forms. Intercontinental travel for instance joins spatial with temporal distance – a long-distance navigator experiences and takes account of the sphericity of the earth by virtue of the lapsing of hours, days, or weeks (depending on mode of transport) and thousands of kilometres. In more immediate contexts, curvature, rather than sphericity, is experienced by the disappearance of large objects over the horizon – again as a result of a spatio-temporal distance being established between the perceiver and the object. I remember that a building was there but now, having travelled some ten kilometres down the road, it is gone. Ten minutes ago I could see the sun, but now it has set.

Application of scale is also often a change of perspective.[2] A change of scale can mean that some objects become visible and others invisible – we may be able to see either the whole forest or the twig attached to a specific tree, but not both at once. A change of scale may also result in a change of observational position. Both points can be illustrated by reference to the satellite images, maps, and street views available on Google Earth and Google Maps. When you locate a place on Google Earth, you can find a satellite image that you are looking at from above, which you can zoom in or out of to see the place at different scales. Zooming is also possible in Google Maps which, however, replicates conventional mapping practice and excludes the visual reality of buildings, trees, and parks. Simple zooming does not mean a change of perspective, simply a change of granularity, bringing some features into view and others out of it. On the other hand, you can also switch to a 'street view' that places you *in* the street, giving you a more experiential feel of

2 Santos 1987; Darian-Smith 1998, 115.

the location.[3] Zooming the map or satellite image changes the scale, while street view changes both the scale and the observational position – from a bird's-eye view (or, by extension, the god's eye view) to something more horizontal and relational. This is similar to the difference in phenomenology between looking at something as an objectified thing different to, distant from, and external to the self or, on the other hand, as part of the world experienced by the self. Of course, using Google Earth or Google Maps, in neither situation are you really *there*, but the street view mimics the subjective feel of being on the ground, so to speak.[4]

Similarly, when you walk down the street, in front of you is an experience of (relative) flatness, but when the scale is changed and you become distanced from the 'real' and immediately present earth, you perceive it as spherical or curved. In the first instance, you are a participant and experience the earth directly, but in the second instance, you are an observer whose perception is mediated by distance, representation, or memory. Which perception is the more 'true'? The experiential one in front of you, or the representational or remembered one? The near one, or the far one? The present one or the mediated one? In one view of the world, we cannot trust what is before us because appearances deceive.[5] Indeed our 'knowledge' that the earth is in fact spherical seems to confirm that this is so: knowledge has often been assumed to be better when it is more objective, when there is space between the knowing subject and the object, or when it is abstract or capable of abstraction.[6]

The presumption that distance produces better knowledge has been thoroughly challenged by critical theories and, in the case of maps, by critical cartography.[7] Representations – including those implicated in a choice of scales or of mapping practices – always select and exclude, while often masking or naturalising the choices involved. Heidegger explains the modern representational world as one where the represented object is produced in the same moment that the (post-Cartesian) representing subject comes into being.[8] The world as object, something representable and able to be dominated, including its map-making imaginary,[9] comes into being with the subject who stands in front of the 'world' as an individual entity. (The 'world' is everything that exists, physical, historical, social.[10]) As Barbara Bolt explains, for Heidegger, 'representation, or representationalism,

3 See Valverde 2015, 59–60, discussing de Certeau 1984.

4 As will become obvious, zooming is only a partial explanation for scale – it suggests that scale is essentially about framing and size but in fact it is equally about relations between elements that might not translate between scales.

5 Plato's allegory of the cave concerns the illusory nature of mere appearances, while in his *Meditations* Descartes elevated doubt about appearances into philosophical method: Plato 1955, 316–325; Descartes 2008.

6 Massey 2005, 107.

7 See eg de Certeau 1984; Pinder 1996.

8 Heidegger 1977.

9 Dorsett 2007, 142–143.

10 Ibid, 129.

is a relationship where, whatever *is*, is figured as an object for man-as-subject'.[11] Rather than being *in* the world, the representing subject stands in front of it, to comprehend it as 'world picture'. Heidegger compares this modern subjectivism–objectivism matrix to the medieval age, where beings were ranked in creation, and also to the Greek condition where the human being remained open and exposed, apprehending rather than representing those things that appear or reveal themselves.

Feminist and critical theory has attempted to put the human being back into the world, by valuing standpoint, highlighting context (culture, language, social normativity), and insisting on the active mutuality of subject and object in knowledge construction. Challenging the subject–object distance – putting the subject into the world as a dynamic part of it (object as well as subject) – has consequences for knowledge, as feminists and many other theorists have shown. My interest in this chapter is to consider the modalities of experiencing and representing law when we pay attention to these matters – that representations are chosen, that scales are diverse, and that there are pluralities of situations and perspective that may animate alternative experiences of law.

Having said all of that, it is still broadly true to say that practitioners, scholars, and the general public associate 'law' with the scale and the territory of the nation-state and the perspective of judges and other expert interpreters who are obligated to come to a view of what the law 'is', regardless of particular circumstances.[12] Legal theory – the part of legal scholarship aiming to understand the nature of law in theoretical terms – still often mobilises one particular scale of law (the state) and one particular perspective (the legal expert or official) as central to an understanding of law. Seeing alternatives through the lens of multiple, and contingent, sliding, and in the end dynamic, scales and observational positions can assist in developing richer and more diverse approaches to legal theory. As I have emphasised already, this is not to discredit the limited view of law – it remains a working understanding that is its own self-fulfilling constructed truth.

The geographical notion of scale

The concept of scale is a regularly used analytical tool of both human and biophysical geography. Scale typically refers to a hierarchy of levels of analysis, ranging from that of the individual body to that of the entire planet.[13] In cartographic terms a 'large-scale' map represents a small space, while a 'small-scale' map represents a large space. This is because the 'scale' refers to the ratio of representation, often expressed as a fraction, where the smaller the quotient, the larger the space

11 Bolt 2004, 13.

12 Even if the actual methodology of many judges is that of ex post facto rationalisation rather than inductively determining the law then applying it deductively to the case, we still expect the fiction of objectively existing law to be sustained discursively – that is, the fiction that the law 'is' a particular way.

13 Brenner 2001, 597.

represented. Thinking about scale is important in a legal context because of the dominance of the state as definitive of law. In this instance a choice of scale has all but obliterated alternative constructions of law.

Scale primarily determines the space under consideration. For instance, analysis can take place at the level of the local neighbourhood, the city, the nation, cross-national blocs, or the globe.[14] In human geography scales are generally regarded as normatively constructed spaces and representational, rather than physical or absolute.[15] The representational nature of scale is sometimes characterised as indicating its 'epistemological' rather than 'ontological' nature.[16] In other words, the scale at which analysis occurs is not a quality of the things-in-themselves or of the natural environment, and it is not objective. It is rather the product of representational choices underpinned by social and legal norms, values, practices, and ideas. In a political and legal sense, for instance, the 'nation' is the product of a legal, political, economic, and social delineation of geographical space; sub-national categories such as the city may not be as strictly defined as legal entities, but are nonetheless the product of intersecting normative and imaginary characteristics. Nations and cities do not exist in nature, their limits and relations are not objective, and as concepts they are generalisable only to a certain degree. Having said that, it would perhaps be more accurate to adopt Karen Barad's term – 'onto-epistemological'[17] – to understand scale. Scale is not a thing in itself, and nor is it just a question of representation or epistemological construction. Rather, scales are brought into being by connections between persons and locations, and necessarily include constitutive, normative, and symbolic elements as well as 'real' emergent relationships.

A simplistic view of scale might see it as a series of spaces in which the smaller spaces are successively embedded within the larger – the often-mentioned metaphor of Russian dolls is one that seems to capture well a vision of a neat hierarchy of enclosed spaces.[18] However, this simple, though perhaps pedagogically useful, presentation of scale is somewhat misleading.[19] Brenner puts it like this:

> Processes of scalar structuration do not produce a single nested scalar hierarchy, an absolute pyramid of neatly interlocking scales, but are better understood as a mosaic of unevenly superimposed and densely interlayered scalar geometries.[20]

14 All of these phenomena also have a different size. Howitt and others have categorised scale into size, level, and relation. I do not deal specifically with size because it is analytically less useful than level and relation. See generally Howitt 1998; Sayre and di Vittorio 2009, 19.

15 Marston 2000; Manson 2008.

16 Cox 1997; Jones 1998; Manson 2008.

17 Barad 2007.

18 Howitt 1993, 36; Howitt 1998, 52; Herod and Wright 2002, 6–7.

19 Mahon 2006.

20 Brenner 2001, 606.

There are a number of reasons why scale cannot be regarded as fixed neatly in this way. First, scales are the product of normative environments and analytical choices rather than predetermined or objective, meaning that they are intrinsically dynamic rather than static. The basic reason for making this claim about scale is that it is also true of space, the underlying component of scale.[21] Space is not just a geometrical area with absolute physical properties that can be objectively described, but rather the product of interacting physical, mental, and social processes.[22] Space is dynamic, as the examples I opened this chapter with illustrate.[23] Any deployment of scale necessarily draws upon this underlying matrix of space construction and its social character in particular means that it may also be motivated by deliberate political choices, as I will explain further below.

The dynamism of spatial categories is perhaps more evident in human geographical deployments of space and scale than in the legal context, where the solidity of state law gives an impression of relative fixity – we have a comparatively static legal notion of 'nation' because it is an entity with a defined international status and internally it is structured by some critical instrument like a constitution (or by critical events in legal and political history). Even so, it is clear that the *state* law upon which much legal theory rests is also the end-point of a number of representational choices. Over time and comparatively across the world, even legal concepts of nation, state, municipality, family, and so forth, vary considerably. With the development of the European Union, European nations are not what they were 50 years ago, and are situated very differently from nations that are not positioned so definitively within a supranational entity. The addition of a scale 'above' the nation changes the nation itself legally and symbolically.[24] Through history, and outside the state, different possibilities have existed for representing and theorising law, but these have been marginalised in normalised theory that takes the state as the core case of 'law'.

A second and equally important argument against the 'nested' view is that scales overlap and interweave – they have a temporal dimension, and are never cleanly delineated. When set in the context of human geography, the diversity of scalar categories multiplies many times.[25] Combined with the plasticity of scale, this lack of fit between the different levels and types of scale means that there is often no way of translating information cleanly from one scale to another, or that it is even possible: 'many important components which characterise relations at one scale simply do not exist at another scale'.[26] Put simply, a particular space or scale is the effect of a variety of types of relations and cannot be pinned down to a mere physical area or clearly limited terrain. To speak of the 'nesting' of one scale within another would in this context clearly misrepresent the complexity of scale.

21 Lefebvre 1991.
22 Ibid, 11.
23 See generally Massey 2005.
24 Darian-Smith 1995.
25 Howitt 1993, 36; Brenner 2001.
26 Howitt 1993, 11.

Howitt has developed a useful analogy with musical scales to emphasise the fact that geographical scales of analysis are essentially relational and temporal. He points out that a particular note – for instance the one that Western musicians call C – can be positioned within a variety of musical scales. Within Western music, it appears in the C major scale, the A minor scale, the G major scale and so forth.[27] It can also appear in non-Western musical scales. The one note has a different relation to each scale. Middle C always has the same basic physical properties in that it always has the same frequency[28] but its position in the scale, its context, and therefore its musical function and meaning (taking that term broadly) can change radically. The musical scale is also not synchronous because the notes have to be played in a specific order and not all at once – its temporality is predetermined and intrinsic. Similarly, a topic that is being studied by a geographer – in Howitt's case aluminium production – can be examined at different scales. A phenomenon within that study, such as the Comalco mine in Weipa, Cape York Peninsula, Australia, means different things in different scales of analysis. Or, to take a legal example, a measure that is regarded as necessary within one level – for instance to protect national interests such as an industry or border integrity – might at another level be regarded as something else entirely – a breach of free trade rules or of the demands of international refugee law. The human being is also inscribed with different legal meanings at different scales of law – sometimes a citizen and subject with legal personality, sometimes a bearer of human rights, sometimes a combatant or non-combatant in an armed conflict, sometimes an asylum seeker, a shareholder, a consumer, a tenant, an owner, an Indigenous person, and so forth. Who a human being 'is' in a legal sense and whether s/he is even visible in a legal sense depends on the overlapping scales and contexts within which the physical person is defined and situated.[29]

At the same time, it is important to remember that embodied human beings necessarily engage with what is around them. We engage horizontally with law,[30] and only experience a 'street view'. Regardless of how scales are constructed and represented in law or otherwise, there always remains a human existential experience – the things and people around us that we connect with. The human being may be defined by and may engage at various structural levels or representational scales, but our own experience is necessarily extremely local and physical. Human

27 Howitt 1998, 55.

28 The statement needs qualification, actually, as Howitt recognises: 1998, fn 4. The pitch of specific notes has changed considerably throughout history and in different places. Concert pitch was not firmly established until the twentieth century: prior to this, the frequency of notes was variable. And of course, the transposing instruments use a different notation to refer to particular frequencies. None of this affects the validity of Howitt's central point, of course, though it does perhaps underline the importance of understanding scale as a matter of both relation *and* (practical) perspective.

29 Cidell 2006.

30 Davies 2008.

experience is always here and now, though overlaid with imaginaries of elsewhere, past, and future. Where academic work in the form of geography and legal theory often looks from the outside or from above at different scales,[31] and collates experiences into generalities, the micro-interactions that forge and maintain these systems are flat (like our daily experience of the earth), contextual, personal, and momentary. Speaking of scale as objective sidelines this necessarily local experience of the subject – scale has no phenomenological meaning because what is around me are people, objects, environs, in an immediate location. The human body is always here and now, in its own little space, interacting with other bodies, other things, other people.

For this reason I would qualify, but not contradict, Mariana Valverde's claim that 'there is no such thing as scale-less seeing or depicting'.[32] I *see* what is in front of me and it only becomes a scaled seeing when I imagine myself from outside, a reflective action that is common enough and necessary to generalised knowledge construction, but not intrinsic to the embodied nature of seeing. Whether I am talking to my neighbours or addressing a larger audience, whether I am walking to the shop or taking an international flight, I cannot *directly* experience scale because what I experience are the immediate flat networks of everyday life. I can nonetheless imagine and project scale, overlaying my immediate experience with a consciousness of global governance, global space, or street-level geography and politics. Embodied seeing is the condition of everyone, regardless of their position in socio-political hierarchies. The Secretary-General of the United Nations, a monarch, or a nation's prime minister all remain in this existential state, seeing what is immediately in front of them even as they reflectively situate their actions and relationships at a particular scale or set of scales for the purposes of governance. As I will explain further in Chapter 7, legal theory can take better account of this experiential dimension of law by altering its imaginary to encompass the legal everyday, and consciousness of law, perspectives long utilised by socio-legal scholars.

Because scale is representational of the 'real' it implicates normative and political choices,[33] and can be deliberately manipulated in the interests of political objectives. The feminist downscaling of the political from state politics to the level of personal relationships is one such deliberate move. It reveals the micro-processes of gender in a way often obscured at larger political scales.[34] Deliberate manipulations of scale can work for many varieties of political claim. When the British Museum claims that it should retain the Parthenon Marbles because they are part of 'the

31 See the discussion by Mariana Valverde 2015, 58.

32 Ibid.

33 Delaney and Leitner 1997.

34 'Exploring politics within the spaces and scales not generally considered political or powerful remains central to feminist geopolitical research': Fluri 2009, 260.

world's shared heritage and transcend political boundaries',[35] it is attempting to bypass the politics of repatriation played out at the scale of nationalism, local culture, and the history of British and Ottoman imperialism. The change of scale is an effort to alter the rhetoric surrounding such items, marginalising or obscuring arguments about cultural theft and national heritage, in the hope that loftier political motivations will emerge in favour of what in the end can still be seen as a national interest (but a British, rather than Greek, one).[36] Or, the naming of a terrorist act as an instance of 'global' terror rather than of local violence deploys scale in such a way as to demand a particular political response – one taken in the name of humanity, rather than a particular nation or group of nations.[37] Importantly, however, the discourse is also constitutive of the scale: talk of 'jumping scales' to achieve political ends has been critiqued on the grounds that it tends to naturalise or reify scales by assuming that the scales are already there and that political actors simply move between them. Instead, we need to be aware of the fact that the rhetoric mobilised to shift the scale of a political debate constitutes or at least reinforces a constructed space.[38] The observer imagines and constructs scale, but is also uniquely situated and has their own experiential engagements.

Law defined through space

The classic analysis of scale in relation to law is Santos' 'Map of Misreading', originally published in 1987, but most recently appearing in a revised format as Chapter 8 of the second edition of *Toward a New Legal Common Sense*.[39] Santos divides the legal world into three broadly described scales – the local, the national, and the global:

> Let us assume that local law is a *large-scale legality*, nation-state law, a *medium-scale legality*, and global law, a *small-scale legality*. This means, first of all, that since scale creates the phenomenon, the different forms of law create different legal objects upon the same social objects. In other words, laws use different criteria to determine the meaningful details and the relevant features of the activity to be regulated, that is to say, they establish different networks of facts. In sum, different forms of law create different legal realities.[40]

35 British Museum, 'The Parthenon Sculptures', available at www.britishmuseum.org/about_us/news_and_press/statements/parthenon_sculptures.aspx (accessed May 2016).

36 An equally powerful though less celebrated example concerns the status of Aboriginal objects removed from the First Nations of Australia in colonial and early federal times. These are also 'universalised' in museum contexts even though they were often stolen and may have a continuing significance to living peoples.

37 Herod and Wright 2002, 2; see also Riles 2001.

38 Herod and Wright 2002, 10–11.

39 Santos 2002; cf Darian-Smith 1998; Valverde 2015, 48–51. See also Fraser 2008.

40 Santos 2002, 426. For an extended critique of the first edition of this work see Darian-Smith 1998, 107–112.

At a local scale, Santos undertakes a detailed analysis of 'Pasagarda' law – the highly developed system of non-state law practised by a large and long-established squatter community in Rio de Janeiro.[41] 'Pasagarda' is a fictional name for the community. Because the land occupation is illegal under state law and because the inhabitants live in poverty, the state system is inaccessible. A residents' association deals with many civil matters, especially concerning the transfer and renovation of dwellings. The system is extensive, elaborate, somewhat formalised and in certain matters supported by state law. At the other end of the spectrum, the global scale, Santos identifies a number of spheres of regulation that mobilise transnational concepts of law – these include the establishment of regional formations such as the European Union, the *lex mercatoria*, the 'law of people on the move', and the law of Indigenous peoples.[42] Like local law these legal formations are not determined exclusively by national or international law, but have developed outside (and alongside) these other domains. 'Interlegality' is the term Santos coins to indicate that local, national, and global scales are not self-contained or autonomous, but overlap and interact in various ways, for instance by the selective borrowing of state law concepts by the informal local legal processes. Despite the global, national, and local spaces defining these different scales of law, they are not neatly nested within each other: they are structurally incommensurable and have porous boundaries. They are constituted, in other words, by spatio-temporal engagements and by the movement of people between systems that are differentiated in theory and practice, but that are also entangled by virtue of the human agents moving between them.[43]

Starting from the point of view of a state-based legality, Santos' division could be regarded as essentially socio-legal rather than jurisdictional, jurisprudential, or legal because his analytical scales are not exclusively pre-defined by specifically *legal* techniques. This is especially so for 'local' and 'global' scales. From the legal positivist perspective, global (or rather international) and local law, in so far as they even exist, *could* be seen as entirely reliant on recognition and construction by positive national law and national sovereignty. The 'local' is simply the result of spaces constituted by the national system being carved up into smaller and more manageable chunks for particular purposes not needing to be regulated nationally. And international law is primarily the law derived from state customs and inter-state agreements. In contradistinction to these specifically positivist spaces, the 'local' and 'global' categories deployed by Santos include informal and non-state legal structures, which interact with state law but are not entirely defined by it.

41 Santos 2002, 99–162.

42 See generally Santos 2002, ch 5; see also Teubner 1997a, 3–28; Twining 2009; Cotterrell 2009b.

43 Mariana Valverde's notion of the chronotope – the intensification of space and time which creates legal categories – is suggestive here (Valverde 2015), but so is Karen Barad's expansion of quantum entanglement into social theory – an entangled state is not just mixing of two or more identities, but a 'calling into question of the very nature of two-ness, and ultimately of one-ness as well. Duality, unity, multiplicity, being are undone.' Barad 2010, 251.

Santos' objective is not simply to illustrate the complexity of the situation in which modern national law finds itself, but rather to open up the definition of 'law' in connection with legal pluralism and informal law. Rather than say, therefore, that Santos adopts a socio-legal categorisation of legal spaces illustrating the interconnections between state law and other norms, it is equally plausible to say (as he does himself) that the analysis reveals that the state does not have a monopoly on the definition of law. As is evident from previous chapters, this can be a difficult point to appreciate, since we are so accustomed to regarding 'law' as synonymous with the nation-state and its various derivatives. If we move the observational lens away from the nation-state and its mapped territory, but still accept that 'law' exists, we see it as a different kind of object, one that is not determined by state institutions but rather by other mechanisms: by supposedly 'universal' norms (whether religious or secular), by relationships with the earth, or by informal and semi-formalised social connections. A shift of perspective is required as well as a shift of scale – that is a shift away from the perspective that all law is originally and necessarily defined by the nation-state.

Such a rescaling of law, though not necessarily explicitly by reference to the concept of scale, has been undertaken for decades by legal pluralists. Legal pluralism decentres the state or removes it altogether from the equation of law–state–system, and considers law within a different geo-cultural frame. Some pluralists also remove the presumption that law is necessarily associated with a system, accepting that there may be some looser and less structured co-existence of norms.[44] Legal pluralism may be identified with the co-existence of customary law or religious law with state law,[45] or with of the operation of 'semi-autonomous' normative orders that, alongside state law, influence people's everyday behaviour and choices.[46] Legal pluralism accepts the existence of parallel systems of law within 'national' spaces, and also the different expressions of law at the local and global scales. The composite image of law obtained as a result of this analysis is far more complex than the three levels of local, national, and global – rather, law is depicted as existing in a multitude of interrelated (physical and conceptual) spaces and at various levels: 'a complex of overlapping, interpenetrating or intersecting normative systems or regimes, amongst which relations of authority are unstable, unclear, contested, or in course of negotiation'.[47] Legal pluralism produces an idea of law that is entirely consistent with the concept of scale imagined by contemporary geographers: 'a mosaic of unevenly superimposed and densely interlayered scalar geometries'.[48]

44 Griffiths 1998; Anker 2014.

45 For an excellent example of the contemporary approach to legal pluralism, which challenges the concept of law while analysing its operation in a specific context, see Anne Griffiths 1998; a classic, but less theoretically exciting, work is Hooker 1975.

46 Moore 1973; see also Merry 1988.

47 Cotterrell 2006, 38.

48 Brenner 2001, 606.

Standing outside the mosaic, or imagining an observational position above it, might encourage a static, synchronic view of legality in space – as though it could be fixed and described as a particular thing.[49] Legal pluralism does often make this social scientific move, and becomes a description of systems of existent, bounded sets of normative practices. But of course, as I have emphasised earlier in this chapter and in Chapter 5, there is no absolute outside position for any observer to take, and the mosaic is therefore not composed of fragments cemented in place, but is instead temporal, historically layered, continually emergent, and intrinsically changeable. In fact, the logic of a merely descriptive pluralism, like the logic of a descriptive spatial scale, unravels when we re-insert the experiential subject into the image. The plurality of norms cannot be seen only from above or from outside because it is always in the process of being generated and performed by human subjects in their engagements with each other and with the material world.[50] Stepping outside may momentarily stabilise the image and provide tools for analysis, but it remains a one-dimensional reading because it objectifies the patterned relationships and personal engagements that constitute experiences and constructions of law. I will have more to say on subject-generated law in Chapter 7.

Jurisdiction and scale in positive law

Before turning to this issue of subjectivity, I will conclude the chapter with some comments about jurisdiction, which has recently been the subject of some critical attention.[51] The idea and practice of jurisdiction brings together a large number of issues relevant to this chapter – notably concerning the territorial and conceptual spaces of state-based law, personal status, temporality, the power to speak/decide, the universality, particularity, and performativity of law, and the numerous contestations that prevent these variables coming into stable alignment. Jurisdiction plays a crucial technical-imaginary role in the delineation of state law – it is the problematic element through which a norm is figured as formal law, where force or repetition becomes authority, where relational beings become interpellated subjects and citizens, and where spatial boundaries become territory.[52]

Although geographers are undoubtedly influenced by the history and conventions of their discipline, they do have some flexibility in choosing appropriate

49 See generally Manderson 1996; Kleinhans and Macdonald 1997; Cornell 2009; Anker 2014, 182–187.

50 Benda-Beckman et al 2005.

51 A commentary by Jean-Luc Nancy 1982 was an early inspiration for some of the critical attention. See further Cover 1985; Davies 1996, 96–98; Ford 1998; Douzinas 2007; Drakopoulou 2007; McVeigh 2007; Valverde 2009; 2015.

52 Dorsett and McVeigh say: 'Viewed as process, jurisdiction encompasses the tasks of the authorization of law, the production of legal meaning and the marking of what is capable of belonging to law. If nothing else, the work of categorization of persons, things, places and events; the procedures of summons, hearing, decision and sentence; and the forensic concerns of argument and proof serve as devices of attachment to law': 2007, 5.

spaces and times for data collection and analysis: as indicated above these choices can be deliberate interventions in a field of knowledge and have political consequences. In contrast, the frameworks of conventional legal analysis often appear to be fixed by positive law or at least by custom even if in many cases the boundaries are contestable or subject to manipulation. Jurisdiction is a critical element in this process of formalisation because it defines the who, where, what, when, and how of legal authority.

To speak of jurisdiction as a thing or a concept is difficult, however, because it is something different in different contexts, and from the subject's point of view multiple placements are a signal of multiple jurisdictional connections. The space around me at the present time is a suburb named Forestville, an area of the legally designated 'Unley City Council' – a municipal council bordering other such entities. I am also surrounded by suburban Adelaide, which is a city in a looser and more colloquial sense of the term. This wider space is officially defined for purposes where the delineation of metropolitan from rural spaces is significant. The corporate legal entity 'City of Adelaide' is some three kilometres to the north-east, in a location known by the Kaurna people as Tarndanyangga – their country stretches around 300 kilometres along the coast where the colonising city is located. The wider state of South Australia is part of a federal system of government defined by the Constitution of Australia, connected legally and historically to external entities such as Britain and its queen (also our queen). All of the formally constituted spaces impose colonial structure and Western historical time on unceded land once regarded as *terra nullius*, and still often treated as such despite being inhabited by several hundred language groups. Within this 'Australian' nation, three levels or 'scales' of government formally subject and define me as a citizen: local, state, and Commonwealth, while the legal imaginary associated with Australia's colonial past places me in the wider commonwealth and common law world.[53] Beyond that, of course, the allegedly 'universal' system of human rights posits an interconnection between me and every other human being on the planet.

The result of these overlaid subjectifications is not only several levels of government with specific jurisdictional terrains and powers, but a myriad of other legally constructed physical spaces that intersect and overlap with these: the state and federal electoral boundaries place me in a set of locations defined separately to other urban spaces, planning regulations impose zones for specific types of land development and use, private and public spaces limit freedom of movement and propriety of behaviour, while transit spaces for cars, bicycles, and pedestrians determine how I can move in particular areas.[54] The legal subject is situated and defined by numerous crisscrossing and somewhat nested types of space.[55]

53 Godden 2007.
54 Blomley et al 2001.
55 Godden 2007.

These lines of placement and inclusion are also, of course, lines of exclusion and denial. The elaborate network of nested and overlapping spatial zones that give me identity and some security as a resident of a local area, citizen of a nation, and holder of universal rights, also imply exclusion. First and foremost in a colonial context, the obliteration of Aboriginal landscapes and temporal spatialities excludes the original citizens and their laws. Place names and the occasional welcome-to-country are reminders of this past and continuing exclusion. Subsequently excluded are the non-residents, non-citizens, and those whose rights are not, in fact, respected. Social exclusions and power differences are often expressed by legal control of access to particular spaces, whether justifiable or not. Throughout history this control has taken the form of variable state-based mechanisms such as apartheid, immigration policies, missions, and imprisonment regimes.[56] 'Competing exclusions' can come into play where basic beliefs differ.[57] Spatial control is also reflected in fundamental legal concepts that are barely open to question, such as that of private ownership that enforces power differences through an intricate and extensive web of exclusions from spaces and resources regarded as 'owned'.[58] More insidiously, the techniques defining legal subjects in space project a very specific set of values and heritage. The legal map imprinted upon any 'Australian' citizen is very firmly the product of a European heritage and colonial past that largely forecloses recognition of Aboriginal cultural and legal understandings of place and space.[59]

In a very practical sense, then, and somewhat apart from the scalar analyses of legal pluralism, lawyers and legal scholars, like geographers, deploy different levels or contexts of analysis. Most obviously, legal issues are situated in relation to a complex of jurisdictions. The term 'jurisdiction' may refer to a spatial territory that is the legally mapped product of history, cultural identity, and/or conflict, it may define a constitutional division of powers for instance in a federal system, or it may denote the power of a court or a tribunal to hear and determine a matter.[60] Although only the first of these notions of jurisdiction concerns physical space, the others also draw heavily on space in conceptual and/or metaphorical forms.

To look at territory first, such jurisdictions are defined by (ideally) bright-line boundaries that, as Richard Ford says, 'are a legal paradox because they are both absolutely compelling and hopelessly arbitrary'.[61] Territorial boundaries and the whole jurisdictional machinery that accompanies them are completely contingent in the sense that – like law itself – they always *could have been otherwise*: historical circumstance, political conflicts, or governmental choice might have led to different

56 Blomley et al 2001.
57 Stychin 2009.
58 Gray and Gray 1999.
59 Dorsett 2007; see generally Graham 2008; Watson 2015.
60 See generally Ford 1998; McVeigh 2007; Valverde 2009; 2015.
61 Ford 1998, 850.

results. There is no natural jurisdiction. The land mass of Australia comprises one national and various state and territory jurisdictions in a federation, but it *could* have become many national jurisdictions or included more states. It could have recognised separate territorial spaces under Indigenous jurisdiction, or even have expanded beyond the immediate vicinity to include Aotearoa/New Zealand, Fiji, or other Asian-Pacific locales.[62] History so far has resulted in a particular jurisdictional matrix, but there is of course no cultural, geographical, or moral necessity to any of it. At the same time, as Ford says, territorial jurisdiction is 'absolutely compelling' because 'an unwavering faith in the necessity and legitimacy of those boundaries would seem to be not only a foundation of our government, but a precondition of any government'.[63] Territorial jurisdictional limits present a façade of necessity and are integral to the sense that positive law with its established boundaries and limitations is the sole and the necessary manifestation of law in our society. In a very real sense, jurisdictional boundaries define the limits of positive law, and thus the law itself.

Because jurisdictions can be understood as defining larger or smaller geo-political spaces (nation, state, council area), which often have more or less far-reaching authority (or at least differently defined authority) the concept overlaps with and bears some superficial similarity with the idea of scale.[64] Understood in a territorial sense, jurisdictions *appear* to be scales or levels of legal analysis: spatial frames that order and define questions of law. But the idea of jurisdiction also eschews physical space in favour of conceptual space and is in some ways a simpler but more profound concept than the territorial fixation suggests: it is essentially about power and authority, the speaking or declaration of law attached to an authoritative position.[65] As Jean-Luc Nancy and others have emphasised, juris-*diction*, the saying of the law, is a formal constraint necessary to law (and all discourse).[66] It is the authority to legislate as well as the authority to decide and, in a sense, it is the *actual exercising* of that authority as well. Juris-diction crosses the conceptual–material divide because it is both the power to state the law as well as the saying of law in an individual case.[67] Jurisdiction is part of every decision and in one sense literally *is* every decision. Of course, the difference between the universal and the particular is never quite resolved: the decision is never only an instantiation or application of law, and the residue of a split between jurisdiction and

62 Some of the states that did join the federation might have refused, making the current Australian land mass into more than one national jurisdiction or others might have joined the federation: the original negotiations included Fiji and New Zealand.

63 Ford 1998, 851.

64 Valverde 2009; see in particular Valverde's comments in 2015, 57, which question the association of jurisdiction with scale. Dorsett 2007, 139 considers the transition to a spatial understanding of jurisdiction from its former association with personal status.

65 Jean-Luc Nancy divided the word to make its meaning evident: 'juris-diction'. Nancy 1982.

66 Nancy 1982. See also Davies 1996, 97–98; Douzinas 2007, 23; Drakopoulou 2007, 33.

67 Cf Douzinas 2007, 23.

juris-diction can be temporally problematic in practical terms. Is an *ultra vires* decision actually a decision? Is it void or voidable? Did it even occur in a legal sense, if there was no authority?

In this way jurisdiction is essentially about authority, rather than territory, though it is true that such authority is often now deployed in the interests of constructing and defining a territory. As Dorsett explains, historically jurisdiction concerned status more than geographical space: the capacities of persons were defined under the jurisdiction of the feudal landholder, the husband, the father, the church, the king, and so forth.[68] It was only as authority began to be defined in territorial terms and mapped by an increasingly technical science of cartography that a certain type of jurisdiction in the Western world became associated with a political territory.[69] Nonetheless in a legal sense jurisdiction is still as much about conceptual as it is about geographical spaces. We are perfectly accustomed to speaking of jurisdictions in relation to a complex matrix of particular legal subject matters – the jurisdiction of the Family Court, a criminal appeals jurisdiction, or the Federal Court's jurisdiction. Different courts are vested with particular jurisdictions or decision-making authority, as are numerous office bearers and agencies. In fact state-based law is a complex network of intersecting jurisdictions, some of which *can* simply be represented as spaces on a map, but most of which are highly abstract and technically obscure. And, like territorial jurisdictions, they are, to repeat Ford's words, both 'absolutely compelling and hopelessly arbitrary'.[70]

Like geographical scales, these frames of legal analysis are neither self-evident nor closed, but rather flexible and contestable. Jurisdictional limits are constructed by prevailing legal practices and methodologies, and subject to various forms of crossing or even transgression. Sometimes cross-jurisdictional movement takes place fully in accordance with the law – reference from one jurisdiction to another and the operation of choice of law principles involve formal means by which jurisdiction may be changed, by transferring a dispute to another court or territorial jurisdiction or, more rarely, by transferring the law of another place into the decision-making forum. Sometimes a challenge to jurisdiction takes place at the edges of legality. Forum shopping, for instance, may involve deliberate manipulation of jurisdiction in order to obtain the best outcome for a client. Or, a choice to engage at a particular jurisdictional level may exert political pressure for legal change at another. This may occur, for instance, where the judgment of an international court is critical of a domestic legal situation, placing pressure on the domestic jurisdiction to alter its law.[71] Beyond law's self-referential analytical frame, however, the variables of legal space multiply exponentially when considered in the

68 Ford 1998, 868–888; Dorsett 2007, 139–140.
69 Ford 1998, 872–875; cf Dorsett 2007, 153–156.
70 Ford 1998, 850.
71 Gelber 1999.

light of imaginary and symbolic networks.[72] A jurisdiction might be self-contained, separate, autonomous in a formal sense, but it is always placed in an imagined legal context – the product of its history, for instance, its language, political alliances, cultural connections and divergences, or its economic status.

Maitland wrote of the common law forms of action in terms of a 'struggle for jurisdiction'[73] – in this instance, a struggle between use of the king's writs and using local and ecclesiastical courts. By contrast, Mariana Valverde speaks of jurisdiction as a 'game' though she also at times deploys the language of struggle.[74] It might equally be plausible to speak of jurisdiction as a puzzle or problem, in particular for litigants and lawyers faced with not-quite-determinate frameworks for choosing a forum or a cause of action. Will they be heard? Can the tribunal or court speak on that matter and in that place? The practice, history, and idea of jurisdiction intensifies in an element of formal law many of the themes I have been investigating in this book: it is material and performative, it delineates and is delineated by a plurality of spatial and scalar codes (both physical and conceptual), it is both necessary and contingent, it oscillates between the universal and the particular, it is always contestable and the subject of struggle, it condenses historical time with iterative time, and it is a (maybe *the*) technique of interpellation that marks out legal subjects.

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The concept of law can be separated from that of the nation-state and imagined in other conceptual and physical spaces. But more than that, as legal geography has illustrated, the idea of law can be rehabilitated from the sphere of abstract rationality to a spatial, material, and embodied existence. This is a theoretical move that is difficult to maintain consistently in the context of legal theory, such is the pull (and indeed the practical significance) of the state/territory-based notion of law that we continue to revert to it even when we feel that we have illustrated its limitations as an ultimate descriptor of law. There is, of course, far more than a simple change of scale going on in legal pluralist and legal geography scholarship. As Santos argues, change in scale is not simply a matter of a change in granularity – when you get closer to an object you see it in more detail like zooming in Google Earth – but also involves a change in projection and symbolisation.[75] Beyond these technical descriptions, it is also possible to see that a change in scale involves (by definition) a change in frame of reference, and also in the modes of authority, the definition of a legal subject, the sources of normativity, the affective ties between norms and subjects, and

72 Pearson 2008.

73 Maitland 1909, lecture 1. Thanks to Peta Spenda for bringing my attention to Maitland.

74 Valverde 2015, 84.

75 Santos 2002, 430–436. In simple terms, projection refers to the underlying logic that creates and organises the space for law (or a map) while symbolisation is a more complex idea relating to the ways in which law imagines and renders reality.

so forth. Certain elements are made visible, while others recede. Everything, in other words, is up for re-analysis and the scholarly imagination must be attentive to new types of objects not seen, or perhaps sometimes seen and marginalised, at the level of state law.

I will return to the relationship between space and law in Chapters 8 and 9. These chapters largely concern legal imaginaries, which I approach by considering tropes, metaphors, and figures of speech in legal theory. However these chapters also look at the indeterminate line between the literal and the metaphorical in understanding law, and the law–space connection has been especially significant in this context.

7 Subjects and perspective

> The split and contradictory self is the one who can interrogate positionings and be accountable, the one who can construct and join rational conversations and fantastic imaginings that change history . . . . Subjectivity is multidimensional; so, therefore, is vision. The knowing self is partial in all its guises, never finished, whole, simply there and original; it is always constructed and stitched together imperfectly, and therefore able to join with another, to see together without claiming to be another.[1]

Introduction

In liberal thought, law and the legal subject have often been imagined as mirror images of each other – both are sovereign, self-determining, self-contained, and self-possessed (in a bodily and a territorial sense). They are each a unity, indivisible. This mirror imaging is most evident where the state has been represented physically as a man's body, for instance in the person of the Leviathan.[2] Such ideal images of law and legal subjects as unified and limited are reinforced by the constructions of legal philosophy with its emphasis upon the expert knowledge regarded as essential to the existence of law – certain legal subjects are invested with a special power to know, understand, and interpret the law. Hart's officials and more pertinently Dworkin's ideal philosopher judge Hercules are not exactly *identified* with law (though Hercules comes close) but they are themselves theoretical reflections of it that also help to legitimate its status as external and separate – its *thingness*.[3] The subjects who are empowered to know and recognise the law by classical legal philosophy are not riven with the contradictions of their psycho–social–political situatedness as subjects, but are rather singular and abstract, identified solely by their office and their expertise.

1 Haraway 1988, 586.

2 Hobbes 1991; for a fascinating extended analysis of the frontispiece image in *Leviathan*, see Richardson 2016.

3 Dworkin 1986; Hart 1994.

Such a subject has long been discredited in critical theory. Nonetheless, law remains, at least in part, a combination of our imaginaries (shared but subjective visions of the normative system out there) and accumulated performances undertaken on the basis that these imaginaries are real. So what happens to law when the imagining and performing subject is not an official, not a unity, not autonomous, and does not identify with the system? What happens when we think of subjects as networked nodes in a diverse community? What happens to law when its constituting subject and groupings of subjects are diverse, differently situated, differently embodied, and entirely plural? What 'fantastic imaginings' of law might exist and be possible?

In Chapter 5 I started to consider the entanglement of subjects in socio-legal spaces. I focused in particular on the experiences of mind and body, inner and outer, and the pathways that connect the internal experience, consciousness, and imagining of law to the outer, bodily and performed, relations that are always becoming-law. This is not a process that can be pinned down, and it has often been bracketed in classical legal theory with its emphasis on the exterior and abstract essence of state law as imagined by its own normalised officials. There is a great deal of theory that challenges the inner–outer distinction in some way, including for instance legal consciousness studies with its view that law and consciousness of law are mutually constituting and philosophical developments about the embodied mind that places cognition as part of the physical world (though not reducible to it).

In this chapter, I continue the discussion of internal and external in law construction. I pick up some of the threads that emerged in Chapter 5, but in particular endeavour to illustrate some of the ways in which subjective imaginings and experiences are formative of law, with perhaps a little more emphasis on how consciousness and imagination are externalised through narrative and performance. This should not, of course, be taken to imply that the material, external, and physical world (of environment, objects, and performances) is not important – it simply recedes in my narrative while I look at law construction from a subjective point of view. I begin by addressing the position of the theorist and theoretical constructions of a knowing subject of law and then turn to the role of subjects in the constitution of law.

The legal theorist as an expert knower

As I have noted repeatedly throughout this book, classical legal theory (and some critical and socio-legal theory) tended to operate primarily at the scale of the national legal system.[4] Legal theory has been characterised by a 'methodological statism' that is comparable to the 'methodological nationalism' noted by human geography and sociology. In the legal context, this approach is simply the presumption that what is essentially or characteristically 'legal' is part of a system, and that

4 MacCormick 2000, 37–57; Melissaris 2009.

any such system of interest to jurisprudence/legal philosophy/legal theory generally belongs to a state.

Both the discipline of legal theory and the modernist–positivist concept of law were established in a process that at once defined and limited law to the state and excluded alternative conceptions and practices that might otherwise have been known as 'legal'. Legal theory developed on the basis that there is a proper scale and perspective for the legal theoretical knower. The appropriate scale for the study of law has been that of the institutionalised legal system at the level of the nation. The appropriate perspective for the theorist was that of the detached observer with an internal understanding of state law, that is, a lawyer's understanding of law, not an anthropologist's or sociologist's.[5] The proper scale and perspective relating to legal knowledge is a closed circle: the legal expert is by education, experience, and even legislative fiat an expert in *state* law and, knowing essentially state law, s/he not only devalues but actively excludes or forecloses both non-state law and non-expert perspectives on state law from the understanding of law. Throughout the twentieth century the methodological statism and monovocal perspective of legal theory narrowed meaningful debate about the concept of law.

Thus, most theoretical knowledge about law has tended to assume an expert knowledge of law understood in an entirely statist way. The perspective of the legal theorist – very often but not always including the critical legal theorist – is that of the person educated in a law school with its extremely restricted understanding of law. It is not easy to challenge this training and classical legal philosophy even celebrated it as a starting point for understanding law. As Melissaris so forcefully and cogently demonstrates, a legal philosopher such as Hart took the perspective of the legal expert, as an insider to state law, as definitive of *all* law: 'in Hartian methodology the perspective of the participant seems to be conflated with that of the observer'.[6] The internal perspective grounds the entire observational and analytical truth. The upshot was that something completely contingent and historical – state-based law – became the model for all law: '[Hart] treated an instance of social mutation [ie the state] that went hand in hand with the project of rationalization and the reduction of social complexity as a manifestation of a trans-contextual paradigmatic case'.[7] As Melissaris makes plain, this silencing of alternative understandings of law operates not only in relation to other laws, other legal systems, but also internally – the expert perspective on which legal philosophy is based excludes the understanding of those who engage with the law in a non-expert and entirely quotidian way.[8] It also reduces the expert to a flat and disembodied self – there is no feminist expert, for instance, with any relevant

5 Of course Hart famously claimed that *The Concept of Law* was 'an essay in descriptive sociology': Hart 1994, v; cf Cotterrell 1989, 103; Balkin 1993; Melissaris 2009, 61–71.

6 Melissaris 2009, 9.

7 Ibid, 66.

8 Ibid, 14.

knowledge about the law. Such a person is defined almost out of existence.[9] Legal theory, and in particular positivist legal theory, has consolidated and reinforced the limited idea of law through an almost unbreakable alliance of abstracted expert understandings of law with highly exclusionary philosophical and pedagogical perspectives. Theory experiences a threefold reduction in its knowers: the knower must be an *expert* and not a layperson, he is an expert in *state* law and nothing else, and he is *abstract* not materially situated or socio-politically engaged (and therefore a 'he').[10]

The problem of perspective in legal theory therefore is not simply the move from an 'internal' expert point of view to an 'external' observational or analytical one. If we adopt for the moment the internal–external distinction as an analytical tool, such a duality of perspective seems unavoidable for any theorist who is trained in a practice but also wants to understand it theoretically. The critical theorist does need to get inside a practice (suspend her disbelief) as well as stand outside it. The problem is rather lack of reflectiveness and clarity about perspective and what becomes lost or obscured in the transition from inside to outside. It is of course perfectly reasonable and indeed expected for practitioners and practical commentators to assume single-mindedly the statist legal framework as the primary set of norms governing their routine technical perceptions and interpretations. It is equally reasonable for theorists to conceptualise, describe, and abstract from this system, as long as its historical and cultural specificities are kept in view. Difficulties arise however when *a* concept of law is mistaken for *the* concept of law, and when there is a failure to understand the context of law and what is excluded when a singular focus on the state and expert knowledge is the basis for legal theoretical knowledge.[11]

In contrast to legal philosophy with its internal perspective on the understanding of law, Roger Cotterrell has argued that legal sociology is characterised by movement between internal and external attitudes. His version of it is characterised by the mobility of the sociological observer and the porosity of legal boundaries:

> Sociological insight is simultaneously inside and outside legal ideas, constituting them and interpreting them, sometimes speaking through them and sometimes speaking about them, sometimes aiding, sometimes undermining them. Thus a sociological understanding of law does not reduce them to

9 The masculinity of the legal expert has been challenged in a very sustained and practical way by the feminist judgments projects which deliberately place feminists as experts in the centre of legal knowledge.

10 In the past, he might also have been Oxford-educated or at least Oxford-centric. See eg Dickson 2011; Leiter 2011. Analytical philosophy, including some jurisprudence, has in recent years taken to reversing its male gender-specific language so that it is female gender-specific. The gesture can appear tokenistic, even deliberately so, and clearly it does nothing to capture diversity when the philosopher, the judge, the lawyer, are still all abstract individuals.

11 Blomley 2003, 20–21.

> something other than law. It expresses their social meaning as law in its rich complexity.[12]

Conventionally, sociology (and other disciplinary interventions) has been associated with an external point of view, in contrast to the internal statist point of view of jurisprudence and legal philosophy. Cotterrell's description of the sociological perspective challenges this simplistic distinction between the philosophy of law and its sociology. The two disciplines may well utilise different methods and be more or less reflective about the question of perspective, but they are nonetheless motivated by a desire to understand law in its specificity as an integral part of a broader social organisation. Having said this, the internal–external distinction needs to be used carefully so that it is not itself reified – Cotterrell's description of socio-legal thought as moving between the inside and outside avoids solidifying the boundaries of law, but they are easily reasserted by our less reflective everyday positivism.

In pursuance of an inside/outside approach we might think of law as a rather solid and traditional house[13] (or any other fixed space) in which some minority of the people are in the living areas, others are in the kitchen or hallway, and some are altogether excluded. The image captures different types of legal spaces, distributions of power and perhaps the degree to which people are recognised and included by mainstream legality or marginalised and excluded. The traditional legal theorist in such a case sits in the living room, but may nonetheless attempt to see the whole house and even account for all the possible dwellings across the planet.[14] The sociologist and anthropologist moves between the various spaces and posits contingent and complex descriptions of a multitude of interactions not confined to the building itself. Critical theorists, feminists, Indigenous scholars, and so on launch repeated attacks or at least throw repeated questions at the edifice, sometimes changing its shape, sometimes simply opening a few cracks, and often altering attitudes. But they are often essentially focused on its pre-given structure.

But if, in accordance with the view I have been promoting in this book, law is understood as thoroughly enmeshed with social life in all its complexity and diversity as well as integral to our own subjective identities, any inside–outside distinction is in fact a theoretical shortcut. It bypasses the point – at once rather obvious and rather difficult to absorb theoretically – that any law cannot be conceptually extracted from the actual human beings and social groupings that practise it and give it meaning in particular locations. Neither the expert, nor the philosopher of

12 Cotterrell 2006, 54; On the division of socio-legal studies from legal theory see Lacey 1998; Norrie 2000; Tamanaha 2001, 134.

13 With apologies to Galanter, whose 'rooms' were various dispute resolution options. See Galanter 1981.

14 Again, to quote Melissaris: 'the Hartian or Razian observer . . . describes what he experiences from the internal point of view and then goes on to pretend it was all done from outside': Melissaris 2009, 22; see also Kerruish 1991, 56, 128–129; Fitzpatrick 1992, 197; Davies 1996, 26.

law, or even the judge, really do stand 'inside' it any more than anyone else. They may certainly be empowered in specific ways by the relationships and narratives that make up the law, but they are not 'inside' anything. This is a metaphor based on a spatial rendering of law and, although like most metaphors it can be conceptually useful, in this case it also obscures the dynamism and performativity of law.[15] Both knowledge of law and existence in relation to law are more complex. The image is misleading because it simplifies the law–subject relationship both in terms of subjection to law, the spatial unity of law, and knowledge of it. As theorists of multiple consciousness, intersectionality, legal consciousness, and law and geography have emphatically shown,[16] inside, marginal, or outside can be measured according to different and incommensurable axes – social background and relative social power, knowledge of law, level of 'habitual obedience' or unreflective internalisation of law, level of reflective acceptance or rejection of law, theoretical stance, political motivations, and so forth.[17] The modalities of inside and outside are numerous and interact in complex and often unpredictable ways.

But more than that, as I have repeatedly pointed out, the idea that law is a solid edifice occupying a simple and static physical space that was once upon a time constructed by humans but is now just 'there' as an organising principle undergoing occasional renovation and cosmetic improvement misses a large number of theoretical points. It misses, for instance, that any kind of law (even state law) is in process, dynamic not just in its content but also in its spatial organisation and form. It is reliant on – not just determinative of – the practices and interactions of people (and not just those understood as insiders) in following, constructing, contesting, ignoring, and interpreting a large number of normative environments (in and beyond state law). The image misses the point that persons are both active and passive in relation to law, that some kind of binding normative commitment – whether state law or something else – is part of our identity and not outside us, and that our world is overflowing with normativity that cannot be neatly organised into self-contained categories.[18] The theorist is necessarily embodied, specific, and located within this material-semiotic network. She or he does not need to be an expert in law. In fact, many very influential theorists of law, notably in the continental tradition, have been sociologists, political theorists, or philosophers rather than trained in law.

Subjective knowers in legal philosophy

It is important to reflect on the position of the knower because it alerts us to the assumed perspective of any legal theory – its implied author, so to speak – which in traditional jurisprudence has been the expert in Western state law. Theory, of

15 I consider the topic of metaphors in legal theory in Chapter 8.

16 Matsuda 1989; Williams 1987, 406–409; Harris 1994, 767–770; Sengupta 2005; Conaghan 2009.

17 See also Ewick and Silbey 1998, cited in Harding 2010, 20.

18 Cover 1983.

course, also traditionally promotes a distance and separation from its object but, as I have indicated in earlier chapters, theoretical interventions must also be regarded as being in dialogue with their objects and as constitutive of them. The concept of law, and hence law, is constituted by legal theory – not *solely* by legal theory of course, or even in a directly causal fashion. Nonetheless, the influence is real. But as I have also indicated, a materially situated law must be regarded as constituted by *all* of its legal subjects, and obviously not only its theorists and disciplinary knowers. This is a key insight of some forms of legal pluralism, legal consciousness studies, and other socio-legal approaches to law and I will turn to these approaches shortly in this chapter. Beyond the expert, and in particular beyond the expert philosopher, legal subjects *know* law in plural ways, and *live* it as a multitude of pathways, limits, and connections for the self in a social–material environment. Thus one of the most prominent areas in which material–plural diversity within law can be understood is by reference to law's subjects or persons.[19]

Once again though, it is possible to see an inkling of such thinking in the legal philosophical tradition (but without the emphasis on diversity). Legal philosophers often explain the search for foundations as being about the nature of law, but it is also about its very existence. Here, as elsewhere, epistemology is tied up with ontology: understanding law and bringing it into being are part of the same process. Because legal philosophy has so often reified law as a thing (and identified it with the state as another reified thing[20]) it has needed to find some basis for, or foundation of, law's existence. It is not necessary to prove that everyday tactile and visible objects exist (though working out what they are might prove more difficult) but an abstract construction like law is altogether different. As indicated by the discussion in the previous section, the subjective intentions, beliefs, and assumptions of various persons have played their part in the positivist theoretical understanding of law and its variations, though the identities of those whose views count in this system is strictly limited.

Thus, although it has often been under-emphasised in legal theory, the 'subjective' in law – personal attitudes and experiences – has nonetheless been present in the abstract account of social and legal normativity. The attitude to law, acceptance

19 The 'subject' is not the same thing as the 'person': 'subject' implies subjection to a system and names an entity which is constituted within a language and context, whereas 'person' generally denotes a more naturalistic biological entity – centrally, a human being. However, since in positivist legal language a 'person' is often regarded as technically a fiction or construct of law, I think it is fair to say that the two concepts are much closer in legal language than in ordinary language, though not necessarily identical. See Naffine 2003.

20 The identification of law and state is either as a unity, seeing them as the same thing, or as an association, that law is the product of a state and associated with its boundaries. One key point of difference between Kelsen and Schmitt concerned whether the state was something different to law or whether they were a unity. Kelsen took the view that law and state are unified, whereas Schmitt famously located the state – in particular its sovereign – outside the law. Of this idea, Kelsen said that the 'dualism of law and state is . . . a result of our tendency to personify and then to hypostatize our personifications'. Even more strongly, he said it was an 'animistic superstition'. Kelsen 1945, 191.

of it, and presumption of its validity form some part of the theoretical world views of Hart, Kelsen, and Dworkin, for instance.[21] As is well known, Hart distinguished between internal and external attitudes to rules and also claimed that the validity of the rule of recognition was based on its acceptance by officials.[22] Hart described the external attitude as constituted by an acknowledgement that a rule exists, that it is responsible for the behaviour of those bound by it, and that consequences may flow from not observing the rule. By contrast, the internal attitude consists of a personal acceptance of the rule as an appropriate and justifiable reason to act or not act in a particular way.[23] Hart argued that simply focusing on the external attitude and the 'observable regularities' of human behaviour would produce a lopsided account of law. (One of the things distinguishing habits and rules, for Hart, is that at least some people have an internal attitude to rules, whereas habits may represent mere behavioural convergence.[24]) Therefore, both elements of understanding normativity are essential in his view to legal theory:

> One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view [the internal and the external] and not to define one of them out of existence.[25]

The subjective attitudes of some ordinary people are built in to Hart's idea of a legal norm. More pertinently, however, the entire system's existence rests on a reflective act of recognition of a basic rule by law's officials.[26]

Hart only ever partially undertook the task of acknowledging the subject location in law. In his account the official subject holding the perspective about the rule is de-subjectified – an 'everyman' or an 'everybody', albeit capable of diverging from common opinions. The persons who hold up law by recognising it were not, for Hart, members of the general community as 'this would involve putting into the heads of ordinary citizens an understanding of constitutional matters which

21 Perhaps most spectacularly, Dworkin used the persona of the idealised judge Hercules as a conduit of legal principle. More super-human than human (though always masculine and entirely socially empowered), as a legal interpreter and decision maker Hercules finds the best view of law as required by 'law as integrity'. Hercules' position as judge and interpreter is especially slippery, and I do not consider him in detail here. See Dworkin 1986.

22 Hart 1994, 56–57, 89–91.

23 The distinction may be simple enough to state in the abstract but is obviously extremely complex in practice, since rules rarely exist in isolation from one another.

24 Hart 1994, 54–55. This aspect of the distinction leaves many complexities unsaid which, if thought through completely, may make the habit–rule distinction quite unworkable. For instance, behavioural convergence (habit) is often the only basis for the most resistant of social norms in relation to which large numbers of people have an internal, albeit uncritical, attitude. Norms relating to gender, for instance, may only be performances and habits, but they are nonetheless accepted and internalised by the majority of the population.

25 Hart 1994, 91.

26 Cf Waldron 2010, 139.

they might not have'.[27] The embodied, intra-active, and diverse subject is not perceived as being of relevance in the constitution of law, and the nexus between the image of law and the image of a rational subject of law remains unbroken by Hart's theory.[28]

In his somewhat different style but with a broadly similar end-point, Kelsen also highlighted the personal and subjective aspect of norms. He claimed that all norms are acts of will and, moreover, that an entire system of norms or law rests on a 'basic' norm, which did not exist but had to be presupposed: 'It is only if it is presupposed that the subjective meaning of acts of will about the behavior of other people can be interpreted as their objective meaning . . .'.[29] In other words, the objectivity of norms in a legal system rests on a (subjective) presupposition. A law's objectivity, or externality to those who willed it in the first place, is entirely conditional upon another act of will – a 'merely thought norm'.[30] Once again, although we see here that the existence of law is conditional upon a thought taking the form of a presumption, Kelsen is less clear on exactly who is doing the presuming. The presumer has no identity, or at best a completely abstract one.

These few examples illustrate the significance of the interior, intentional, agential, and subjective knower to mainstream jurisprudence. What is ultimately preserved in these examples is the delineation between interior and exterior – the subject, who shares a collectively held knowledge, creates or in some way acts in relation to a norm, which is dissociated from the self and is only 'valid' in so far as it is *different* from subjects and selves. The individual, their subjectivity, their experience, and their separation is maintained as other to this external world of legality. Moreover, the 'perspective' or attitude of will, intentionality, or acceptance is de-subjectified in a fashion characteristic of the epistemology of privilege.

Fractured subjects and plural laws

The tradition of legal theory, even in the process of creating law, erases both the manifold contexts within which legal subjectivity arises and 'actual', 'natural' subjects whose subjectivities transgress the limits of law and are framed by a variety of social discourses. Such subjects have been little acknowledged by formal law, such as those marked as different by their gender, indigeneity, sexuality, race, culture, level and type of education, and class.[31] But if they are still relatively obscured in formal law, they have been almost invisible to the jurisprudential tradition, whose subject is devoid of any of the characteristics that actually make up a social human being.

27 Hart 1994, 60.
28 Cf Hutchinson 2009, 54–56.
29 Kelsen 1991, 256.
30 Ibid.
31 See generally Crenshaw 1991; Brown 1995, 152; Thornton 1995, 11–12; Watson 1998; Kapur 1999; Naffine 2009.

Social and political theory has moved well beyond the notion that human individuals can be reduced to a formal type. Not only are subjects differently located and differently constructed in culture; they are also internally fragmented – not entities but rather pluralities. There is an 'irreducible outness'[32] between one subject and another such that no aggregative model of a subject will be satisfactory. Any concept of a reified subject will merely be a reduction to the same of different embodied subjects who have commonalities and share discursive frames and cultures, but are in the end unique. Any such singular concept will completely obscure the inherent plurality of any self. (As Deleuze and Guattari put it succinctly at the beginning of *A Thousand Plateaus*, 'The two of us wrote *Anti-Oedipus* together. Since each of us was several, there was already quite a crowd.'[33]) If we take seriously the socio-legal perspective that law is fully embedded in social discourse, should we not then ask how the subject (always plural) sees, experiences, performs, and creates law? This is not intended to promote a 'subjective' notion of law, but rather a notion that takes adequate regard of the fact that social subjects are plural and that law is created by interactions in social spaces.[34]

Although this is a perspective that has rarely been taken in legal *philosophy*,[35] there are many adjacent literatures that have asked it or at least implied it. At least since Eugen Ehrlich argued in favour of 'living law' in the early twentieth century, it has been clear that law is fully social: law lives in the social sphere and is not just an institutionalised reflection or crystallisation of selected social forms. Law exists in the living relationships and contexts of everyday life.[36] Ehrlich differentiated such 'living' law from official law. A more contemporary statement of this might be that law is performative – it is the net effect of collective readings, practices, discourses, and intersubjective relationships that subsist in social practice as well as in the semi-controlled environment of formal law.[37] In the late twentieth century, the multiple environments of culture, race, gender, occupation, class, and religion that condition such relationships became highly visible to legal theorists and legal sociologists. If we look at law as a dialogue between subjects themselves constituted by plural and contradictory cultural messages then law also must be regarded as inherently, irreducibly plural.

Law, then, can be thought of as the accumulated readings, interpretations, and practices of plural subjects in dialogue with each other in the context of established conventions and texts. If law is not different from the social 'context', but embedded in it as a materialisation of multiple socio-political interactions, it must also be

32 James, cited in O'Shea 2000, 27.

33 Deleuze and Guattari 1987, 3.

34 Hannah Arendt pointed out that the tradition of political philosophy tends to erase the plurality of human existence. This is an important point also to be made in relation to legal theory. See generally Arendt 1958.

35 By 'legal philosophy' I mean the analytical tradition with its focus on state/institutional law, expert knowledge, and the internal perspective.

36 Ehrlich 1962; Ziegert 1998; see generally Hertogh 2009.

37 Davies 1996; 2012; Ford 1998; Blomley 2013; Ramshaw 2013.

characterised by this plurality or otherness between us all. The central point is not that each person has their own experience and idea of law, but rather that *conceptions and practices of law circulate in multiple cultural and subcultural discourses.*

In this vein Kleinhans and Macdonald have argued in favour of a 'critical legal pluralism' that 'does not perceive law as objective data to be apprehended and interpreted by experts in the normative community' but rather 'presumes that subjects control law as much as law controls subjects'.[38] Similarly, emphasising the repeated indeterminate interpretations and acts of symbolisation that constitute law, Desmond Manderson argues that:

> The human dimension of misreading is necessary to any genuine pluralism, for it rejects the reification of 'law', 'system', 'culture', or 'community', as a thing which can think or read. Law is not manufactured by a 'multiplicity of closed discourses' precisely because it is only realised through the actions of human beings who exist simultaneously in *several* discourses and who are, therefore, themselves plural.[39]

In other words, rather than ask how a reified and singular 'law' sees subjects, we need to be able to see the diversity – the radical and constitutive difference – of socially situated subjects and their relationships as the starting point for law. This point applies regardless of whether we are looking at formal state law or at a variety of different normative systems or more generalised normativity. State law is not a closed or singular system except in some imagined theoretical worlds, because it is composed and performed by plural subjects – subjects who are internally complex and multiply aligned in social groups. As I have said previously in the book, a singular idea of law might be extracted or even imposed on these beliefs and relationships, but it will always be an approximation. It is far more interesting to try to improve on any such approximation by acknowledging the diversity of subjects and contexts and thinking about how this can lead into new ideas about law.

As theorised by Kleinhans and Macdonald, critical legal pluralism starts with the deceptively obvious insight that knowledge is an entirely human construct, and that therefore knowledge of law, and legal reality, is produced by legal subjects.[40] Although part of that knowledge production is the construction of a reified law, that image is always open to question and transformation, because the self is 'an irreducible site of internormativity'[41] – in other words the self is a site where norms come together, interact, and are transformed into new norms. Such a view of law cannot be separated from the self or regarded as outside, like traditional positivism and pluralism. As Kirsten Anker says: 'legal pluralism is something hosted by human selves . . . a permanent interplay of ideas and principles in peoples' minds,

38 Kleinhans and Macdonald 1997, 40; see also Cotterrell 1997.
39 Manderson 1996, 1064.
40 Kleinhans and Macdonald 1997, 38.
41 Ibid, 38.

gleaned from innumerable sources, that resolves into "the law" for any one person in any one situation'.[42] Anker illustrates this process of law creation out of plurality in the context of native title negotiations in Australia, suggesting that the process of reaching an agreement does not simply represent a coming together of two separate fields of law – Indigenous and Western – but that rather what is regarded as law is re-evaluated in the process.[43] Thus, critical legal pluralism reimagines law as a practice engaged in by human societies, rather than as a mere determinative limit to action or externalised set of rules or principles.

Differently situated law construction

There are several elements of a subject-based materialist pluralism in law. These elements are implicit – and sometimes explicit – in different types of theory and include ideas and imaginaries about law (state and non-state), narratives and shared discourses, performances or practical reiterations of law, and physical bodies living the law in time and space (the often forgotten precondition or more accurately the *identity* of any subject). In this section of the chapter I consider some further critical and socio-legal approaches that have taken seriously the subject-centred and social nature of law construction. I look in particular at feminist theory, legal consciousness studies, Robert Cover's concept of jurisgenesis, and the emergence of a materialism that locates human beings/bodies in their natural and other physical environments (a topic already considered in Chapter 4). These are only exemplars of subject-focused law construction, and not representative of the totality of such thinking. They are independent of critical legal pluralism, but they all share its emphasis on understanding the culturally and materially located self as a conduit for law creation.

The endeavour of formulating a subject-centred and social-centric understanding of law has been addressed unevenly in both critical and socio-legal theory, however. Critical theorists have often contested the view of law as somehow above and separate from the life of individuals and the community, but the image is frequently still perpetuated of a person shaped, influenced, or constructed by law – that is, a person who is essentially subjected to a law that is separate from the self. Despite the critical intent, the image of law as a state-bound object acting upon a separately conceived 'society' and its individuals remains very powerful. An obvious reason for this is that, in a statist legal system, this is very often the experience of law felt most acutely, especially by those who are excluded or marginalised by it. However, this does not mean that counter-narratives cannot be exposed. A change of perspective has in some instances opened new possibilities for critique that have not, perhaps, been fully exploited theoretically. For instance, critical race studies and feminist legal theory have sometimes been framed as simply asking

42 Anker 2014, 187.

43 Ibid, Chapters 6 and 7. Anker's analysis is subtle, detailed, and compelling, and quite impossible to do justice to in a brief summary.

the question of how law (understood in a positivist sense) impacts upon racial minorities and women and how power is embedded in legal values and structures. A reformist agenda might then drive change that avoids or ameliorates both overt and unintended discrimination while the need to transform legal culture might be addressed by pedagogical methods. These critical strategies have also, however, sometimes asked what different understanding of law arises when the perspective shifts from the centre to the margins.[44] These counter-hegemonic narratives are easily sidelined by the continuing pull of legal positivism and the sometimes more pressing political need to deal with questions of inequality under positive law.

For instance, feminist legal theory has very compellingly illustrated the reliance of state-based legal reasoning on gendered fantasies, mostly the work of a narrow subset of privileged men. The 'embodied imagining' that becomes externalised law through the process of legal reason is a privileged masculine imaginary.[45] The result has often been a legal construction of women and the female body as marginal and abnormal. This is a subject who is subjected to law, and has little power in reformulating it, except through the pre-given channels of law reform. Feminist theory has less frequently asked how law might be reconstructed or reimagined or performed differently.

However, a female subject-driven understanding of state law has been promoted in recent feminist work, for instance through several feminist judgments projects.[46] These projects involve feminist scholars and activists re-deciding and re-writing selected cases with a critical and feminist consciousness. One of the methods of the feminist judgments projects is to diversify the available embodied imaginations of law, and therefore to contest, dilute, and shift persistent legal narratives. The situatedness of legal knowers (both the original judges and the feminist judges) is foregrounded, even if the performance of law in individual instances remains – in keeping with the game of law – often distant and disembodied.

Therefore, adding breadth to the necessarily positioned thinking that is used in legal reason, feminist judgments embody law differently and also bring to the surface the embodied subjectivities of all judicial officers. This places feminist subjects right in the centre of the entangled knowledge production that is state law. In one sense it does not directly change the fundamental conceptualisation of that law: there are still courts, statutes, precedents, cases, decisions. On the other hand, state law is completely altered because (as in the realist understanding) law itself becomes composed of *doings*: active subjects, with their own experiences, interpretations, and narratives. Thus, rather than go in search of the (one true, or best, or entirely objective) law, feminist judges make it.[47]

In a different arena of scholarly activity, legal consciousness studies – at least in the form originally envisaged by Ewick and Silbey – have also contested the

44 Delgado 1988–1989; Watson 2000.

45 Grbich 1992; Hunter 2013; see generally Conaghan 2013b, ch 3.

46 Hunter et al 2010; Douglas et al 2014.

47 See eg Davies 2012.

boundaries between subjects of law and its objective reality. The idea of legal consciousness has a long history in various forms of US theory.[48] The idea was given empirical substance within socio-legal studies, where – instead of referring to the consciousness of judges and legal officials – it was democratised across the narratives of law constructed in ordinary people's everyday lives. It challenges both the law–society and the law–self distinctions by illustrating their mutually constitutive relationship. Not only does law affect individual and collective lives and the nature of social groupings, but social patterns and narratives also constitute the law. Legal consciousness is not only about people's subjective experiences of state law, but also about how people live the law, how they interpret, use, and resist law, and how they embed and re-enact those meanings in their practical everyday settings.

In *Regulating Sexuality*, Rosie Harding argues that legal consciousness studies have an implicit openness to plural and alternative understandings of 'law' and 'legality'.[49] This openness may be underdeveloped in legal consciousness theory, sometimes leading to an overemphasis on state law or a reversion to the assumption that law is essentially state law. If, as Ewick and Silbey argued, legal consciousness refers not only to what people know or understand about law, but also how they themselves make the law in their own lives, then law can never simply be state law but must open out onto different beliefs and alternative normative patterns. Having said that, a more restrictive view of consciousness has sometimes emphasised subjective understandings of state law, obscuring the complexity of normative environments and in particular the ways in which power and social marginalisation are written into consciousness of law. As Harding says:

> a plural approach to legal consciousness studies can help to address some of the limitations of previous legal consciousness research. By explicitly recognising that the 'legal' part of legal consciousness can include structural or normative pressures, as well as 'official' law, a plural legal consciousness framework has the potential to be more sensitive to the position of marginalised individuals in society.[50]

Bringing pluralism and consciousness of law together allows for a much more expansive definition of legality and a more nuanced analysis of everyday narratives of law. Engagement with and resistance to the formal law is refracted through a variety of normative lenses other than the state law itself.

Importantly, for my purposes here, *law and consciousness of law cannot be separated* but must be regarded as mutually constituting. More than that, they are actually different angles on the one plane of existence – interrelated thinking beings in the world produce law through thinking and acting. Mind–body distinctions, or

48 See eg Hunt 1986.
49 Harding 2010.
50 Ibid, 32.

law-in-the-head and law-in-the-world, are crystallised fictions of these interrelationships. Although such studies have focused primarily on consciousness of state law, they open the way for thinking about law as emerging out of intersections between social actors with multiple normative affiliations and institutionalised law:

> Whatever functions or dysfunctions the law serves . . . it often reproduces the norms, activities and relationships that exist independent of law. In this sense, law is a particular re-creation or reinstitutionalisation of social relations in a narrower, relatively discrete, and professionally managed context.[51]

An equally far-reaching (that is, reaching beyond state law) approach to thinking about the subjective element of norm construction is to be found in the work of Robert Cover, and the extensive scholarship inspired by his work. Cover situated the process of norm construction, or what he called jurisgenesis, essentially at the level of communities and their underlying narratives. Law, he argues, cannot be understood separately from the narratives, myths, and patterns of behaviour that shape a community.[52] Communities create multiple and often conflicting normative worlds: in cases where the community is very insular and self-defining, the normative world or *nomos* is an integrated vision 'constitutive of a world'.[53] This is a question of degree – the more loosely organised associations to which we all belong as well as those that have some transformative purpose also necessarily contest and construct law – what it is and what it might be – on an ongoing basis according to their own normative universe. The result for Cover is not unclear law, but '*too much* law'.[54] To speak of unclear law would be to revert to the position that there is one law that speaks with a single voice. Cover's point was rather that each community creates its own law, and that there is therefore a diversity of laws. Courts, in contrast, are jurispathic or deadly to this polyphony of law, because they have the institutionalised power to select from the available norms single authoritative norms, effectively killing off the rest.

Of course, as Post points out, 'The state is not uniquely jurispathic; every nomos exists by virtue of its exclusion and denial of competing nomoi. Jurispathology is in this sense built into the very sociology of human meaning.'[55] As Post argues, all normative worlds (including the liberal state) are both jurisgenerative and jurispathic. The difference between state law and the law created by other communities is essentially that the state has power to enforce its normative

51 Ewick and Silbey 1992, 737; cf Harding 2010, 31–32.

52 Cover 1983, 8–9; see also Resnik 2005; Soifer 2005.

53 Cover 1983, 31. As Judith Resnik points out, Cover emphasised the idea that the *nomos* is a mode of perception or a vision of the world, but downplayed the internal dissidence which characterises many communities and therefore perhaps underestimated the effect of distributions of power within those communities that allow one dominant narrative to suppress alternatives. Resnik 2005, 47.

54 Cover 1983, 42.

55 Post 2005, 13.

interpretations on the community at large with all of its complexities and subsections. Nonetheless, Cover's work is instructive. Considering law at the scale of community rather than that of the nation forces a change in perspective: we do not see law only as a hierarchically authoritative collection of objective norms, but as integrated into a history, a set of narratives, and a range of values that order the world differently in different contexts. The theorist is not simply the expert insider of state law, but a participant in various normative worlds and the observer and interpreter of others.

The state itself can also therefore be seen as the fictional end-point of normative practices, assumptions, and performances. Law and state are the effects rather than the cause of legal performances in an interconnected context of perspectives, relationships, narratives, and imagined worlds. Drawing on Judith Butler's analysis of gender,[56] Richard Ford emphasises the performative nature of jurisdiction – that is, that jurisdiction is the effect of legal practices, as much as the cause of such practices.[57] Jurisdictional limits are practised and performed by legal practitioners and judges, and also by legal subjects undertaking everyday transactions. When I apply for a passport, renew my driver's licence, or register my dog, I am recognising the jurisdiction of the federal, state, and local levels of government over such matters. The jurisdiction is arguably no more than the sum total of these accumulated practices and material contests. We attribute to it an abstract meaning and act as if that meaning simply pre-exists and causes our performance, even though the 'meaning' is the product of our assumption that it actually exists and our practical response to that assumption.

As I have emphasised already in this book, normativity and law generally can be regarded as performative: that is, what we think of as 'law' as a conceptual object is only the effect of a large number of everyday practices and performances situated in particular locations. Law exists as an ideational object because we act *as if* it exists,[58] but its only substance is this mental image and assumption propped up by a variety of material actions and collective behaviours. Kelsen was right to say eventually that the basic norm is a fiction.[59] The fiction does not simply operate at the pinnacle of the system, but rather at every level, in every action, every interpretation, every performance based on law. We are constantly acting as if law has some independent 'reality' rather than being totally reliant on human belief and action. This does not mean that the image or concept of law is *only* a derivative of practice or a fiction: the image informs practice at the same time as practice sustains the image.

Certainly some conceptions, practices, or interpretations of law are more powerful and more uniformly crystallised and institutionalised than others: in Western societies, state law as defined by legal 'insiders' is the entity typically vested with the

56 Butler 1990.

57 Ford 1998, 855–858. Further on law and performance see Davies 1996; Blomley 2013.

58 The philosophy of the fiction as the basis for thought is developed in Vaihinger 1925.

59 Kelsen 1991, 256.

profile of law *per se*, or the central case of the term 'law'. The apparent separateness of this version of state law from alternative legal conceptions is, however, undermined by its social and intersubjective origins. Both the status and the content of state law are reliant on cultural dynamics, and do not pre-exist social engagement: the separation of state law from other forms of law is a construction of, and therefore secondary to, social relationships. Moreover, subjects as law-creating agents are not separately bounded by a single normative space but co-exist across spaces, and cross-fertilise their normative presumptions: even Hart's 'legal officials' recognising and constructing law are also the subjects of socially plural environments.

Posthuman agents

Having raised the relationship between social subjects as constitutive of law, there is no reason to stop with the discursive constructions of subjects and thinly conceptualised notions of performance. Practical iterations of norms are bodily and physical and enmeshed in the material world. As I have argued in Chapters 3–5, we can also therefore think of law as a psychosomatic product, as having bodily, psychological, and indeed neurological dimensions. The law subsists at some level in corporeal subjects in their relationship with physical things, not only because law disciplines the body and acts upon it, and not only because it shapes landscapes and space, but because bodies in their temporal and spatial dimensionality enact, create, and perform law. Bodies perform law in that they act as if it were a real thing, following the motions laid down by an imagined set of norms. But law also emerges from the engagement of human and non-human entities, for instance in the delineation of subjects and objects discussed in Chapter 4. The norms emerging from material repetition and intra-actions might be classified in the first instance as forms of social normativity but they are legal in so far as they interact with formal law and ground it. They are also legal in the extended, 'unlimited', and general senses of law promoted in this book.

The category of the 'posthuman', which has taken such a prominent place in recent theory, seems to lead in two opposite directions: first, *away* from embodiment into the realm of information and the intelligence of computers and machines; secondly, to a *more embodied* state, where the mind and the self are not contained in an individual body, but are socialised and only realised in interactions with the physical world.[60] Both forms of posthumanity remove human consciousness and the understanding of mind from an individual pre-social self, and allow us to see the self as epiphenomenal, an effect or symptom of the innumerable and complex interactions between body, environment, and other subjectivities.

How does non-human agency fit into the subject-generated understanding of law I have been highlighting? My focus in this chapter has been on the ways in which human subjectivities and consciousness can be said to be law-generating. But do physical objects and localities – land in particular – have a comparable

60 See generally Hayles 1999; Braidotti 2013, ch 1; cf Colebrook 2014.

role in constituting law? If an object, say, or a place, is related in multidimensional ways in the human world in what sense can we say that it also participates in the generation of law?[61] Actor Network Theory and Barad's account of intra-activity assert that agency extends beyond the human to the non-human world and arises in the associative states of networked entities or in the dynamics that solidify those entities as such. If this is the case, then it follows that this non-human-centric agency participates in law construction. But how can this be the case?

There have been some theoretical inroads made into the project of analysing the ways in which law emerges from the mutually constitutive dimensions of place, person, and thing, and also – more recently – from the plane of natureculture.[62] Rather than fully engage with that literature here, I would like to approach the question by sketching a series of conceptual steps – from individual subjective law construction to a more distributed and holistic, though entirely plural and material, view.

In the *first* instance, it is important to observe that human-centric expositions of law construction have already displaced the locus of law-generating subjectivity away from the individual into a non-individual social arena. The first conceptual step is from a central locus of law-as-command creation to a dispersed and aggregative, social location. The will of a sovereign, a legislature, or of a judge is less significant in socio-legal domains than the consciousness of groups. While not exactly a general swing back towards custom as definitive of law, such theory certainly promotes an element of common experience and values. Knowledge of law is still held by differently situated individual subjects (as it will always be), but is mediated through experiential, mythological, and cultural understandings that are the product of social relationships (again, as it will always be).

However, reliance on human society alone does not really get at the material depths of these interactions, or the distributed and qualitatively mixed nature of the networks involved.[63] It is a small (*second*) step from this position to a less anthropocentric emphasis on human–non-human networks that allows for things to play a part in the relationships that constitute law. Our networks are not only with other people in an abstract social sense. Rather, we are as thinking bodies situated within and enmeshed in physical locations. In a practical sense this acknowledgement of the non-human in human contexts adds weight to the ethical shift towards giving recognition to objects in order to protect them (and therefore us) – either through attribution of rights,[64] or incorporating stewardship or custodianship values into law.

As I have emphasised in previous chapters, the shift in consciousness away from individualism to community and ecological networks is associated with another

61 I started to consider this question in Chapter 4 and my comments here build on that analysis.

62 See for instance Delaney 2010; Burdon 2011; 2013; 2015; Graham 2011a; Grear 2013; Davies 2015; Philippopoulos-Mihalopoulos 2015; Barr 2016.

63 See generally Latour 2005.

64 I am not generally in favour of the attribution of rights to objects, although I can see that this may serve pragmatic purposes. See Davies 2015.

(*third*) conceptual transition, towards understanding ourselves as *in* an onto-epistemological context, rather than outside it. As knowers, human beings are always and necessarily in their material contexts and can never stand outside as mere observer or controller. Being fully part of existence means that there is an unavoidable horizontality to our interactions, despite the common effort to remain separate and in control.

Our embeddedness in material space and time leads to a *fourth* step, which is that not only are human beings not central or superior to their ecological and material contexts, we are in fact reliant, even parasitic, on them. As Nicole Graham says, '[h]umans are physical beings dependent on and subject to, their only home and ultimate jurisdiction – Earth'.[65]

This recognition of reliance by humans on the earth leads potentially to a fifth point, which is that physical objects and locations can be conceptualised as beyond our ultimate control – they in fact also exercise a kind of agency of their own, as explored in Actor Network Theory and other approaches that acknowledge the coexistence and inseparability of human and non-human worlds. Living non-human entities, for instance, can be seen to relate: they resist, adapt, reproduce, mimic, and exchange – they are not the passive stuff outside human life; they *are* it and engage with it. Non-living physical things may appear less ecologically interrelated but are equally implicated in the extended material-semiotic networks of earthly life. It is possible that use of the term 'agency' in such contexts stretches a word associated with consciousness and choice a little too far: whether or not that is the case, there is a strategic purpose in using the term as it underlines the fact that human beings are objects of the earth as well as subjects in our own constructed domains.

Sixth, and finally, reorienting the human perspective so that our absolute reliance on the earth is uppermost has both a normative and a descriptive dimension. It is the case that human beings are utterly dependent on the earth for our existence. This dependence means that everything in human society, including our law, is also dependent – this is more than a trivial association because, as I have argued in Chapters 3 and 4, law is always material, always placed, and always therefore dynamic. The thick texture of human–non-human co-existence means that there can be no law without these interrelationships. At the same time, the normative angle on this insight of reliance can be framed in several ways. Do we *want* ourselves and the planet to survive as living entities? If so, we need sustainable societies. Do earth's ecologies have value as ends-in-themselves? If so, we need to protect them. More intrinsically, what norms *are embedded* in natureculture? At this point, we need to look to the everyday material practices of socio-physical existence – those imagined, performed, reliant, pathfinding, resistive, reproductive, imitative, or autopoietic actions through which humans and non-humans engage. It is here that we might find patterned and ultimately normalised and normative practices.

The history of colonial property law illustrates some of these matters. The law that exists in particular localities may be either adaptive and responsive, or (more

65 Graham 2011b, 261; see also Hodder 2012.

often in a colonised place) it may be maladapted and universalised,[66] as has been compellingly illustrated by Nicole Graham. When Australia was invaded, contrary to the law of the time relating to invasions, British law was transported across the globe and imposed onto a fragile and complex natureculture continuum.[67] As Graham and others have shown, the resulting ecocide illustrates the extremely problematic nature of the assumption that law, and property law in particular, is abstract and transportable. Relations between people and place that give rise to an adaptive law will result in different, and more sustainable, ecological outcomes than a law that is maladapted, unresponsive, and imposed from a different place. This is because the place itself, its life and character, actively demand an adaptive response. The place resists, engages, and responds. It relates to human actions. Both adaptive and non-adaptive forms of law at any relevant moment emerge from the relationships established between people and locality, though the first relationship is characterised by regarding place as equal or as active in the relation with human agents while the second type of law might be said to emerge from a relationship of inequality or hierarchy – where locality and its attributes are regarded as passive matter to be controlled and the human is misunderstood to be in control of, and superior to, the specific place. In both cases, however, there is a relationship that gives shape and character to law and has consequences for human and non-human co-existence.

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The meaning of law (like all meaning) is social and intersubjective, where 'social' includes the materialities of place, time, and things. While not necessarily denying the social origins of the meaning of law, legal theory has in the past often erased the multiple sites and the dynamic nature of the process of legal meaning making. In my view, even an adequate *description* of law[68] needs an appreciation of both the plural preconditions for any singular account of law and the political nature of the 'acts of definition' that determine monistic views of law (such as the idea that law should be identified with state institutions and state will). 'Horizontal' accounts of law do not necessarily supplant traditional vertical accounts,[69] but they can arguably uncover the pluralities and possibilities inherent in existing notions of law. Such narratives move beyond the traditional legal philosophical distinction between 'is' and 'ought': they are at once descriptive *and* aspirational because they

66 See in particular Graham's excellent account of dephysicalised property law in Australia: see Graham 2011a; 2014. My comments are inspired by Graham's book but I am not sure that she has – or would – make these points in quite the same way as I do here. See also Sarah Keenan 2015.

67 This is not to say that the British law itself was at this time adapted to its own conditions – the result of the enclosures was to remove law from land in its specificity. 'As the law of private property and enclosure objectified or *other*ed land into landscape, the law erased the specificities of those lands as places in its discourse.' Graham 2011a, 67, and see generally ch 3.

68 Assuming that description which does not presuppose normative choice were possible.

69 Lacey 1998, 158–162; Davies 2008.

illustrate how the pluralistic 'non-legal' domain not only intrudes into, but is essential to, the definition and the practices of conventionally defined law.

As I indicated at the beginning of this book, several commentators have promoted the idea of a reinvigorated 'general jurisprudence',[70] which does not confine itself to 'state law viewed from what is essentially a Western perspective'.[71] As Douzinas and Geary say, in its fixation with the concept of positivist state law, '[m]odern jurisprudence has neglected the big philosophical questions'.[72] In particular, analytical legal theory has sometimes failed to see law as thoroughly enmeshed in social life and therefore it has failed to see the need for multidimensional theoretical approaches. Multiperspectival legal theory, by contrast, can be inspired by moving away from the internal and expert perspective to the knowledges based in different legal cultures, quotidian perspectives, and variable, always dynamic, engagements with the physical environment.

70 Tamanaha 2001, xvi–xvii; Douzinas and Geary 2005, 10–11; Twining 2009, 18–21; Conaghan 2013b.

71 Twining 2009, 21.

72 Douzinas and Geary 2005, 11.

8 Imagining law

Introduction

Like all theory, jurisprudence is expressed through a number of metaphors and images that are 'loaded' in the sense that they bring conceptual shape, orientation, and often aesthetic and even normative values to the subject matter. This is unavoidable and a normal part of theoretical language. Individual laws or norms are figured as boundaries, paths, imprints, and spaces, while the imagery for legal systems includes trees, maps, empires, structures, and ecologies. This chapter considers some of the metaphorical contours of legal thought and in particular a significant metaphorical contest. Broadly speaking this contest is between metaphors that suggest singularity and those that suggest plurality. Metaphors suggesting a singular legal system are often also associated with hierarchy, verticality, purity, limitedness, foundation, and spatial enclosure or boundaries, while metaphors suggesting plurality tend to be more relational and present law as horizontal (or flat), networked, ecological, and connective. More interestingly, some metaphors suggest both singularity and plurality, closure and openness, or centre and margins – as in Teubner's description of autopoiesis as 'order from noise' (capturing operational closure and structural coupling) or Santos' promotion of the baroque, the frontier, and the south as metaphors to imagine the human subjects of emancipatory politics.[1]

The purpose of this chapter and of Chapter 9 is to explore some of the ways in which law is imagined through figurative language. As in previous chapters, my aim is not only to present a particular frame through which we can understand law, but also to contest and subvert it in some ways. In this case, the distinction between literal and figurative can be questioned: metaphors for law are not necessarily *only* metaphors, but in some cases may be literal and even physical referents of law. This is perhaps most obviously the case for boundaries and frontiers, but another metaphor I will explore in Chapter 9 is the image of law as a pathway, an idea that conveys a sense of performativity as well as a physical trajectory, which goes somewhere. The idea of normativity as a pathway is often casually used in legal contexts, for instance in the idiom of 'following a rule'. As a metaphor, it has

1 Teubner 1991; Santos 1995.

been developed in some detail by others.[2] Thinking of law as a pathway is useful for theorising the ways in which patterned and repetitive behaviour crystallises into durable normative forms. It helps to transcend otherwise entrenched dichotomies between time and space, singular and plural forms, structure and agency, ideal and material, and collective versus individual action. I also look at some non-metaphorical, entirely physical, legal pathways – those inscribed into the earth and our neurological systems that guide behaviour and thought. In keeping with my emphasis upon conceptual plurality, I am not proposing the pathway as definitive of law or normativity in any rigorous sense. It is simply intended as an indication of law's conceptual multi-dimensionality and as an alternative to the more common boundary imagery.

Metaphors and meaning

Thinking, conceptualising, and abstracting are necessarily and unavoidably metaphorical. As Susan Haack explains, some of the most prominent English philosophers – Locke, Hobbes, and Mill – saw the philosophical deployment of metaphor or any kind of figurative language as an illegitimate strategy that clouded rather than clarified truth.[3] Locke, for instance, thought that figurative language appealed to the emotions rather than to rationality, while Hobbes thought it was deceptive. And yet Haack provides several illustrations of these writers actually using metaphor in the course of their condemnation of it – Hobbes, for instance, entertainingly argued that without using consistent language a person would 'find himself entangled in words, as a bird in lime twigges; the more he struggles, the more belimed'.[4] As Haack and others point out, the Leviathan itself is a metaphor, and as metaphor has been both compelling and enduring. By the twentieth century, many thinkers had become less hostile to such tropes, though some appear to have regarded metaphor as a choice, a tool or device, extrinsic to philosophy itself, to be taken up in the service of explaining or exploring ideas – much like Plato's analogy of the cave, the whole point of which is to argue for a pure and ideal form of truth.[5] Others, however, regard figurative language as pervasive and unavoidable, something that structures and informs thought, rather than being an optional additive to it.[6]

Similarly, twentieth-century continental philosophers have tended to see metaphor as so ingrained in language as to be completely unavoidable. Nietzsche, in fact, went so far as to describe truth as an 'army of metaphors':

> What then is truth? A mobile army of metaphors, metonyms, and anthropomorphisms – in short, a sum of human relations, which have been enhanced,

2 Cooper 2001.

3 Haack 1994.

4 Ibid, 2, citing *Leviathan*.

5 As Le Doeuff says, the 'metadiscourse [of philosophy] regularly affirms the non-philosophical character of thought in images'. Le Doeuff 2002, 6. Cf Haack 1994.

6 Lakoff and Johnson 1980.

> transposed, and embellished poetically and rhetorically, and which after long use seem firm, canonical, and obligatory to a people: truths are illusions about which one has forgotten that this is what they are; metaphors which are worn out and without sensuous power; coins which have lost their pictures and now matter only as metal, no longer as coins.[7]

According to this view, metaphor is not extraneous to meaning, or merely secondary or ornamental, but rather woven in with meaning and concepts – the metaphorical nature of truth is obscured by familiarity, long use, and repetition. But other explanations of metaphor, and imagery more generally, in philosophy give it a more specific function. In the work of Michele Le Doeuff, as Del Mar explains, images point to critical tensions in philosophical texts,[8] an analysis that recalls Derrida's exposition of the undecidability in terms such as '*pharmakon*' (in Plato).[9] This is not necessarily to debunk truth, rather simply to denaturalise it and to place it in the realm of linguistic and rhetorical constructions.[10] As Del Mar comments (summarising and combining Le Doeuff and Marguarite La Caze), 'what makes images philosophy-makers is that they are also philosophy-breakers: they leave many things unsaid, unjustified, to be believed in. Images then, both enable and endanger thought.'[11]

It is not my purpose here to enter into the broader debate about the function of metaphor in language or as an epistemological building block. My points of departure for the following discussion are the following, possibly contestable, propositions. First, metaphor and other forms of figurative language are in fact pervasive and unavoidable in theoretical discussions. We can deliberately choose a metaphor to illustrate a point, but many of them we inherit as figures of speech, and they are ingrained and almost invisible usages. (A point is not *illustrated* by a metaphor, except perhaps by a visual metaphor. A usage is rarely literally *visible* and hence cannot be literally *invisible*.) In many instances it is not possible to delineate clearly the difference between a metaphorical and a literal claim. Second, I assume that figurative language does have a conceptual function – metaphors and analogies do structure cognition and shape our perceptions, including our self-identity. An example is the idea that concepts have *shape* and *structure*, and are there to be *perceived* or *seen*. Seeing is of course probably the most well-known metaphor for cognition and understanding.[12] Third, using another visual metaphor, I take it for granted that it is important to be reflective, as far as possible, about the ways in which language, including its metaphorical content, structures thought. Fourth,

7 Nietzsche 1954, 46–47.

8 Le Doeuff 2002; Del Mar 2013.

9 *Pharmakon*, Derrida notes, can refer both to a 'remedy' and a 'poison'. In Plato's *Phaedrus* Socrates calls certain written texts by this name, thus embedding in the text the ambivalence of writing – as both assisting and destroying memory, for instance: Derrida 1981, 70.

10 Cf Derrida 1982; Bennington 1993, 119–133; Bennington 2014.

11 Del Mar 2013, 48.

12 Rorty 1979; Hibbits 1995.

choices of metaphorical language may provide evidence of and contribute to conceptual and even cultural transitions. One such transition in legal theory is from hierarchical and vertical metaphors associated with a singular and limited law, to horizontal and networked metaphors associated with a pluralist and expansive conception of law.[13] It is possible for theorists to emphasise certain metaphorical constructions rather than others, and thereby to influence, though not entirely direct, conceptual change.

Finally, the presumed gaps between metaphor, meaning, and matter need constant interrogation – many metaphors evoke a physicality in time or space or both that, on one view, is erased in conceptualisation.[14] We do not literally 'see' a concept in the way that we see a tree. But a 'merely metaphorical' understanding may constitute, point to, and emerge from relations between material bodies: when is a 'pathway' merely an idea about something that can be followed, and when is it literally inscribed in the ground, in the brain, or in the coming together of body, space, and iterative time? When is a boundary a conceptual limit or an abstractly defined zone such as the jurisdiction of a particular court, and when is it an uncrossable wall in time and space? The boundary of the self is metaphorically connected to the boundaries of law and state, but these are/have become physical boundaries as well as discursive boundaries. The distinction between metaphorical and literal may appear to be clear in many cases, but it is important always to remember that discourse and physicality are not ontologically separate but rather ideologically separated in Western philosophy. Thus, although I use the terminology of metaphor in this chapter, it is often (but not always) the case that the language can also be understood literally and concretely and that there is an interconnection and mutuality between what appears on the one hand to be a merely discursive association and its physical referent.

'A moderate amount of cacophany'

Throughout much of the twentieth century metaphors for nation-state law emphasised its systematicity, its unity and coherence, its authority, its foundations, its purity, and its boundaries.[15] For instance it has been relatively common for lawyers and legal philosophers to use ideas about hierarchical, and vertical, structures to describe legal authority and validity. We have higher and lower courts, for instance, and Kelsen described a vertical system in which lower norms were authorised by higher norms (though in an inversion, the top norm, the *grundnorm*, became foundational, and basic). Dworkin described law as an 'empire' where the judges were princes.[16] Both Kelsen and Dworkin used an image of 'purity' in association with their view of law – for Kelsen it was a metatheoretical term: he proposed a 'pure

13 See Ost and van de Kerchove 2002.
14 Cf Derrida 1982.
15 See Davies 1998.
16 Dworkin 1986, 400.

theory' of law (not a theory of pure law) which excluded disciplinary impurities such as sociology or history.[17] Dworkin, by contrast, promoted the classical common law view that law 'works itself pure' – a highly essentialist notion of law in which 'there is a higher law, within and yet beyond positive law'.[18]

Such metaphors of hierarchy and singularity were not ubiquitous in twentieth-century legal theory, however. The realist Jerome Frank compared legislators to composers of music, and judges to performers with their various interpretations.[19] Rather than purity and complete harmony in the performance, he noted that it would not always fit together perfectly: 'after all, modern music has taught us that a moderate amount of cacophony need not be altogether unpleasant'.[20] Frank's analysis was incomplete, but pre-empted an entire sub-genre of law and humanities scholarship comparing law and music.[21] This scholarship often takes music as a model or a metaphor for law, but it also – more recently – considers their interaction, for instance in the power of music in setting normative directions, or in the aesthetic and non-linguistic resonances of law.[22] Typically, and possibly unavoidably in Western separatist metaphysics, even these efforts to blur the boundaries between law and music seem on one level to preserve them as distinct spheres. By contrast, Australian Aboriginal law is often referred to *as* song – not *like* music, or interacting with it in some way, but literally as the process of singing: 'Our laws are not written. They live in the song, story or the oral traditions of our old people, our paintings, the life ways, the dance and the land. Law is communicated through the storyteller or song holder.'[23] Although this seems very different to any conceivable Western understanding of law, in particular with its literal identification of law with song, dance, painting, and land, it does point to something that is perhaps buried in Western ideas of law and is slowly being rediscovered – that law is lived, rather than simply limited to an abstract sphere.

Frank's commentary on law and music is an early illustration used by Bernard Hibbits in an article published over 20 years ago to document a change in US legal thinking from visual and architectural to aural metaphors. Other examples are the popularity of describing law with terms such as 'voice' and 'silencing' (in feminist and critical race theory), 'polyphony' (in legal pluralism), and more generally 'discourse', 'rhetoric', 'dialogue', and 'conversation'.[24] Although Hibbits analyses this transition in terms of altered *metaphorical* associations, there is no particular reason to limit it in this way – after all, law is concretely performed, transmitted, and constructed, in part at least, in actual conversations, in physical

17 Kelsen 1967.
18 Dworkin 1986; see generally Davies 1996; 1998.
19 Frank 1947; 1948.
20 Frank 1947, 1272.
21 See eg Weisbrod 1998; Postema 2004; Ramshaw 2013, among many others.
22 Manderson and Caudill 1998; Manderson 2014.
23 Watson 2015, 32.
24 See generally Hibbits 1995.

speech and acts of silencing (for instance in a courtroom), with many of these taking place at once.

It may be right that aural metaphors and terminology were at one point gaining ground in legal thought; however, I would be surprised if this is still the case 20 years later. It is not that aurality (and its association with the passage of time) has been superseded or supplanted, but rather that a range of other metaphorical alliances have been made with law – in particular spatial metaphors, but also corporeal, environmental, and ecologically inspired metaphors. Some of these have been deliberately proposed in an effort to reimagine law,[25] and others have emerged with changing scholarly preoccupations. For instance, Latour's Actor Network Theory offers the image of a network to describe the connections between material nodes (actants) in a specific social field.[26] Latour's work describes relations between the human and the physical as horizontal and equal and, in the context of state law, the distributed empirical associations that produce law.[27] Ost and van de Kerchove also wrote of a transition from law as 'pyramid' to law as a network.[28] In a much more expansive fashion, Andreas Philippopoulos-Mihalopoulos has written of law as an 'open ecology',[29] a notion which also captures the image I have presented in this book, that is, of a law which is emergent from the indivisibility of culture and nature, and from the collapse of taken-for-granted distinctions such as sensible–intelligible and mind–body. Philippopoulos-Mihalopoulos explains the 'open ecology' as combining 'the natural, the human, the artificial, the legal, the scientific, the political, the economic, and so on, on a plane of contingency and fluid boundaries'.[30]

One notable aspect of these legal imaginaries is that the essentially discursive, conceptual, or abstract character of legal tropes is cast into doubt. We see much greater acknowledgement of the interpenetration of metaphor, meaning, and matter – the 'real', natural, physical world is certainly a *source* of metaphors for law (landscape, boundary, ecology), but they are arguably not merely metaphors. The structure of law is threaded into physical reality as relation between human and corporeal, and human and material. The network is a metaphor for law, but it also refers to actual relationships, which are on some level literal physical linkages – law emerges in the associations between people and between people, things, and place. The term 'ecology' has undergone a metaphorical transference from the study of organic connections in general to the study of human legality in places and environments. The etymology of the term (from *oikos*, house or household)

25 Eg Santos 1995.

26 Latour 2005.

27 Latour 2010. Latour takes the field of 'law' as given in this work – it is an essentially pre-defined law. See the critique by Alain Pottage 2012.

28 Ost and Van de Kerchove 2002.

29 Although I cannot enter into a detailed analysis here, my range of 'law' concepts appears to be a little different from those deployed by Philippopoulos-Mihalopoulos. But there are undoubtedly some key similarities.

30 Philippopoulos-Mihalopoulos 2011, 10–11.

suggests that the term is no more figurative when applied to law than it is when applied to biological connections.[31]

Boundaries

Most common, perhaps, is the trope of law as a limit or boundary that encloses a particular kind of space – a space of acceptable conduct, for instance, a jurisdictional space, or the line delineating law from other types of norms: religion, morality, etiquette, cultural expectations, and so forth.[32] Space and boundaries as metaphors are often imported into the conceptualisation of law as imagined limits that line up with rules, carving law into jurisdictional and behavioural spaces. The boundary or limit is a useful image because it can be applied in various ways: to individual laws, to the territory of a nation-state, to a limited jurisdiction (such as the jurisdiction of an administrative court), and the conceptual edges of an entire legal system. Law is conceptualised at different scales as a series of limits or boundaries that enclose a spatialised domain of legitimacy and exclude a range of illegitimate or non-legal others. Any limit of course need not be a bright line, but may have a penumbra;[33] it may be a contestable and indeterminate zone, or a fractal.[34] It may be held in place by force, by iteration, or by simple presumption.

These boundaries of law appear in both actual physical delimitations of space and conceptual or metaphorical limits. For instance, a *physical* limit of law is evident in the border between countries (whether it is marked by a fence, an announcement on a sign, a security zone, or a determinate line in the ocean). Law is also represented in the barbed wire around a prison,[35] the survey pegs demarcating my yard from my neighbour's, the multitude of boundaries carving up real property,[36] and what Schmitt calls 'the *nomos* of the earth'.[37] In fact, Schmitt retrieves an early Greek meaning of *nomos*, later understood merely as law: *nomos* is the word 'for the first measure of all subsequent measures, for the first land appropriation understood as the first partition and classification of space, for the first primeval division and distribution'.[38] The understanding of space and the methods for distributing it vary from one era to the next for Schmitt, but it is the act of appropriating and ordering that creates order and the conditions for government. *Nomos* is not law, but the act of division and appropriation, 'the fundamental process of apportioning

31 *Oikos* + *nomos* = economics, the ordering of the household, an idea only later transferred to national housekeeping: Arendt 1958, 28–29. Arendt also says, however, that law was *between* households, not inside them: ibid, 63.

32 See generally Blandy and Sibley 2010; Bańkowski and Del Mar 2014.

33 Hart 1958, 607ff.

34 Manderson 1996, 1066.

35 Delaney 2010, 21–22.

36 Young 2014, 41–44.

37 Schmitt 2003, 78–79; see also Jacques 2015.

38 Schmitt 2003, 67; see also Lewis 2006.

space',[39] which makes law possible. It is 'radical title',[40] not a multitude of legislative acts and other positive laws. Similarly, Hannah Arendt noted that the derivative word for *nomos*, *nemein*, 'means to distribute, to possess (what has been distributed), and to dwell' and that law originally referred to the boundary between households 'which, in ancient times was still actually a space, a kind of no man's land between the private and the public'.[41]

The association of the physical line or limit with law remains strong: walls, boundaries, fences, and perimeters are often physical reminders and enforcers of law. They elicit a sense of law as an appropriation or taking of space, and align most comfortably with an imperative view of law based on legislation and regulation – the deliberate transmission of law from one rational being or legislature to legal subjects, or the intentional construction of a wall, a statement that the law is here, demarcated *thus*. Legal geographers have written extensively about the relationships between law and material spaces, each being read into the other in a generalised socio-legal-spatial field. Some of these conceptualisations of law and space have been considered in Chapters 5 and 6.

Such physical limits, with spaces on either side understood as inside or outside the rule, legal or illegal, or legal and non-legal, are paradigmatic metaphors for law. I use the term 'metaphor' here tentatively, and with all of the qualifications outlined at the beginning of this chapter. The term on the one hand seems appropriate because we do not ordinarily understand the actual fence, the wall, or the border as laws in themselves. They are regarded as signals or markers of law, which itself has a more abstract existence, or at least – if not entirely abstract – an existence whose materiality is extremely complicated. This complexity seems especially evident in a modern nation-state, where even the simplest and most minimal 'law' is the product of an entire array of institutions, practices, judgments, acts, and pronouncements, always undertaken (in the end) by human agents. Hence actual physical boundaries may appear as only signals of law even though they are its real enforcers, while all law (regardless of whether it is about demarcating physical space) is understood metaphorically as a system of such limits.

Legal boundaries can also be less perceptible, but equally powerful, overlays on the formal spatialised structures: social delineations such as race and gender, networks of influence, propriety, reasonableness, and other less definable sources of differentiation. For instance, a norm may appear on its face to apply neutrally to people, regardless of gender, race, sexuality, or class. Such a rule may be understood to have limits that are *formally* in the 'right' place; it includes and excludes appropriately with no regard to irrelevant difference. Western law no longer says, for instance, that men are in the category of people permitted to vote, while women are not. It no longer says, as it has done in various times and jurisdictions, that places are to be identified with or occupied by one race of people or another. It no

39 Schmitt 2003, 78.
40 Ibid, 70.
41 Arendt 1958, 63.

longer creates and enforces status differentiations demarcating groups of people. (Sex remains as a 'thin' status, compulsorily registered on birth certificates but with little remaining meaning in the formal law of Western countries.) But as feminists and critical race theorists have shown, what works for the 'universal' subject upon which the law is modelled may not work for others. Historical separations and exclusions leach into the present – sometimes they are almost as definitive of social order as they ever were. Legal limits are displaced and fail to line up with all 'equal' citizens, meaning that existing privilege is amplified rather than dulled. There are many examples across many areas of law of the distortion of the formal limits of law by pre-existing social divisions and exclusions.[42] Some conventional legal theory, such as mainstream positivism, would place these effects of social power as outside the law, and in particular outside the definition of law. But understanding that law is composed of a series of limits makes such a view implausible: the limit abstractly created by law does not remain unaffected in the face of social power – it is displaced and even rendered ineffective by power, which therefore must be regarded as integral to law. Boundaries and limits do not work in isolation, but create a web of insides and outsides, together with all of the exclusory and identity-forming characteristics of such spaces.

Two aspects of the law-as-boundary metaphor are noteworthy for my present purposes. The first is the matrix of ideas that links law to the self, and the second is the ongoing interrogation of the non-static nature of boundaries. I will consider these matters briefly in the remainder of this chapter.

First, political and legal theory has often imagined the state and the self in somewhat similar terms. As we have seen, physical lines on the ground and in the air delimit private property, the nation-state, and any number of other spatialised legal entities. Law constitutes these spaces, and is metaphorically constituted as space and limit in its conceptual renditions. Similarly, the human body in the Western legal imagination – with its liberal autonomy and self-possession – is also a physical bearer of law. The edges of the body are a legal barrier, the body is imprinted with law, and even still given a legal status (the last remaining status category of general significance is sex). At the same time, as I have discussed in Chapter 4, the human body and human bodies as collective flesh[43] are the stuff of law – like (arguably) the earth and its spaces, they are the material substance of law.

These physical boundaries – the law of the person in liberal legality – are metaphorically tied to the state as persona. Liberal legality is based on an imaginary in which the self and the legal system are mirror images. Neither is the original that is reflected in the other; rather, they are constituted as one ideal body manifested at different scales. Thus the state/system and the legal subject are both autonomous, rational, bounded, self-determining, sovereign.[44] In this paradigm, the law and the self are imagined in similar ways, but they are ontologically separate – the

42 See generally Ford 1994; Davies and Munro 2013.
43 Beasley and Bacchi 2007.
44 Nedelsky 1990.

boundary is the quintessential defining feature of both law and the self. They are metaphorically connected, or connected through a political imaginary, but nonetheless constructed as distinct. They are, in fact, only two aspects of the much more extensive line-drawing exercise of liberalism.[45]

There are of course several layers to this set of ideas. Most simply, the state is imagined as a 'body politic', the most enduring example being Hobbes' Leviathan. As Kelsen said, seeing the state in this way is 'a result of our tendency to personify and then to hypostatize our personifications', a tendency he called an 'animistic superstition' because it places an imagined being, the state, behind the law as its god.[46] (Kelsen's agenda here was to insist that the state and the law were unified and entirely juristic, in contrast to Carl Schmitt, whose sovereign was precisely the political entity *not* captured by law – but still a secularised theological concept.[47]) In addition to the imaginary that personifies the state, the qualities of the state are read into the person, who is constructed as autonomous and self-legislating.

One conceptual bridge and mediator between state and person is the idea of property – the law is understood to be spatially limited, territorial, jurisdictional, and the person's autonomy is similarly associated with their self-possession, their almost-proprietary control over their body, their labour, and their freedom.[48] This network of associations has been explored in detail by Jennifer Nedelsky,[49] who emphasised in particular the grounding of personal liberty and security in the boundaries offered by property.

It is essential to the notion of the person that s/he is existentially different from law – that difference and the boundaries around the self are at the basis of her freedom. Of course we are always bound by law, but are free to choose not to follow it and suffer the consequences. Moreover, as Nedelsky says, 'the boundaries around selves form the boundaries of state power'.[50] In liberal thinking, where the individual stops, the state starts and vice versa, a principle ideally contravened only where individual action causes 'harm to others'.[51] This separation is integral to the liberal consciousness. We use a common set of images to describe law and the person, but they are fundamentally separate.

The image of law as a series of boundaries delimiting a patchwork of spaces is therefore related through the liberal imaginary to the idea of a proprietary self. The characteristics of the boundary, however, are not at all easy to pin down.

45 Walzer uses a spatial metaphor to describe the entire socio-political field. He says the 'old, preliberal map showed a largely undifferentiated land mass, with rivers and mountains, cities and towns, but no borders. . . . Society was conceived as an organic and integrated whole. . . . Confronting this world, liberal theorists preached and practiced an art of separation. They drew lines, marked off different realms, and created the sociopolitical map with which we are still familiar.' Walzer 1984, 315.

46 Kelsen 1945, 191.

47 Schmitt 1985.

48 MacPherson 1964; Locke 1967.

49 Nedelsky 1990; see also Naffine 1998.

50 Nedelsky 1990, 167.

51 Mill 1909.

Much work has been done to show that a boundary is never a simple two-dimensional line delineating adjacent spaces. Boundaries are permeable, they are dynamic and sometimes quite fluid, they are contingently placed, and they generally require maintenance, sometimes by force. Boundaries are the sites of exclusion by literal and metaphorical border police who decide what or who belongs inside and what or who must remain outside the limit.[52] There are contestations, power struggles, and paradoxes at any frontier that affect or infect the nature of the inside.

Nedelsky argued that we need to move beyond boundary as a conceptual metaphor both for the person and for the law:

> The imagery associated with boundary is too well established, too wall-like, too closely tied to a separative self. We have thought of the problems of the self and the collective in boundarylike terms for so long that they invite no new modes of inquiry; they shield our understanding of reality.[53]

As Nedelsky points out, the metaphor of the boundary obscures the fact that selves are constituted by their connections rather than by their isolation: 'autonomy [is] made possible by relationship rather than by exclusion'.[54] The boundary is an impoverished metaphor, which does not fully capture the social self and, worse, it promotes an unhelpful and gendered image of people as atoms, and of autonomy as being about separation from others. Nedelsky considers whether it is possible to reconfigure the boundary metaphor so that its more positive elements are brought out but argues that a new metaphorical universe is needed for law – in which law, the constitution, the self, and property are all understood in a relational and networked fashion as part of our 'connective responsibility',[55] rather than essentially being defined by permeable or (more usually) impregnable walls.

Mapping legal landscapes

The idea that law is a boundary is powerful and so ingrained that it appears to be inevitable. This set of metaphors works extremely well at the level of both individual legal norms and the entire system (hence its success), but it also brings with it an image of law as somewhat static and disconnected. As indicated above,

52 As Van Houtoum put it, 'To border is an act, it is a process of both internalization/subjectification of the Inside and the Objectification/Verdinlichung/Exclusion of the outside, the Other. The making of Border is the making of a Be-Longing into an Order, an in-group in an In-land, and In-side; and the making of Others, is the making of a be-Longing to an Out-Group in an Out-Land, the out-side. This act of bordering is to be understood as a continual space-fixing process . . .': Van Houtoum 2010, 290.

53 Nedelsky 1990, 176–177.

54 Ibid, 168; Cornell discusses the African notion of uBuntu: 'a person is a person by or through other people': Cornell 2009, 47. For analysis of how the concept is useful in the context of Western feminist debates about care, autonomy, and ethics, see Cornell and van Marle 2015.

55 Nedelsky 1990, 184.

a boundary may be acted upon or altered, it exists within a complex system where limits do not exactly line up with each other, and it contains an intrinsic indeterminacy. All of this means that boundaries are dynamic. Nonetheless, boundaries still, as Nedelsky argues, imply division, separation, and fixity.

Legal geography has also been very productive in generating new ways of understanding law: some of this work deploys and extends the idea of legal boundaries, but much geography scholarship also finds other ways to speak about law and in particular extends law into physical space. Like the 'metaphors' associated with aurality and those of boundaries, analysis of law in terms of landscapes is not entirely metaphorical, especially in recent law and geography scholarship. One point of such work is to connect law with the geographical substance of place and space and to show, in fact, that law emerges from specific actions and interactions in specific locations.

Linking law to maps and landscapes metaphorically is not an innovation. In introducing the task of the 'academical expounder of the laws' in his *Commentaries*, for instance, Blackstone said:

> He should consider his course as a general map of the law, marking out the shape of the country, its connections and boundaries, its greater divisions and principal cities: it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet.[56]

Blackstone's method positions the scholar as cartographer and the law as a landscape to be mapped. The scholar's task is general rather than specific. Fixing the location and nature of 'inconsiderable hamlets' might be supposed to be the work of legal practitioners, but not of academics.

Where Blackstone's cartographer was the scholar of law, for Santos, writing two centuries later, *law itself* was a map of social reality, which was figured spatially: 'In my view, the relations law entertains with social reality are much similar to those between maps and spatial reality. Indeed, laws are maps; written laws are cartographic maps; customary, informal laws are mental maps.'[57] Like a map, Santos argues, law misreads and distorts social reality utilising cartographic choices such as scale, projection, and symbolisation. These choices are essentially representational – they concern how the map/image renders the represented space. Scale is a choice about the contraction of a real space onto the represented space; projection concerns choices about how to render something spherical into something flat; while symbolisation concerns the ways in which features are reduced to a form or style.[58] All three modes of misreading involve political choices. Similarly, Santos argues,

56 Blackstone 1765, 35.

57 Santos 1987, 282; updated version 2002. I have considered the questions regarding scale discussed in this work in Chapter 6, above. For further discussion and critique of the notion that law reflects society see Tamanaha 2001; Conaghan 2013b, 188–193.

58 Santos 1987, 283–286; Valverde 2015, 48–51.

different forms of law structure social space at different scales,[59] forms of legality are based on different organisational perspectives (such as the idea of liberal or as he calls it 'bourgeois' legality), and quite different signifying systems are manifested in different styles of law (for instance, whether law is imagined as distinct from custom or connected to it or whether it is conservative or transformative of political facts).[60]

Thinking about how different forms of law (or scholarship) represent reality is useful, and provides a number of analytical tools to understand the distributions of meaning and modes of exclusion practised by law. Clearly, representations do have political purposes and they also (a point perhaps understated in this article though not in Santos' other work) act on and shape 'reality': as indicated earlier in this book, norms and facts are not separate, since norms (in whatever form they take) so obviously shape and constitute facts while repeated facts exert a gravitational pull that becomes normative. This is particularly evident in relation to law, which has equally representative and constitutive functions. Looked at as a separate structural entity, law does clearly represent and therefore does 'distort' or misread reality. But it also creates and shapes it, and dynamically responds to and even emerges from it.

Emphasis on representation has several disadvantages, therefore, in particular in so far as it separates the representation from its object, and establishes a temporal and ontological priority of some original thing. It often positions the observer as outside the scheme of representation, observing and analysing it, but not responsible for constructing it (though Blackstone did make his role as cartographer explicit). I want to be clear that there is a point and much utility to this story about law as representative of social and conceptual space, but that there are also other ways of understanding law that place it *in* the material world, not as somehow outside it.

The significant innovation of recent law and geography scholarship lies in the ways it has found to disrupt the distinction between an abstract law and physical space. This scholarship has taken a distinctly non-representational and non-metaphorical turn in its rendering of the relationship between law and space. Law structures bodily, social, and physical space, but this is not a one-way relationship. Space and more generally the physical world acts upon and is part of law. I have considered some of this material in earlier chapters, and summarise it again here in order to emphasise the connections between representing/imagining, performing, and constituting law.

The precise nature of the law–space relationship is irreducible to a simple description, and has taken several forms in law and geography scholarship. Most prevalently, law is seen as having material effects – as shaping and defining physical spaces, for instance when electoral boundaries are set, when public behaviour is regulated, or when proprietors are prevented from culling trees. In fact, clearly the

59 For further discussion of Santos on scale, see Chapter 5, above.

60 Santos 1987, 286–297.

most significant state legal impact on physical places is felt through the effect of property law, which, as Nicole Graham has so compellingly demonstrated in her book *Lawscape*, operates through a narrative of abstraction, fungibility, and dephysicalisation – treating all spaces as legally the same, and human life as ontologically separate from the places in which it is lived.[61] The result in colonised areas of the world, where ideas about property were transported away from their European origins, is a property law that is maladapted to place and fails to respond to (or even notice) the quite different conditions in which it is performed. The abstract, entirely self-referential, law has destructive consequences in its neglect of actual conditions. Property does not need to be this way, and indeed, a more responsible and reciprocated relationship between persons and land is possible, as Indigenous cultures throughout the world have illustrated. Graham points towards an adaptive notion of property (and I would say law) in which place matters in normative constructions, rather than being erased and absented from them.

The nature of the connectedness between imagined law, performing beings, and space has also been articulated by David Delaney. Delaney coins the term 'nomosphere' to refer to an interpenetration of law and place:

> 'nomosphere' refers to *the cultural-material environs that are constituted by the reciprocal materialization of 'the legal' and the legal signification of the 'socio-spatial', and the practical, performative engagements through which such constitutive moments happen and unfold.*[62]

Although slightly cryptically expressed, I take Delaney's central point to be that law does not just shape or order space. Rather law *materialises in space* and *space has a legal signification*. Law is the result of performances in time and space – actions of people in, and in connection with, particular localities. Delaney therefore says that we 'are never outside the nomosphere, never free of its effects',[63] which is to say that we are networked into a conceptual and physical space of law. Law is around us in our physical environment, it is also in us as our (legal) identities, and all the same it materialises through performance and is differentiated by place or location (much like the biosphere). In this sense there is no differentiation between law and space – they are co-emergent.

Delaney's nomosphere draws comparisons with more readily (or commonly) observable physical things such as the atmosphere, hydrosphere, lithosphere, and biosphere.[64] This alliance with the objects of science might be thought a little risky – suggesting a normative ether, so to speak, which has its own thinghood. As Mariana Valverde asks, 'do we need a neologism that takes the grammatical form

61 Graham 2011a. I have also considered Graham's work briefly in Chapter 7. The term 'lawscape' has also been used in a somewhat different way by Andreas Philippopoulos-Mihalopoulos to refer to the continuum and difference between law and place: 2007, 8–11.

62 Delaney 2010, 25, emphasis in the original.

63 Ibid, 25.

64 Ibid, 22.

of a noun . . . and thus constantly risks reifying sociolegal relations?'[65] Valverde argues that this is indicative of an emphasis on space rather than time in Delaney's book (though as she recognises, he is careful to avoid making his concept a static one). Delaney's work is nonetheless a significant effort to place the idea of law in terms of spatial materialities, specifically with a view to thinking about the apparent boundaries of the human self and the spatio-legal qualities of bodies. Delaney has, for instance, suggested that a womb is a 'nomic setting' and in this way he promotes an imaginative legal transgression of the boundary of the self which normally stops at our corporeal edges.[66] This insight opens the way for any and all body parts and systems to be regarded as temporal–spatial zones of law – wombs may appear to be particularly politicised and regulated, but so too are spleens, kidneys, genes, and gametes.[67] It may appear that the mind is uniquely excluded from these regulatory and constructive spaces – after all, we are not told what to think. But as I have explained in Chapters 4 and 5, mind and matter are not separable. A performative view of law sees imagined law and its material performance as co-emergent, constantly in dialogue. Indeed, as I have suggested, this patterning can even be thought of as inscribed in the human brain as the neural pathways that are the physical evidence and facilitator of millions of legal micro-actions.

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For these reasons, and to repeat a point I have made repeatedly throughout the book, law's being and our knowledge of it emerge together in legal performance. Legal ontology and legal epistemology cannot be separated, any more than is and ought can be separated. Metaphors and imagined forms shape an idea of law, but these also arise from physical forms. Law materialises throughout our bodies, not only in the form of cognitive abstractions – internalised norms or impositions that discipline the self, for instance – but as the habits and pathways that are laid down by repeated actions or usages. In the next chapter I look at the idea of law as a path as one specific instance of the imagined and physical in the constitution of law.

65 Valverde 2015, 40.
66 Delaney 2010, 61–62.
67 See generally Davies and Naffine 2001.

9 Pathfinding

Introduction

The boundary metaphor evokes primarily *imposed* lines and spatial zones and is in keeping with the predominant twentieth-century view of law as command or as posited directive. Some of the examples I gave of boundaries in Chapter 8 imply *both* ingrained cultural patterns as well as imposition. For instance, the insides and outsides of the privileged spaces of race and gender, and the limits of the body, exist primarily because of long-ingrained social norms that continue to be enforced in many visible and invisible ways. But the boundaries of formal law generally imply the positive creation of a specified zone or region. This is most evident when we think of territorial boundaries that, in the West, are regarded as ideally bright-line decisions, impositions, or sovereign acts. The actions of colonial powers in arbitrarily carving up vast areas of land throughout the world is only one very evident example. The boundaries of the Australian states bear no relation to country cared for by hundreds of First Nations: the states were simply delineated by colonial fiat. By contrast to the trope of the boundary, the metaphor of the path primarily implies practice and iteration. Again, the association is not complete: some pathways are obviously imposed as such – the footpath outside my study, for instance, is the result of a planning decision and therefore differs from the pre-existing songlines that it has obscured. Nonetheless, as metaphor and to a large degree as physical engraving in land, a pathway suggests going over, iteration, and custom.[1]

Paths are suggestive because of their metaphorical resonance, their physicality, and their connection to our very ability to think and act. This final substantive chapter looks at why it is possible to see law as a pathway and whether this conception offers anything useful to contemporary efforts to rethink law.[2] My conclusion

1 A boundary, of course, can also be a pathway. This is most strikingly illustrated in the example provided by Dorsett of the ritual of perambulation – walking the perimeter of the parish once a year in order to embed knowledge of its limits: Dorsett 2007, 141.

2 My very first academic article ('Pathfinding: The Way of the Law') concerned the idea of law as a path – Davies 1992 – but I did not develop the point in subsequent writing. More recent works which look at paths and walking in connection with law include Blomley 2011; Philippopoulos-Mihalopoulos 2015; Barr 2016. Tim Ingold has also written outside the legal context about 'wayfaring' as a mode of being in connection with the route travelled: Ingold 2007, 76; see also Instone 2015.

is that it does, though I would not want to overstate either its power or its utility. It is an alternative metaphor, one that, like boundaries, networks, and ecologies, has a literality in some manifestations. Thinking of law as a path elicits different theoretical forms, but is not itself a theory, or necessarily even a model. Rather it is a way of thinking about law that brings into focus the connection between abstract law and everyday law – whether this is the 'everyday' law of legal practice, or of segments of the community, or of individuals.

The way of the law

Before turning to further discussion of the characteristics of law as pathway, it is worth noting that law and 'path' are connected in several traditions. Both *sharia* and *halakhah*, a Hebrew word for law, mean path or way.[3] Pilgrimages such as the hajj or journeys to various Christian sites have been seen as a connection between body and soul for the faithful, and a mandated part of their belief. There is also a strong connection between the law and walking a path in Australian Aboriginal knowledges, as Irene Watson explains:

> From my Tanganekald and Meintangk standpoint, what I know as law, what I have named 'Raw Law', is unlike the colonial legal system imposed upon us, for it was not imposed, but rather lived. It is a law way, which emanates from the ruwe [land] and connects the collective or mob of First Nations Peoples. . . .
>
> Our ancient laws were not written down; knowledge of law came through living, singing and storytelling. Law is lived, sung, danced, painted, eaten and in the walking of ruwe.[4]

Watson speaks of law existing 'in the walking of ruwe' – this is not a metaphorical path, but a literal way across the land. The term 'songlines' is often used to refer to the coming together of song, land, and walking in Aboriginal law – the songline is not just a navigation method, but also a means of survival, and of living the right way. It is part of the land, but is not only a physical way, because it is also in song, in people, and in walking with knowledge of the land.[5] Any particular songline is only perceptible with the right knowledge and can only be followed by singing the right song. It is (in part) a pathway that exists in the surface of the earth, which has existed since the beginning, and which is known by the repetition of songs, dance, and walking. As described by a current research project, songlines are 'complex

3 '*Sharia*' literally means a way to the watering-place or the path apparently to seek felicity and salvation': Kamali 2008, 2. See also Broyde 2000 (on *halakhah*).

4 Watson 2014, 12.

5 See also Black 2011, 15–16; and Graham's discussion of the Lurujarri trail in Western Australia: Graham 2011a, 199–200.

pathways of spiritual, ecological, economic, cultural and ontological knowledge'.[6] The law is a pathway in the land, and in life, which directs that it is necessary to go this way, rather than that way.

Beaten tracks

Western ontology by contrast separates the spheres of law, land, people, and culture. Law is abstracted from the physical world: people and their civilisations are regarded as separate from their environment. However, these powerful cultural constructions are challenged by a more relational and materialist agenda which has been developing over the past half-century (and some of which I have considered in previous chapters), but which probably has much older origins.

Is there any sense in which we can think of literal, physical pathways as law? (I will turn to metaphors shortly.) To start with a relatively impoverished image, though one familiar to the colonial imagination, we could imagine law ingrained in the land as a sheep track, inscribed by what Davina Cooper calls 'multiple tramping of the same soil'.[7] (I use the term 'sheep track' generically to refer to all such tracks made by repetitive animal movement, human or otherwise.) Such tracks are the consequences of the repeated passing of animals. They may be less evident in open paddocks where the sheep have free choice about where to roam, but often show the right way to go across more difficult terrain. In this sense such tracks are pre-formed in the contours of the land, and worn in by animals. Of course, tracks made by colonising animals such as sheep and various other Europeans are mostly destructive of land and therefore of the Aboriginal law-ways.

Such pathways are not only ingrained remnants of movement, but they bear meaning, as Henri Lefebvre suggests:

> Paths are more important than the traffic they bear, because they are what endures in the form of the reticular patterns left by animals, both wild and domestic, and by people (in and around the houses of village or small town, as in the town's immediate environs). Always distinct and clearly indicated, such traces embody the 'values' assigned to particular routes: danger, safety, waiting, promise.[8]

Lefebvre implies that these pathways are inscribed on land – he says that 'mental and social activity *impose* their own meshwork upon nature's space' and that

6 Songlines of the Western Desert: http://archanth.anu.edu.au/heritage-museum-studies/songlines-western-desert.

7 Cooper 2001, 129.

8 Lefebvre 1991, 118.

'*natural space changes*'.[9] As I have said, however, there is a sense in which the land may pre-form at least some of these tracks by its contours, its dips, ridges, and hollows. There are places to avoid, impassable areas, places where water may be found, where the vegetation is not as thick, where it provides cover from the sun, or places where natural landmarks provide guidance. The track – at least in some instances – may be a dialogue between traveller and land, rather than being a simple imposition. Such tracks are not *entirely* imposed but created in a relation between beings and land. As Ingold says, they can be additive ('the snail leaves an additive trace of slime') but are normally created by the removal of material from the earth ('the wear and tear of many feet').[10]

A celebrated artistic rendition of this phenomenon discussed by Ingold and others is Richard Long's 'A line made by walking' (and other similar works by the same artist).[11] Created by walking and wearing a line in a field by 'multiple tramping' and then photographing the effect, the work evokes both the enduring animal tracks in 'natural' environments created by repetition as well as the straight lines of 'cultural' form. It is an artefact of natureculture constituted by corporeal performance but then represented in photographic form. (This also leaves an indeterminacy about which is the artwork – the performance, the line in the ground, or the photograph?) Tim Ingold says that this example did not entail either removal or addition of material, rather just bending of grass. However, it is clear that very ingrained, enduring tracks do involve removal of material or, at the very least, displacement onto adjacent ground. Olivia Barr focuses on the place making through walking in the image, and suggests that 'what is most striking about this artwork is not only its intense linearity, but also its fragility; all that remains is the image'.[12] It is true that the represented object, a line made by walking, is long gone and may only have lasted a matter of days; however it is nonetheless reminiscent of the enduring nature of all forms of repetitions. Transit patterns, social habits, neural pathways, the *normal* which the line invokes, are often extremely resilient. They engrave regularity onto physical things.

Taking up Lefebvre's term 'meshwork', Tim Ingold writes of tracks and pathways inscribed in the land as interwoven and entangled, rather than being a simple

9 Ibid 117, emphasis added. It might be thought that only land is imprinted in this way, but that does not mean that the sea has no meaning and character. Schmitt said: 'Ships that sail across the sea leave no trace. "On the waves, there is nothing but waves." The sea has no *character*, in the original sense of the word . . . meaning to engrave, to scratch, to imprint': Schmitt 2003, 42–43. However, it is easy to see that the view that the sea is empty of trace may just reflect a land-bound and Eurocentric consciousness. The sea–land division is not this clear for many Indigenous peoples. Butterly, for instance, comments on the superficiality of the distinction between country and sea country: Butterly 2014, 2.

10 Ingold 2007, 43.

11 See discussions by Ingold 2007, 43; Barr 2016, 8–13.

12 Barr 2016, 10.

connector from place to place.[13] Looked at cartographically, from above, they are so, but considered experientially they are 'the trails *along* which life is lived'.[14] Being in the landscape and looking at it from above are different perspectives (as discussed in a different context in Chapter 6), and we may often alternate between them in choosing the right way to go. But the *action* of following or reiterating a pathway is necessarily horizontal and immediate.

Although those of us who live in urban environments might envisage that such worn-in pathways belong essentially to rural landscapes, in fact they are all around us as sometimes personal and sometimes collective transit habits. Of course the majority of these in colonised space are the result of an urban plan imposed on a landscape once imagined as *terra nullius* or a blank slate: this plan lays out its roadways, tunnels, intersections, footpaths, and cycle tracks as officially mandated and often politicised paths for us to follow.[15] There are also other, less formal, urban pathways – short cuts, local knowledges, the personal routes of 'an individual who regularly repeats a series of movements through time-space'.[16] It is common enough to see a beaten track across a piece of grass where collective practice is to cut across an area rather than follow the formal route. Some such routes may be less visible, as people create their own trajectories through the city, circumventing the hierarchy of roads and pathways of the planners.

Planned roadways and beaten tracks reflect a distinction made by Cooper between *de jure* and *de facto* methods of instituting pathways, that is (and like norms in general), they can be made either by usage or by imposition from above. Both methods create paths as norms,[17] where the normative element arises from directive or from repetition and the opportunities and closures that arise from repetition. As Sara Ahmed explains: 'The normative can be considered an effect of the repetition of bodily actions over time, which produces what we call the bodily horizon, a space for action, *which puts some objects and not others in reach.*'[18] In other words, repetitions create routes where the way to go is laid out, normative, and an effort is needed to break out and find a different path. The path is what analytical philosophers refer to as a 'reason for action'.[19]

13 Ingold 2007, 80–81.

14 Ibid, 81.

15 See, for instance, Blomley's in-depth account of the governance functions of sidewalks: 2011.

16 Cooper 2001, 127. For instance, on my journey to work, the painted bicycle lane on the road imposes a particular direction for me on a busy road but, in order to avoid a dangerous narrowing of the road at one point, like others I always veer onto the footpath and follow that for 70 metres before returning to the designated way. At the local tram stop, nearly every alighting passenger who wishes to cross the tracks to walk north bypasses the ramp leading to the designated crossing and takes a large step down from the platform, which is a much more direct route to the crossing. A helpful local resident has placed a concrete block next to the end of the platform to make the step easier to negotiate. Every city contains innumerable such tracks.

17 Cooper 2001, 128; see also Butler 1993, 227.

18 Ahmed 2006, 66, emphasis in original.

19 See generally Raz 1975.

It is not the European habit to think of these pathways in the physical environment as law, but nonetheless they do have a normative element, and are often mandatory, especially if imposed by the state. Once I have settled on a preferred route between my house and the market, and have repeated the walking of this path, embedded it as a habit, it becomes routine, normal, normalised.[20] It may not be a 'law' in the official sense, though it may constitute part of my own personal 'law'. I can change the route as I wish, but there are many reasons I follow it: it is more shady, the footpaths are better, it passes alongside a creek and is away from the traffic, it provides an opportunity to pass by an ancient red gum. I have several choices about which way to take, but local knowledge influences my choice, while state law, and in particular property law, prohibits me from freely choosing any route at all. There would be songlines in the vicinity as well, but as a member of a colonising population I have no knowledge of where they are. As Watson points out, the Aboriginal pathways still exist, buried under the colonial law and colonial landscapes[21] – thus there are a plurality of law paths around us but we do not always perceive them as such, or at all.

There are other physical pathways that we might consider including in the broader category of law. Most interesting perhaps are neural pathways – routinised and visible transit routes in the brain and central nervous system – which are the result of responding to the environment and laying down learning patterns.[22] These are also essentially tracks formed by repeated usage and, like other pathways, they may under some circumstances be changed or diverted.[23] Under normal conditions they promote a certain normative efficiency to behaviour, thought, and memory. Having laid down a pathway in the nervous system via, for instance, cognitive learning and/or repetition of motor skills, the connection that allows the thought or action to be repeated exists and can be followed more swiftly. A large number of such pathways is the consequence of, and also facilitates, our engagement with the world. The mind–body entity is part of its environment; it responds to it, engages with it, and is formed through its repetitions. Most importantly for my purposes, a neural pathway *normalises*, or creates a norm for, a particular action or thought. It is a customary or habitual norm, to be sure, though the original instance may well have taken the form of an imposition from without.

It is unorthodox to include neural pathways in the category of law but this is nonetheless encouraged by contemporary efforts to break down the mind–body distinction by showing the continuities and dialogical relationships between human behaviour, human imagination, and the environment.[24] Moreover, it is clear that

20 Cooper 2001, 127.

21 Watson 2014, 12.

22 I will not pretend to describe the processes which turn indeterminate neural matter into a highly organised system of transit routes for electrical signals, but I understand it to occur via movement and thought, with repetitive use strengthening a circuit and therefore increasing its efficiency or directness. See Rogers 2011, 158–161.

23 Doidge 2007.

24 See eg Malafouris 2013.

our 'external' forms of law, whether the plural systems identified by social scientists, or the everyday forms of narrative and consciousness, are also materially entangled with our neural realities and potentialities. After all, learning *the* law necessarily involves the creation of new pathways in the brain (and students often initially say that they feel divided in two – a legal and a non-legal thinker).

Performing law

The path may, therefore, be *literally* understood as law. This usage is unusual in Western thinking, for somewhat obvious reasons – most significantly that we think of ourselves as people, as communities, and as law creators as above and different from the environment in which we live. Natural law in the West has never had a great deal to do with the natural environment[25] but has rather been about abstractions and supposed universal values. And legal theory generally has also removed law from place.[26] It is only recently, through law and geography, earth jurisprudence, and wild law, that law and place have been reconnected.[27]

It is much more comfortable to think of laws as *imaginary* pathways, for instance in the manner discussed by Cooper, as reiterative hegemonic and counter-cultural practices that solidify and challenge social norms. In the rest of this chapter I simply want to consider, in a very sketchy and outline form, the characteristics of this metaphorical association. As indicated in Chapter 8, I do not consider the literal and the metaphorical to be entirely separate. I should also note that the metaphor of a path is not intrinsically more open or pluralistic than some of the other metaphors mentioned in Chapter 8. Boundaries may be multiple, overlapping, and incommensurable; a network by its nature extends in all directions and is usually seen as somewhat open-textured; and a legal ecology in particular is extremely dynamic and relational. By contrast, a pathway may be seen as rather singular and teleological – a 'straight and narrow' road, for instance, that leads in one direction. Nonetheless, the idea of the pathway helps to clarify certain tensions in legal thought, and in particular allow us to question some ingrained concepts.

In the first place, then, a pathway conveys performativity, that is a behavioural and linguistic iteration that creates a norm.[28] Thinking about law in general, it is of course a multitude of performances, a multitude of people following the complex of pathways already trodden by others, rather than any singular and finite route. Performativity is a useful idea for many reasons in relation to law, and in particular because it bypasses the distinction that has been central to legal theory, between *is* and *ought*, between a static description of an existing and past state of affairs, and a

25 Counter examples might of course be mentioned, for instance the failed Christian effort to link heteronormativity with animals in nature, which has been disproved as more has become known about animal behaviour.

26 Graham 2011a.

27 See eg Delaney et al 2001.

28 Butler 1993.

projection about what should be the case, now and in the future. A law that comes into being by being performed is not only a static enclosure that can be described in one way or another and followed or not. It is brought into being, or at least reinforced, and reimagined, by being followed.

When we follow a metaphorical path we both reiterate the past and create the future – following the tracks left behind, and laying down more tracks for others. Pathways can be regarded as essentially conserving the patterns of previous actors, but they also hold promise for different actions to be pursued, new routes to be found. It is for this reason that Davina Cooper speaks of pathways as potentially transformative, and as useful way of understanding counter-hegemonic and oppositional practices: 'While the enactment of socially marginal pathways may generate hostile, coercive or repressive reactions, they may also produce adjustments in dominant norms, practices and procedures.'[29] The process of creating and following a path may simply reiterate an existing normality, but it can also re-interpret it, or head off in a new direction (which will, of course, only become normalised if it is repeated, and becomes habitual). As explored in Chapter 7, legal consciousness studies also offer resources for theorising the ways in which patterned and repetitive behaviour crystallises into durable normative forms.

The potentially transformative element of a performance or path-finding exercise challenges some other dichotomies that have been central to legal thinking: the distinction between structure and agency, and that between inside and outside. The idea that law is a system or structure that shapes, determines, and limits people's identities, behaviour, and relationships imagines law as a kind of container or, as we have seen, a boundary that is quite separate from the person. Thinking of law as a complex of pathways challenges this thinking because, although there are certainly predetermined routes for agents to follow, the existence of the law is also dependent on the action of following and indeed, as Cooper says, may be transformed by different practices, or by new practices altogether.[30] Moreover, the distinction between law's inside and outside must also been seen as a rather contingent and illusory notion – if law is constituted by peoples' movements through space and time, even a synchronic reduction of it will be highly permeable, and informed by all sorts of 'non-legal' factors.

The metaphor of the path also brings together temporal and spatial dimensions of law: as Lefebvre says, '[t]ime and space are not separable within a texture so conceived: space implies time, and vice versa'.[31] One of the difficulties with the boundary metaphor, as indicated in Chapter 8, is that it imagines law in rather static and essentially spatial terms. Law just is, it does not emerge from anything, or

29 Cooper 2001, 123. Cooper also makes the point that iteration is more transformative than mere disruption: 'The transgressive power of breaking rules and conventions – of trespassing into socially forbidden territory – emanates largely from iteration. This is underappreciated by those activists and writers who see the sudden, unexpected disruption as key.' Ibid, 124.

30 See also Cooper's comments on structure and agency in 2001, 130ff.

31 Lefebvre 1991, 118.

go anywhere. Although we might imagine paths as represented on maps or plans as somewhat fixed, for instance in the example of the urban plan, the emphasis on a pathway as made by use, rather than only by imposition, introduces an unavoidably temporal dimension into law. It is emergent from relationships, including the relationships between humans and things, between minds and bodies, rather than imposed. In this image, a dynamic is integral to law rather than the result of deliberate interventions or imposed change.

Paths are also indicative of connections, between one place and another, between a beginning and an end, or just between people. This sense of the path going somewhere or connecting place to place implies a teleological character – an end-point of a particular act of following – and indeed many iterated legal acts are undertaken precisely to achieve a purpose in an efficient manner, by following a well-trodden and mandated route (like a neural pathway). Having started a process, the end comes into view, and depends on sufficient steps being taken in the right direction along the way. Paths can be created by individuals but they are just as commonly established collectively by people going over the same ground, doing the same thing, and being the same way. In this way, a path connects collective with individual action – the individual follows the normalised pattern established by others. Again, this is not just an abstracted set of instructions but a material way of being in the world, with others, and with the physical environment.

This sense of *following* in path creation and path finding may suggest that the path (or the law) is essentially non-dialogical and reduce the sense in which persons are seen to *interact* in creating law.[32] This may be the case if our image is of a singular pre-existing route that is followed, which always leads in the same direction, and is followed mechanically by people walking in parallel.[33] In reality, however, and as I have tried to show throughout the book, the performances that constitute the law are intrinsically interactive. Person–person, person–place, and person–thing relationships are the material sources of the abstractions we know as law: these interactions consolidate into patterns and maybe paths, which are then iterated, but the interactive element is always necessary to the maintenance and transformation of legality. There is no sense in which a path, or a law, precedes interaction and dialogic relationships.

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Thinking of legality as a path or way helps to transcend otherwise entrenched dichotomies between time and space, structure and agency, ideal and material, and collective versus individual action. The pathway, by contrast to metaphors of hierarchy and boundary, cannot be conceptually tied down to either time or space because a path is necessarily traversed through both time and space. A pathway

32 Thanks to Maksymilian del Mar for making this point.

33 See Detmold 1993, 161.

may separate, but it also connects. Pathways also, interestingly, are a commonly used descriptor of the neurological patterns or connections which form what may be understood as our inner law. These govern our ability to be and to make meaning in the world. As indicated, a pathway may be metaphorical or literal – it does not provide an alternative to existing metaphors for law, but it may add several further dimensions to existing patterns of legal thought.

10 Conclusion

Broadly speaking, this book has addressed the materiality and the plurality of law. My methodological starting point was to try to imagine law without limits, or at least without the pre-set limits given to it by the legal philosophical and pedagogical traditions that associate law with ideas such as the state, or some other form of system, a professional practice, an identifiable concept, or an immaterial thing *other* to the self. This act of unlimiting law has meant questioning its abstract and unified nature, and exploring the many ways in which it can be said to be material and plural. The materiality and plurality of law are of course connected because they emerge from an understanding of the world that emphasises its particularity, its irregularity, and its dynamism. As a theoretical object, law is 'all over' or 'ubiquitous'[1] – in our relations with others and with the physical world, in everyday practices, in formal and semi-formal spaces, in bodily experiences and actions, and as a ceaseless constructive movement or intra-action that cannot be contained, even for a moment.[2] In orthodox legal theory the empirical and conceptual multidimensionality of law have often been reduced to a singular abstraction – a static concept. Although I do not discredit frozen concepts as useful analytical tools, any such reduced version of law must be regarded as a momentary stopping point in an ongoing process of conceptual experimentation. A 'concept' of law is a particular perspective, or the result of bracketing a number of variables, but it is never an end, a foundation, or an entire framework for thought. From this perspective, the history of legal theory can be seen as a history of experimentation with the idea of law, rather than a history of failure to define or capture it.

I have endeavoured to elicit a sense of this materiality and plurality by looking at the diverse spaces, systems, forms of subjectivity, relations, discourses, narratives, imaginings, and things from which norms emerge and are formalised. The norm itself takes different forms, for instance as normalised action (what the common lawyers called usage), legislative fiat or edict, relationality between humans and between humans and the non-human world, narrative, and cultural beliefs. None of

1 Sarat 1990; Melissaris 2009.
2 Cf Barad 2007.

these normative forms are primary or core: they are mutually reliant, but achieve differing degrees of intensity in different contexts. They can be understood differently using different organising themes. Some of these various thematic frameworks formed the basis of the later chapters of the book, where I considered in turn law's spaces, subjects, metaphors, and physical imprints.

Understanding the diversity in both the places and scales in which law exists, and of the subjects and their interconnections that create law and other forms of social normativity, can lead to a more textured understanding of law, one in which the subject is seen to participate in law creation as opposed to simply being the passive recipient of law. Law can be seen as visible and material, rather than abstract and reified. Classical accounts of law have generally assumed that the law is a superstructural and abstract phenomenon, quite separate from persons as persons in their engaged lives. The living human being is absent from the concept of law – s/he is simply the recipient of law, the one for whom it is made, and upon whom it is imposed. Law is a separate object from identity and everyday life. By contrast, the image I have tried to draw out of the resources of legal theory is one in which law arises from the interconnections of subjects and of subjects and objects, and therefore is not separate because in fact it has no existence apart from these relationships.

Theory and activism that reframes law identifies sites other than the state for analysis and engagement. These sites can be expansive and beyond the horizon of the state, or closer to its conceptual centre. In the case of law, a multitude of spaces adjacent to, derivative of, and sometimes partly modelled on state law can be identified in which people find normative meaning and opportunities either to construct or resist law. These can be sites defined and managed by state institutions under the auspices of state 'law' but deploying fluid and participatory norm-creation practices, such as some of those mentioned above: restorative justice processes, responsive and reflexive regulatory systems, truth and reconciliation processes, or community justice centres. Or they can be special-purpose civil society forums such as people's tribunals that step in 'where states fail to exercise their obligations to ensure justice'.[3] They can be culturally or religiously defined sites of law, or 'semi-autonomous' normative orders specific to particular economic or cultural fields.[4] It is tempting, but simplistic, to see all of these spaces as either *deviations* from a core conception of law identified with the state or as *alternatives* that are completely outside the state in some other zone, such as the zone of economics or the private (eg religious) sphere. Whether or not we classify such practices as 'law' and thereby enter into debates about the politics of naming, the fact remains that any separate identity they have is a theoretical and ideological abstraction rather than on-the-ground reality because the subjects who constitute them have multiple normative identifications – to their politics, their religion, their communities, and their nation.

3 Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery, Case no PT-2000-1-T, para 65.

4 Moore 1973.

The plurality and materiality of law is easy to perceive when the limits of law are disengaged and we endeavour to look past the state for theoretical material. But as I hope has become evident, state law is itself a material-plural object. Even taken on its own terms as a separated system, state law exhibits all of the characteristics of materiality and plurality I have been describing. The image of law I have been trying to unfold in the book is not that of an undifferentiated plane of material-semiotic normativity where the state and its law either stand apart as something different or are totally dissolved into a flat sphere of social practice. Rather the law-state entity is a kind of emergent mass within broader constructions of law. The law-state is entirely open in a conceptual and experiential sense in that there is no part of it that is not fully part of the social-physical sphere of normativity I have been describing. This is a result of the fact that it remains a consequence of human interactions in history and in particular places. This is captured most immediately when we refuse to separate completely the meaning of legality from its matter:[5] the physical performances, the interactions in time and space, the articulations, and the imagined forms of law are all integral to its being. These interactions have a flat or horizontal dimension, even though they are often institutionalised and conceptualised as hierarchical. The openness of state law and its entanglement with the world at large sits (in my mind) quite comfortably alongside the fact that it is so often conceptualised as a closed system and achieves a distinctive form and power in its separation from other planes of meaning.

As a general and universal concept, then, law does not exist. Or, perhaps it would be more accurate to say that law (as a concept) exists in the same way that god exists. Institutions are created and sustained, and people act and generate their imaginings, on the presumption that law/god is real and knowable. The existence of law/god is in the institutions and ultimately the actions, performances, and relationships of a large number of people in diverse contexts. In the case of law, this imagined locus of meaning has a real purpose. Countless legal and other universals circulate around the institutions, performances, and consciousnesses of our social life, congealing here and there into definite forms: statutes, interpretations, decisions, declarations, and so forth that make social life possible. Law is the assumption behind, and the accumulated effect of, these diverse practices, but in order for law to have any reality beyond an assumption or fiction it can only be regarded as the practices themselves. It is impossible to extract from the multiplicity of legal forms and particulars a universal concept that will account for everything.

As I mentioned at the beginning of the book, the approach I have pursued is explicitly prefigurative, in the sense that it promotes a future-oriented understanding of law but does not ignore the present and past of law and legal theory. Prefigurative theory is not completely tied to a narrow version of what 'is' nor directed solely at a future 'ought' but attempts to interpret the intellectual resources of the present and past in a way that opens an alternative way forward. Activists who for the moment have put aside the dream of utopia or revolution often engage

5 See in particular the discussion in Chapters 3 and 4, above.

in what they call prefigurative action. There is no reason why we should not also think of theory as prefiguring different patterns of thought, different ideas, different politics. We could also call it performative theory. Indeed, if we want to move away from a view of theory that sees it necessarily as about analysing, describing, or categorising a present with no eye to the future then theory must be prefigurative. Theory must perform, envision, lay down, or suggest a theoretical future, that is to say a future that orders the world and responds to the world differently than before.

Thinking of theory as prefigurative draws on a number of intellectual resources. Most obviously, it draws on (and reiterates) the well-established collapse of the is–ought and fact–value distinctions, which have been precious to jurisprudence as well as to positivist social science generally. It also draws on the contemporary philosophical insistence on the dynamism of concepts, a matter I discussed in Chapter 1. Concepts are increasingly not seen as givens that categorise the material world, but nor are they simply read off the empirical world.[6] Concepts and objects are dynamically related, meaning that researchers can reflexively create meanings that respond to changing material conditions. Writing of concepts of the state, for instance, Davina Cooper has spoken of an 'oscillation between imagining and actualisation' and a 'constant movement, at variable speeds, between the plane of fantasy, thought and dreaming and that of social practice'.[7] Rather than think of the imagined and conceptual as prior to practice or practice as the basis from which concepts are inferred, they are in constant dialogue and in the end are co-emergent. This internal–external flow of meanings and practice seems in many ways self-evident – how can we do anything without a pre-existing notion of what it is we are doing, but how can we have that notion without having already done or experienced something? Nonetheless, it has been difficult to capture theoretically the mobile, emergent, and onto-epistemological character of the concept–practice relationship.[8]

The process of concept formation may be more or less intentional but the key point is that researchers (including empirical researchers) neither find *nor* invent the truth but crystallise it from an inchoate and interpretable substratum. Sociologists have described empirical work as 'performative' in that it *makes* sociological reality.[9] However, it cannot make just anything, because a bad performance of the real would be an obvious and transparent failure of knowledge. But nor is knowledge production just an approximation of reality. Rather, as Law and Urry put it, 'reality is a relational effect. It is produced and stabilised in interaction that is simultaneously material and social.'[10] My approach in this book has been to

6 Haraway 1988; Gane 2009; Smart 2009. On the work of Deleuze see also Barad 2007; Cooper 2014; 2015.

7 Cooper 2015, 89.

8 Once again, I use the term 'onto-epistemology' from Barad 2007 to capture the connections of being and knowing.

9 Law and Urry 2004.

10 Ibid, 395.

promote a range of such relational effects as constitutive of law – law is produced through relations between human actors with their particular ideas about law, and through their corporeal situatedness in a reactive physical world.

Finally, then, what comes next? Theory can never deal urgently with the world's problems, it can never formulate immediate solutions or reforms, and its horizon for change is in the medium-future historical range (of decades or centuries), rather than the short-term near-present. After all, we are still living in and feeling the effects of the expansionist colonial-capitalist individualist mentality that has its origins in the Enlightenment. (I do not underestimate the material and egalitarian benefits of aspects of this change for many people, but it would be extremely one-sided to erase its failures and its victims, which include the planet we are living on.) Despite the medium-term horizon of change envisaged by theory, there are clearly very urgent matters needing attention. Most obviously, the degradation of the earth consequential upon industrialisation, human exceptionalism, and the false presumption of infinite resources is becoming an immediate rather than a future problem. Theoretical reconfiguring of the place of humanity in relation to other beings and to the earth's resources is now visibly an integral part of dealing with these issues – collaborating with, rather than directing, more practical transformations and activist agendas. And within that context, an understanding of law that is responsive and relational, situated within a continuous plane of natureculture and human–non-human, seems essential. In drawing together and hopefully consolidating existing theory, I have hinted at some of the forms this new understanding of law can take. However, the project itself and the socio-political change it involves remain considerable.

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Index

CHAPTER 2

Kafka's Empty Law: Laughter and Freedom in *The Trial*

Dimitris Vardoulakis

A Cage without Walls?

Hannah Arendt's re-evaluation of Kafka persistently defines his works in terms of what it does *not* stand for—Kafka is not amenable to religion or psychoanalysis, he is neither a realist nor a surrealist, and so on. In the midst of this "negative exegetics" the following assertive statement suddenly appears: "Kafka's laughter is an immediate expression of the kind of human freedom and serenity that understands man to be more than just his failures."[1] The power of this claim resides in the connection between freedom and laughter. This may, at first blush, appear counter-intuitive. As even a cursory look at Kafka's work will reveal, the figure of imprisonment is paramount—from the Red Peter in "A Report to an Academy" and the "Hunger Artist" who are both confined to a literal cage, to a series of implied cages, such as Gregor Samsa's room in *The Metamorphosis*. However, as Kiarina Kordela and I have argued elsewhere, this need not be taken as a sign of despair and resignation but rather as a critique of the liberal democratic—and capitalist—sense of freedom that developed in Europe since the seventeenth century.[2] Further, as I have also shown, this critique of freedom in Kafka is presented through laughter. Comic elements become the technical means for the presentation of a revamped notion of freedom. Instead of an idealized freedom that can never be reached thereby leading to a sense of human failure, Kafka proposes a sense of mediated freedom that consists, above all, in freeing oneself from that idealized notion of freedom.[3] Hannah Arendt points precisely to the same nexus between laughter and freedom in Kafka's work.

Such a positive articulation of non-idealized freedom through laughter is challenged when we turn to a work like *The Trial*, where Kafka describes a generalized sense of encagement by the law. *The Trial* presents a man, Josef K., ensnared by an all-pervasive law. As the novel famously opens: "Someone must have slandered Josef K., for one morning, without having done anything wrong, he was arrested" (*Trial* 3).[4] This is a similar beginning to the *Metamorphosis*. A man wakes up to find himself completely trapped. Josef K., like Gregor Samsa, is also in his room. There is the image of the narrow street outside the window as well, although here the outside intrudes because the neighbors from across the

road spy on Josef K. The main difference with *The Metamorphosis* is telling: whereas Gregor is confined in his room throughout the novella, Josef K.'s entrapment by the law disperses over his entire milieu. Josef K. enjoys freedom of movement, but everywhere he goes everyone seems to have already judged him as guilty for something indistinct, unexpressed, unknown. Josef K. finds himself trapped by an omnipresent and omnipotent law—he finds himself trapped in a cage without walls.

The reason for the law's omnipresence and omnipotence in *The Trial* is that the law is empty. As the lawyer Huld explains to Josef K., "the proceedings are not public. . . . As a result, the court records, and above all the writ of indictment, are not available to the accused and his defense lawyers" (*Trial* 113). Josef K. is accused of something, but he is not allowed to know what the accusation is nor the law upon which the accusation is based. The proceedings of the courts, as well, are never made public: "The final verdicts of the court are not published, and not even the judges have access to them" (*Trial* 154). The impossibility of finding the content of the law takes a humorous twist when Josef K. does manage, after a lot of effort, to get hold of the law books of an abandoned court-room, but they turn out to be nothing but dirty books: "They were dog-eared book. . . . K. opened the book on top, and an indecent picture was revealed. A man and a woman were sitting naked on a divan" (*Trial* 57).[5] The book of statutes turns out to be a pornographic illustrated novel. If the law is understood as a proscription—"you shall not do this or that"—then the pornographic content of these law books seems conversely to preach promiscuity.[6] So, not only is the only law book seen by Josef K. devoid of actual laws, its content is also incompatible with the law as such. Such a law devoid of content is, as Patrick J. Glen avers, an "empty norm."[7] This emptiness is what makes the law all the more omnipresent and omnipotent.

Prior to having a close look at the emptiness of the law in *The Trial* it is necessary to contextualize this figure of the empty law. I will do so with reference to Spinoza for several reasons. First, in the manner in which Deleuze emphasizes the laughter in both Spinoza and Kafka, we can say that there is an intellectual affinity, even kinship, between the two.[8] This consists in the determination to counter any ideals, to undermine any universals, with a trenchant insistence on materiality. Second, the *Tractatus Theologico-Politicus* is concerned with the problematic of freedom and the law is presented therein as empty, as pure obedience.[9] Thus, Spinoza's empty law is related to the problem of freedom, just as in *The Trial*. Third, the law's emptiness in Spinoza signifies its liberatory potential.[10] Hence, the detour via Spinoza will provide us with indications of how to identify, in Arendt's words, the "laughter" as the "expression of freedom" in the world of *The Trial* that is dominated by the omnipotent and omnipresent empty law.

Spinoza's Ethical Laughter

In order to present the conception of freedom in the *Tractatus Theologico-Politicus*, it is required to look at Spinoza's description of empty law. The reason is that, as already intimated, it is through the redemptive potential of the empty law that a sense of non-idealized freedom arises.

The affirmation of the emptiness of the law is best articulated by Spinoza in chapter 14 of the *Tractatus*. This chapter bridges the analysis of the Bible offered in the previous thirteen chapters and the analysis of power and freedom propounded in the rest of the book. This is done with reference to the law. Spinoza writes that "the aim of Scripture is simply to teach obedience. . . . Moses' aim was . . . to bind [his people] by covenant" (*Tractatus* 515).[11] Spinoza avers that the Mosaic law is purely functional. Its function is solely to instill obedience as a means of securing a "covenant," or the creation of a Jewish state. Articulating Spinoza's conception of the empty law in terms of existence, we can say that law as means toward pure obedience corresponds to the modality of necessity. The law is necessary for the creation of a state and that's the only function that the law performs. "Moses, by his divine power and authority, introduced a state religion . . . to make the people do their duty from devotion," writes Spinoza in chapter 5 (*Tractatus* 439). The discussion of the handing of the Ten Commandments to Moses in chapter 1 of the *Tractatus* may appear curious since it concentrates on the question of whether Moses actually heard the voice of God.[12] But this is thoroughly consistent with Spinoza's aim to describe the law as purely necessary. The content as such of the commandments is irrelevant. All that matters is that the commandments will be binding and this requires that they be perceived as necessary by the people in need for a legal framework in order to form a state. In other words, all that matters is the functionality of the law—the fact that the law is a means. Thus, even though the ten commandments might have been written on stone, their content was secondary compared to the modality of necessity they enabled to be perceived as God's law—a necessity required in order to allow Moses to introduce a "state religion." The voice of God, as described in chapter 1 of the *Tractatus*, is precisely that modality of necessity that leads to unquestioned obedience.[13]

The modality of necessity that characterizes Spinoza's empty law is accompanied by the modality of contingency. This is related to the fact that the law is conceived by Spinoza as constitutive to the building of sociality. In chapter 14 of the *Tractatus*, shortly after arguing that the sole purpose of the Mosaic Law was obedience, Spinoza writes: "the entire Law consists in this alone, to love one's neighbor. . . . Scripture does not require us to believe anything beyond what is necessary for the fulfilling of the said commandment" (*Tractatus* 515). We see here again that the law is conceived as empty. The function of the empty law—its necessity—consists solely in the love of one's neighbor, insists Spinoza. This neighborly love becomes the constitutive element of "state religion." In other words, it is indispensable for the creation of a community. Spinoza refers here to Paul's assertion in *Romans* (13.8-10) that "Thou shalt love thy neighbor as thyself. . . . [L]ove [is] the fulfilling of the law." However,

just as in the case of the Mosaic Law and the Ten Commandments, here Spinoza again significantly re-interprets—I am tempted to say, "subverts"—Paul's meaning. In the standard interpretation, the love of one's neighbor is the fulfillment of the law in the sense that it points to a universal sense of justice.[14] Spinoza uses neighborly love to refer to contingency instead. When discussing in chapter 3 the universal importance of the Mosaic Law, Spinoza insists that Moses' law was written in order to suit the specific—that is, contingent—needs to the lawmaker/prophet and the people he was addressing at that particular place and time. Or, if law is understood as means, then the law must be adaptable to the given circumstances in which the law is to function. At that point, Spinoza turns to Paul's *Romans*. He interprets the epistle as arguing that "to all men without exception was revealed the law under which all men lived" (*Tractatus* 423). If there is a "universality" to the law, then that "universality" never belongs to one people and is never expressed in one way. Rather, it is a materialist universality, expressed always in contingent terms, related to the living conditions of the people to whom the law applies. Later, when Spinoza addresses explicitly the command to love one's neighbors in chapter 12, he prefaces that by saying that one cannot expect to find "the same markings, the same letters and the same words" in the laws of different people. The "Divine Law" is empty since its content is changeable and it can only be expressed under the modality of contingency (*Tractatus* 508). Thus, any written laws are nothing but "letters that are dead" since statute depends upon the contingent circumstances of the community (*Tractatus* 521). So, whereas Paul presented love as such in order to identify it with universal or divine justice, Spinoza emphasizes instead a love *for*—a love that requires an object that is only ever transient, aleatory, contingent.

The reconfiguring of both the Mosaic Law and the sense of legality in the New Testament are to be understood together. There is, according to Spinoza, a mutual dependency between necessity—the fact that the law's only purpose is obedience—and contingency—the expression of that obedience according to the given, accidental circumstances. The law is empty because it is both necessary and contingent. Or, as Spinoza puts it, "since obedience to God consists solely in loving one's neighbor . . . it follows that Scripture commands no other kind of knowledge than that which is necessary for all men before they can obey God according to this commandment and without which men are bound to be self-willed, or at least unschooled to obedience" (*Tractatus* 511). The contingent expression of the love toward one's neighbor is the fulfillment of the necessity of the law that consists in nothing else than the fact that the law is to be obeyed. Defining the law in terms of such contingency and necessity makes the law a means—a pure functional element. This co-presence of necessity and contingency denominates "state religion" and the theologico-political in Spinoza.

Further, the co-presence of the modalities of necessity and contingency indicates that the emptiness of the law presupposes something more primary. Or, more precisely, there is an element that arises out of the emptiness of the law that cannot, however, be contained by it. This element is associated with rebellion: "faith requires . . . dogmas [that] move the heart to obedience; and this is so even if many of those beliefs contain not a shadow of truth, provided that he

who adheres to them knows not that they are false. If he knew that they were false, he would necessarily be a rebel" (*Tractatus* 516-17). The moment that an excess is perceived in obedience, then it is no longer possible to rest content with its dictates, especially if they are false. This overcoming of falsity introduces an instability in the obedience that characterizes the co-ordination of the necessity and the contingency of the empty law. The emptiness of the law—unquestioned obedience, pure authority—is paradoxically premised on the power of rebellion. "No body politic can exist without being subject to the latent threat of civil war ('sedition'). . . . This is the cause of causes," as Étienne Balibar puts it.[15] Rebellion is excessive of the theologico-political nexus of necessity and contingency but in such a way as to underlie "state religion." Rebellion is more primary than state constitution. But this simply means that the law as means has no end. No matter what specific content the law has, that content is always changeable. There is no telos that defines what a state should look like or what a state should proscribe its citizens.[16]

The rebellious countering of the falsities of obedience is associated by Spinoza with the truth making function of philosophy: "The domain of reason . . . is truth and wisdom, the domain of theology is piety and obedience" (*Tractatus* 523). Truth is excessive of the necessity and contingency that characterize the Mosaic and Pauline laws of "state religion." Or, differently put, truth shows that the means lack an end—there is no teleology in nature, as Spinoza makes clear in the preface to Part IV of the *Ethics*. The introduction of truth leads to the third and last modality of existence, namely, possibility. This is expressed in the *Tractatus* as the theory of power or *potentia* and it is introduced in chapter 16 in terms of a theory of rights.[17] According to Spinoza's conception, rights are the expression of one's possibilities: "each individual thing has the sovereign right to do all that it can do; i.e. the right of the individual is coextensive with its determinate power" (*Tractatus* 527). The search for truth is not an abstract activity but rather embedded in existence. It is linked to the exercise of one's right to realize one's power. The notion of right in Spinoza is incompatible with liberal notions of right, according to which rights point to universal human values. Rather, right for Spinoza is precisely the possibility to rebel when truth interrupts the nexus of necessity and contingency, that is, when truth interrupts the emptiness of the law. Or, differently put, right as power is excessive of, and interrupts, "state religion."

At the same time, it is important to note that Spinoza does not lapse into a utopian vision of a world that could be free from empty law. There is no pure expression of power.[18] Rather, the expression of power requires the presence of the empty law. It is the rebellion against the empty law that allows for the expression of power and hence for freedom. In this sense, freedom for Spinoza is the freedom *from* the empty law.[19] Thus, freedom in Spinoza requires the two modalities of necessity and contingency. Freedom is the breaking of the hold of obedience that they institute—a breaking that is enacted through the introduction of truth. Truth, then, forges the connection with the third modality of existence, possibility, giving rise to Spinoza's theory of power that allows for a conception of freedom not as absolute but rather as mediated.[20]

Spinoza's empty law, then, far from an inescapable encagement, offers rather a redemptive potential. The emptiness of the law relies on the way that the modalities of necessity and contingency are co-present. Within this context, the excessive elements of rebellion and truth point to the modality of possibility. Thus the emptiness of the law indicates that a political being can in fact be conceived otherwise. Freedom in fact consists in retaining this "otherwise"—the possibility of resistance and change. Politics is never finalized. There is no universal determination of the right political value that would determine a telos to the state and its laws. Truth is not an abstract thesis or inference valid for ever. Rather, truth is the enactment of that "otherwise"—the possibility of resisting the current political arrangement. According to Deleuze, this possibility—this power—to arrange human relations "otherwise" constitutes Spinoza's "ethical laughter." Deleuze contrasts that laughter to the irony and mockery that characterize the tyrant, whose purpose or telos is to remain in power. Such mockery is "another way of saying that human nature is miserable," whereas the affirmation of life and materiality makes Spinoza's laughter joyful—a laughter that affirms the possibility of change.[21]

Empty Law without Truth

The empty law of *The Trial* can be understood in Spinozan terms. Specifically, it is possible to understand the emptiness of the law as the conjunction of necessity and contingency. The best place to examine the description of the law's emptiness in terms of necessity and contingency is the parable "Before the Law" that is contained in the chapter "In the Cathedral."

Josef K. goes to the cathedral to meet a customer of his bank. The customer does not turn up. Nevertheless, Josef K. meets a priest who narrates the parable. It is the story of a "man from the country" who wants to be admitted to the law. A gatekeeper does not so much prohibit him from crossing a first gate on the way to the law, as warn him that there are more gates guarded by increasingly ferocious gatekeepers, so it would be better for him to wait for admittance. The man from the country waits for many years, but to no avail. His pleas with the gatekeeper fall on deaf ears. He grows old, his strength and eyesight weaken and as a matter of fact he is about to expire, when a strange thought crosses his mind: How come no one has striven to reach the law all these years, even though everyone wants to have access to it? The gatekeeper responds: "'No one else could gain admittance here, because this entrance was meant solely for you. I'm going to go and shut it now'" (*Trial* 217). This conclusion to the parable fits perfectly the Spinozan framework of the emptiness of the law. We can identify here the necessity and contingency that characterize empty law. There is no proscription against entering the first gate toward the law—the man from the country is free to do so but he is warned against it because of the ferocious gatekeepers that he is bound to encounter further down the road. He does not enter the gate, then, for functional reasons. This functionality determines necessity. Contingency is also present when the gatekeeper asserts that the entrance to

the law "was meant solely for you." From this perspective, the law articulates itself through its contingent relation to the subject. The law is not universal but rather suited to the specific circumstances of the man from the country. The combination of necessity and contingency delineates an empty law in the parable that is amenable to the Spinozan conception of empty law.[22]

The affinity with Spinoza is complicated, however, when at the end of the exchange with the priest the question of truth arises. Josef K. avers that it is not possible to understand everything that the priest is saying as true. The priest objects that the category of truth is inappropriate: "'you don't have to consider everything [the gatekeeper says] true, you just have to consider everything necessary.'" Josef K. can be read as conceding the point to the priest when he says that, when truth is separated from necessity, "'Lies are made into a universal system'" (*Trial* 223)—although I will return to this assertion in the following section to explore a different interpretation that retains a Spinozan possibility of resistance.[23] The gatekeeper's articulations determine the law as both contingent and necessary—they determine the law as empty. The separation or disengagement of truth from the empty law creates a dualism, which entails that, in Spinoza's terms, the possibility of freedom is eliminated. The man from the country is presented as being absolutely obedient. Without recourse to truth, he has no recourse to any methods of resistance to the contingent and yet necessary pronouncements of the gatekeeper. Separating the emptiness of the law from truth leads to a different understanding of truth than what we discovered in Spinoza. Truth no longer resists teleology. Or, differently put, truth no longer points to the possibility that the political can be configured "otherwise." Therefore, the way that the empty law is construed as disengaged from truth has repercussions for how the third modality, possibility, can be understood. Possibility is inscribed here as the impossibility of searching for the truth, and hence the impossibility of resistance. Spinoza's rebellious stance is excluded from this construal of power. The fact that the law is empty means that the law is inaccessible, and therefore the representative of the law speaks with a necessity that has absolute authority. The empty law that relies on a necessity without truth can take three guises: a theological, a biopolitical and a moral one.[24] I will examine these in turn.

The incontestable authority of a law devoid of truth can spawn a theological reading of *The Trial* because such a law in *The Trial* draws its power from the fact that it is both invisible and thoroughly pervasive. The invisibility and all-encompassing nature of the law in the *Trial* has often been given a theological interpretation.[25] Passages like the following do seem to allow for such a reading: "'[Everyone is] in agreement . . . that the court, once it brings a charge, is convinced of the guilt of the accused, and that it is difficult to sway the court from this conviction.' 'Difficult?' asked the painter [Titorelli], throwing one hand in the air. 'The court can never be swayed from it. If I were to paint all the judges in a row on this canvas and you were to plead your case before them, you would have more success than before the actual court'" (*Trial* 149). The judges can be understood as metonymies of the divine that, as Augustine demonstrates in his *Confessions*, never responds despite the appellant's pleads.[26] Or, one can under-

stand the judges' absence in negative theological terms, as the absence that makes the presence of their universal judgment possible.[27] What such readings have in common is the supposition that there is a universal dimension to the law that is visible in the universal ascription of guilt. We have here a fallen world because of an original sin. The law is legitimated through such a universalized guilt. And yet, we have already seen that the law's emptiness requires the contingent. How can the law be both contingent and universalized?

The answer is simple enough and it leads from a theological to a biopolitical construal of authority.[28] It is not the content of the law that is regarded as universal. Rather, the emptiness itself of the law is universalized. For instance, no one knows the content of the law that has Josef K. arrested. In the absence of content, everyone in the novel becomes a guardian of the law.[29] Thus, when Titorelli says that the judges are invisible, this is not because the judges are hidden and their judgments assume a universally true content, but because they are everywhere and their judgments are arbitrary. Everyone is a judge, everyone condemns Josef K. from the very first moment of his arrest without charge. In the absence of any justification or legitimacy based on a sense of legality, their judgments are capricious, contingent upon their mood. And yet, their judgments are simultaneously all the more uniform and universal—they all pronounce Josef K. guilty. The effect of this universalization of contingency is that the law is dispersed and all-encompassing—it is omnipresent and omnipotent. Here, everyone is a proxy to the law, everyone is a legitimate judge. Such a dispersal of the law seeking to take control of the everyday characterizes biopolitics, according to the last lecture of Foucault's *Society Must be Defended*. Foucault expresses this idea in one of his examples: "Ultimately, everyone in the Nazi State had the power of life and death over his or her neighbors, if only because of the practice of informing."[30] The dispersal of an empty law makes judgment legitimate and yet also completely arbitrary and thus an instrument of the exercise of unlimited authority. Law's emptiness—the absence of a content to the law—can become the ultimate trick that authority plays, namely, dissimulating a denial of content only so that everyone is forced to supply arbitrarily content every instant anew, and yet always with the same result—ascription of guilt. The emptiness of the law is universal, but in biopolitics this is understood as the license for everyone to pass an arbitrary judgment—that is, a judgment without concern for truth. In this sense, the prison without walls represented in *The Trial* can be viewed as the perfect depiction of the repressive emptiness of the law. This pure authority of the empty law is only possible because the law is dissociated from truth.

There is a final turn to the mechanism that disengages authority from truth, thereby foreclosing the possibility of freedom. This consists in the introduction of morality as the law beyond or above the legal system.[31] As has already been shown, the universalization of the law's emptiness means that the judgments passed are arbitrary—everyone regards Josef K. as guilty, even though none relies on a definite content of the law. There is no process whereby guilt is tested by evidence—there is no "natural justice"—and hence the very idea of a state law becomes dubious. Maybe, then, we are not dealing here with law as statute but rather with law as an unwritten moral imperative. Immanuel Kant describes

such a moral imperative in the *Groundwork of the Metaphysics of Morals*.[32] He defines a categorical imperative that can never be given any steadfast content, but it is rather the principle that should determine action "as if" one knew at any time what that content were. It is this "as if" that gives the empty moral law its universal dimension. In *The Ethics of Reading*, J. Hillis Miller examines this empty law by analyzing one of Kant's examples, namely, the proscription against making empty promises—the proscription against lying.[33] Miller shows that Kant cannot determine whether the proscription articulates this empty law through a contractual agreement between humans or through reference to a transcendent law. Both possibilities are necessary and yet they contradict each other.[34] Or, in the terminology used earlier to describe Spinoza's position, an empty moral law is caught in a double bind that is called to decide between contingency and necessity—and yet, it cannot make that decision without annulling its emptiness. Miller compares this Kantian conundrum to Josef K.'s assertion that "Lies are made into a universal system," and infers that "Whether I intend to lie or do not intend to lie I lie in any case."[35] The separation of truth from the empty law indicates a space of judgment and law beyond the legal system—it signifies morality. Nevertheless, the incapacity of that morality to decide between contingency and necessity articulates itself as a lie, thereby contradicting its own moral proscriptions. In other words, the empty law without truth of morality appears as nothing other than a persistent lying. It would be easy to infer at this point that such lying creates a "world order" that represents a lamentable existential condition.

The theological, the biopolitical and the moral interpretations of Kafka's law all lead to despair and a profound sense of failure. In all these construals, Kafka is presented as the most tortured of tortured authors, the most sublimely tragic figure. Guilt is inescapable, there is no possibility of resistance and everything turns into a lie. There is nothing more foreign to Kafka's laughter than condemning the human to such a fallen world with a dispersed power of control and a moral law that exists only as a lie. Such an existential despair is a direct result of separating empty law from truth, which produces a dualism that can be articulated in different ways—theological, biopolitical, moral—and yet with the same result: absolute imprisonment. Deleuze and Guattari note that *The Trial* presents "the law as pure and empty form without content" (*Kafka* 43). They describe this emptying of content as the law's transcendence that posits "a necessary connection of law and guilt." They continue: "Guilt must in fact be the a priori that corresponds to transcendence. . . . Having no object and being only pure form, the law cannot be a domain of knowledge but is exclusively the domain of an absolute practical necessity." They point out to the priest's separation of necessity from truth as the presentation of such a transcendent law (*Kafka* 44-45). The transcendent law that cannot be known, the law that cannot be related to truth, is absolutely necessary because it ensnares the individual in perpetual guilt.

As opposed to this lamentable condition of humanity Deleuze and Guattari insist on a different possibility. They argue that the discovery of Kafka's laugh-

ter leads away from dualism and the ensuing despair—and even leads toward the discovery of a promise of freedom in Kafka's writings.

The Laughter of Freedom

The possibility of such a promise of freedom through laughter can only be discerned by remaining attentive to how truth is re-figured in *The Trial*. We need to return to the separation of the empty law from truth, as it is expressed at the end of the exchange between the priest and Josef K. Citing the passage in its entirety is required so that an alternative interpretation can emerge that no longer leads to despair:

> "The man has only arrived at the Law, the doorkeeper is already there. He has been appointed to his post by the Law, to doubt his dignity is to doubt the Law itself." "I don't agree with that opinion," said K., shaking his head, "for if you accept it, you have to consider everything that the doorkeeper says as true. But you've already proved conclusively that that's not possible." "No," said the priest, "you don't have to consider everything true, you just have to consider everything necessary." "A depressing opinion," said K. "Lies are made into a universal system [*Die Lüge wird zur Weltordnung gemacht*]." K. said that with finality [*abschließend*] but it was not his final judgment [*Endurteil*]. (*Trial* 223)[36]

As seen in the previous section, truth can be separated from the empty law because truth is understood as something universal, unrelated to the possibility of resistance and of seeing the world "otherwise." A different understanding to truth starts arising by noting that the distinction between "finality" and "final judgment" in Josef K.'s assertion introduces a sense of interruption. Josef K. says that lying is a universal principle in conclusion (*abschließend*) but this is not his final judgment since that would have consisted in an endless guilt of the human who, after shedding the yoke of a repressive content to the law, is now even more repressed than ever. This leads inexorably to a lament for human suffering in the state of lying. But by not articulating his final judgment (*Endurteil*), Josef K. interrupts that ceaseless lament, refuses to see humanity as being in a state of perpetual suffering and hence does not seek consolation by the priest.[37]

This interruption is the first move toward retaining a notion of the truth. In fact, such a notion of truth can be gleaned from what Josef K. says about lying. The crucial move is to resist the interpretation that lying—as it is expressed by Josef K.'s formula that "Lies are made into a universal system"—points to the separation of truth from the empty law. In other words, the notion of lying suggested in Josef K.'s statement should not be seen as an apposition to the priest's assertion that what the gatekeeper says is necessary but has nothing to do with truth. When lying is seen as related to truth then lying leads back to the possibility of resistance and the mediated freedom that we discovered in Spinoza.

So, how does truth re-inscribe itself through the figure of lying so as to assert the possibility of freedom? The first point to note is that Josef K.'s statement can be taken to denote a process. "*Die Lüge wird zur Weltordnung gemacht*" does not simply mean that lies are becoming a universal principle, but the process of lying is such a principle. Understanding lying as a process is important because it opposes the presupposition of the priest's previous statement, according to which the gatekeeper's articulations do not pertain to truth but only to necessity. The priest presupposes—and that is what the rejection of the link between necessity and truth amounts to—that truth is universal, or that truth needs to be understood in terms of an assertion of a universally true content. Josef K. responds that lying, as a process, describes how the world is. Understanding lying as a process amounts to a rejection of the premise that truth is to be defined in relation to a content. Instead, Josef K.'s statement allows for an understanding of truth as that which is allowed—that which is *possible*—in relation to the lying that pervades the world. In other words, lying is understood as the untruths of the contingent expression of empty law—as the falsities against which, as Spinoza insists, rebellion is necessary.

Understanding lying—and hence truth—as a process, affects the way the relation between contingency and necessity is understood. When the gatekeeper tells the man from the country that this entrance to the law is only for him and that he will now shut it, the gatekeeper, as already intimated, affirms the contingency of the law as it is applied to the man from the country. But what exactly does the shutting of the entrance mean? From the perspective that seeks to separate the empty law from truth, the entry to the law is barred because the law is empty and it is this emptiness that is universalized. In other words, even though the entrance is solely for the man from the country, still the shutting of that entrance pertains to the guilt that is ascribed to everyone. That is why, also, there is no process here—Josef K. was judged as guilty from the moment of his arrest because everyone is guilty *ab initio*. Conversely, allowing for a relationship between the lying or untruth of the law's articulation and truth highlights the impossibility of eliminating process. The relation between contingency and necessity is not resolved—or, dissolved—in a universalized state that is separated from truth. Rather, it is a relation that is infinitely negotiable, continuously evolving and transformable. It is a relation pregnant with possibilities. There is an agonistic stance articulated as the opposition to any form of occlusion. In this construal, the gatekeeper does not guard access to the law as such—if such a thing exists—but rather to the solidification of the law. The gatekeeper suspends access to the law so that the law can remain open and transformable in its contingency. He shuts the entrance to the law so as to avoid any misunderstanding that the empty law can be attributed a telos. From this perspective, the gatekeeper functions as Spinoza's figure of the philosopher, whose role is to resist blind obedience to the law. It is as if he is telling the man from the country to stop hanging around the gate, submissively waiting for an entrance to the law, urging him instead to rebel. Such a rebellion should be understood in Spinozan terms, namely, as the admonition to stop seeing the empty law as a tool that leads to absolute obedience.

This agonistic stance can be seen as a rebellion against universality. It will be recalled that the universalization of the emptiness of the law is a defining characteristic of the empty law without truth and it results in arbitrary judgments. According to biopolitics, since the law is empty, then everyone can pass judgments, even though such judgments are completely arbitrary. The shutting of the gate is a different form of judgment. It is a judgment that is no longer arbitrary. Rather, it interrupts the process that makes judgment arbitrary. It does so by severing the link between necessity and universality. Or, it is a judgment that insists that a sense of truth is possible, even only as the process of agonism against untruth, against obedience, and against an empty law whose transcendence creates universal guilt. To express this in yet another way, the judgment here inscribes itself as the interruption of occlusion, and hence as the interruption that allows for process to continue.[38]

The possibility of such a sense of judgment is the form that power takes in its agonistic opposition to empty law without truth. Kafka presents Josef K. as arriving at this sense of power, but also as being unable to recognize it. (I will describe shortly the Kafkaesque laughter arising from Josef K.'s inability to recognize the possibility of such a sense of judgment even though he has already arrived at it.)[39] At the end of the dialogue with the priest, Josef K. asserts that "*Die Lüge wird zur Weltordnung gemacht*." The way that the world is organized consists in lying, avers Josef K. here. The corollary of this assertion is that truth is not universal, or, even more emphatically, that there is no universality as such in the world order. Josef K. says this in conclusion to the conversation (*abschließend*) but not so that he makes it into a final judgment (*Endurteil*). It would be recalled that, according to the interpretation that separates the empty law from truth, this concluding remark does not arrive at a final judgment in the sense of an incessant lament for the ineliminable guilt of a "humanity" faced with a transcendent law. But this concluding to the conversation can be read in a completely different way. It can also be taken as the reiteration of the gatekeeper's gesture of shutting the door in the face of the man from the country. The remark that lying is the order of the world is, literally, a shutting up, an *Abschließen*. Josef K. asserts the possibility of an interruption of this process—this dialogue—so that he is not led to the final conclusion that the possibility of judgment (*Urteil*) has ended and is substituted instead by lament. It is a shutting up that allows for the continuation of the process. This process continues because the shutting up affirms an agonistic stance against a final judgment—a judgment about the universalization of contingent necessity that eliminates truth. At the point that Josef K. stops the process that is intended to suspend all process, at the moment that he interrupts the disempowering gesture that separates truth from necessity in order to universalize arbitrary judgment, Josef K. asserts his potential, assumes his power and responsibility. In Spinozan terms, Josef K.'s observation about the pervasiveness of lying is an assertion of his power (*potentia*), an act of resistance against an empty law devoid of truth. This is not a sense of freedom as the opposite of the imprisonment in guilt that is the outcome of a transcendent law. It is, rather, as Deleuze and Guattari put it, a "line of escape and not freedom" (*Kafka* 35). In other words, it is a sense of freedom that

operates in a register that is different from that of a law without truth. In fact, it is a liberation precisely from that false promise of freedom contained in transcendent law. This is not an absolute freedom from imprisonment and guilt, but a freedom that is *mediated* by its agonistic relation to that illusory sense of absolute freedom. Josef K. liberates himself *from* the universalization of empty law. He is free *from* the illusory promise of a universal freedom that the empty law without truth offers.

If such a potential has been reached, if Josef K. has discovered the possibility that he has at his disposal in order to adopt an agonistic stance against the all-pervasive biopolitical power, then how can we explain the fact that Josef K. does not grasp that possibility, does not realize that potential? Why does he not recognize this mediated freedom?[40]

There are two crucial aspects to answering why Kafka does not present Josef K. as aware of being free from the unknown accusation that ensnares him. The first aspect is Kafka's own circumspection. Kafka is cautious to pre-empt any illusion that a sense of freedom is still possible when the empty law is separated from truth. There is no theological sense of enlightenment that discloses a spiritual freedom, nor is there a sense of universalized freedom that adheres toward the biopolitical paradigm, nor, finally, an individual freedom within the confines of a moral law. What all these senses of freedom presuppose is the separation of an empty law from truth. Obedience to the law is always seen as a lack of freedom, as an instance of absolute obedience that curtails the individual. They all presupposed the dualism of absolute freedom versus absolute imprisonment. Presenting Josef K. as liberated from the unknown accusation that an omnipotent and omnipresent law leveled against him would have run the danger of appearing as if a sense of absolute freedom from the empty law can be achieved. That would not have been merely a utopian conclusion. Further, by accepting the presuppositions of the separation of empty law and truth it would have affirmed the primacy of that separation itself—thereby asserting the priest's position, according to which the empty law is separated from truth. Absolute freedom is not the opposite of the absolute imprisonment that characterizes transcendent law. Rather, absolute freedom and absolute imprisonment operate within the same dialectic of transcendence that produces an empty law devoid of truth. Kafka wants to avoid any confusion between such a notion of absolute freedom and the mediate freedom that is the immanent expression of a freeing oneself from the guilt induced by transcendence.

Besides wanting to resist any misconception that such an absolute sense of freedom can be achieved, there is a second aspect as to why Josef K. is not presented as aware of being liberated. As already indicated, Josef K. has already reached a sense of freedom different from the absolute—and thus unreachable—freedom presupposed by the separation of the empty law and truth. We saw the discovery of that sense of freedom in the conclusion to the conversation with the priest. The finality of his conclusion to the exchange, his *Abschließen*, it will be recalled, is a form of interruption, like the gatekeeper's shutting of the door. What this interrupts precisely is the universalizing impulse that requires an understanding of truth, no less than of freedom, as absolutes. Josef K. concludes

without a final judgment, resisting occlusion in such absolutes. Such an interruption posits a sense of freedom *from* the discourse that understands both freedom and truth as absolutes. And yet, Josef K. remains unaware of it. Like the man from the country, he appears in this occasion, when he finds himself before the empty law, a bit naive, a bit unsophisticated, a bit too obedient to recognize that authority can always be challenged—indeed, that the possibility inherent in making judgments that stake a claim to truth is precisely the challenging of the necessity of authority. Josef K.'s ignorance of what he has achieved is an expression of Kafka's humor.

Kafka laughs with Josef K. by presenting him as having arrived at the conclusion but without being able to recognize it. The entire novel then appears as a joke at the expense of Josef K. The joke consists in the fact that Josef K. constantly strives toward complete liberation—to be granted "complete acquittal," in the vocabulary of *The Trial*—and yet he never realizes it because such an acquittal is unattainable. But the reason is simply that he was looking for the wrong thing—namely, absolute freedom. Everybody was warning him that "complete acquittal" does not exist. Absolute freedom is the chimera that imprisons the subject. Josef K., the bank manager who dresses up like city dandy—someone who aspires to a high social and economic status—acts like the man from the country, an unkempt buffoon with dark nasal hair.[41] We have, on the one hand, someone who is meant to be "in the know" and, on the other, someone who is meant to be ignorant of the ways of the world. They form a comic pair because they are set up as complete opposites, and yet they ultimately appear not dissimilar. They are not only presented with the same task—the attempt to comprehend their relation to the law—they also both fail to see that their relation to the law points to action and truth. They fail to see that there is no inner sanctum of the law that can be reached. There is no absolute freedom. Rather, it is the enacting of their relation to absolute freedom that is a liberation *from* that sense of freedom. Their task is to liberate themselves *from* the emptiness of the law devoid of truth. They both arrive at this conclusion and yet they both fail to see it—until it is too late. The sentence of Josef K. to die "like a dog" recapitulates the erasure of the distance that separates him from this comic pair—the dandy banker lapses into animality and to country ignorance, he descends from his lofty position and thereby meets the animal or a representative of the most low stratum.[42]

Arendt's assertion discussed at the beginning of the chapter makes perfect sense from this perspective. Arendt noted that Kafka's laughter points to a sense of freedom that "understands man to be more than just his failures." Josef K. has indeed failed to recognize his liberation from transcendent law. But this failure is articulated as laughter. Kafka's humor is *immanent* in Josef K.'s failure. This takes two guises. First, it is immanent in the sense that it points to a sense of being that is not reliant on transcendence. One cannot laugh when one is confronted by transcendent ideals—a heroic endeavor toward something lofty and ideal is never meant to be funny. Indeed, laughter is a physical symptom, a bodily expression, that does not point to anything high, anything transcendent. No wonder that it has always being associated with "low" literature.[43] Kafka em-

braces that low literature—or what Deleuze and Guattari call "minor literature"—that is meant to provoke laughter in the reader.

The second aspect arises when it is recognized that even if a heroic deed that aspires toward transcendent ideals is not meant to be funny, it still can appear laughable. In other words, the failure to live up to transcendence can be subject of laughter.[44] In fact, as we have already seen, Deleuze calls Spinoza's laughter "ethical" precisely because it is an opposition to forms of transcendence that constitute attempts at imprisonment. Deleuze and Guattari raise an equivalent point when they discuss Kafka. They argue that even though Kafka presents an empty, transcendent law that is absolutely necessary in *The Trial*, still "the humor that he puts into it shows an entirely different intention" (*Kafka* 43). In fact, Deleuze and Guattari argue that the empty law without truth is "a superficial movement" in Kafka's work that is needed because it "indicates points of undoing, of dismantling" (*Kafka* 45). What is being dismantled is the structure of transcendence that separates necessity from truth, thereby leading to absolute authority. Laughter performs such a dismantling, or "even . . . a demolition," as Deleuze and Guattari emphatically put it (*Kafka* 45). In other words, laughter leads to an empty law that is conceived in terms of its immanent relation to whoever is before it. Thus laughter functions as the *means* for the expression of a freedom from the empty law without content. In Kafka's world, laughter is the conduit to freedom. The one who laughs at Josef K.'s perennial guilt is Spinoza's necessary rebel who interrupts the nexus of contingent necessity by recognizing its falsity.[45]

Notes

I would like to thank Norma Lam-Saw and Aleksandra Ilic for reading and commenting on this chapter.

1. Hannah Arendt, "Franz Kafka, Appreciated Anew," in *Reflections on Literature and Culture*, ed. Susannah Young-ah Gottlieb (Stanford, CA: Stanford University Press, 2007), 106-7.

2. See Kiarina Kordela and Dimitris Vardoulakis, "Kafka's Cages," in *Freedom and Confinement in Modernity: Kafka's Cages*, eds. Kordela and Vardoulakis (New York: Palgrave, 2011), 1-6.

3. Dimitris Vardoulakis, "'The Fall is the proof of our freedom': Mediated Freedom in Kafka," in *Freedom and Confinement in Modernity*, eds. Kordela and Vardoulakis, 87-106.

4. The English translation of the *Trial* referenced in this chapter is Franz Kafka, *The Trial*, trans. Willa and Edwin Muir, rev. trans. E.M. Butler (New York: Schocken, 1995).

5. Walter Benjamin observes that filth and decay are constant characteristics of power in Kafka's worlds. Benjamin, "Franz Kafka: On the Tenth Anniversary of his Death," in *Selected Writings*, ed. Michael W. Jennings et al. (Cambridge, MA: Belknap, 2001), volume 2, 794-818.

6. If the law does indeed elide proscription in *The Trial*, then a relevant point can be raised (that I cannot, however, take up in any detail here) about the concluding remark of

PART TWO
Homo Sacer

§ 1
Homo Sacer

1.1. Pompeius Festus, in his treatise *On the Significance of Words*, under the heading *sacer mons* preserved the memory of a figure of archaic Roman law in which the character of sacredness is tied for the first time to a human life as such. After defining the Sacred Mount that the plebeians consecrated to Jove at the time of their secession, Festus adds:

At homo sacer is est, quern populus iudicavit ob maleficium; neque fas est eum immolari, sed qui occidit, parricidi non damnatur; nam lege tribunicia prima cavetur "si quis eum, qui eo plebei scito sacer sit, occiderit, parricidia. ne sit." Ex quo quivis homo malus atque improbus sacer appellari solet. (De verborum significatione)

The sacred man is the one whom the people have judged on account of a crime. It is not permitted to sacrifice this man, yet he who kills him will not be condemned for homicide; in the first tribunitian law, in fact, it is noted that "if someone kills the one who is sacred according to the plebiscite, it will not be considered homicide." This is why it is customary for a bad or impure man to be called sacred.

The meaning of this enigmatic figure has been much discussed, and some have wanted to see in it "the oldest punishment of Roman criminal law" (Bennett, "Sacer esto", p. 5). Yet every interpretation of homo sacer is complicated by virtue of having to concentrate on traits that seem, at first glance, to be contradictory.

In an essay of 1930, H. Bennett already observes that Festus's definition "seems to deny the very thing implicit in the term" (ibid., p. 7), since while it confirms the sacredness of a person, it authorizes (or, more precisely, renders unpunishable) his killing (whatever etymology one accepts for the term *parricidium*, it originally indicated the killing of a free man). The contradiction is even more pronounced when one considers that the person whom anyone could kill with impunity was nevertheless not to be put to death according to ritual practices (*neque fas est eum immolari: immolari* indicates the act of sprinkling the *mola salsa* on the victim before killing him).

In what, then, does the sacredness of the sacred man consist? And what does the expression *sacer esto* ("May he be sacred"), which often figures in the royal laws and which already appears in the archaic inscription on the forum's rectangular *cippus*, mean, if it implies at once the *impune occidi* ("being killed with impunity") and an exclusion from sacrifice? That this expression was also obscure to the Romans is proven beyond the shadow of a doubt by a passage in Ambrosius Theodosius Macrobius *Saturnalia* (3.7.38) in which the author, having defined *sacrum* as what is destined to the gods, adds: "At this point it does not seem out of place to consider the status of those men whom the law declares to be sacred to certain divinities, for I am not unaware that it appears strange [*mirum videri*] to some people that while it is forbidden to violate any sacred thing whatsoever, it is permitted to kill the sacred man." Whatever the value of the interpretation that Macrobius felt obliged to offer at this point, it is certain that sacredness appeared problematic enough to him to merit an explanation.

1.2. The perplexity of the *antiqui auctores* is matched by the divergent interpretations of modern scholars. Here the field is divided between two positions. On the one hand, there are those, like Theodor Mommsen, Ludwig Lange, Bennett, and James Leigh Strachan-Davidson, who see *sacratio* as a weakened and secularized residue of an archaic phase in which religious law was not yet distinguished from penal law and the death sentence

appeared as a sacrifice to the gods. On the other hand, there are those, like Károly Kerényi and W. Ward Fowler, who consider *sacratio* to bear the traces of an archetypal figure of the sacred -- consecration to the gods of the underworld -- which is analogous to the ethnological notion of taboo: august and damned, worthy of veneration and provoking horror. Those among the first group are able to admit the *impune occidi* (as, for example, Mommsen does in terms of a popular or vicariate execution of a death sentence), but they are still unable to explain the ban on sacrifice. Inversely, the *neque fas est eum immolari* is understandable in the perspective of the second group of scholars (*"homo sacer,"* Kerényi writes, "cannot be the object of sacrifice, of a *sacrificium*, for no other reason than this very simple one: what is *sacer* is already possessed by the gods and is originarily and in a special way possessed by the gods of the underworld, and so there is no need for it to become so through a new action" [*La religione*, p. 76]). But it remains completely incomprehensible from this perspective why anyone can kill *homo sacer* without being stained by sacrilege (hence the incongruous explanation of Macrobius, according to which since the souls of the *homines sacri* were *diis debitae*, they were sent to the heavens as quickly as possible).

Neither position can account economically and simultaneously for the two traits whose juxtaposition, according to Festus, constitutes the specificity of *homo sacer: the unpunishability of his killing and the ban on his sacrifice*. In the light of what we know of the Roman juridical and religious order (both of the *ius divinum* and the *ius humanum*), the two traits seem hardly compatible: if *homo sacer* was impure (Fowler: *taboo*) or the property of the gods (Kerényi), then why could anyone kill him without either contaminating himself or committing sacrilege? What is more, if *homo sacer* was truly the victim of a death sentence or an archaic sacrifice, why is it not *fas* to put him to death in the prescribed forms of execution? What, then, is the life of *homo sacer*, if it is situated at the intersection of a capacity to be killed and yet not sacrificed, outside both human and divine law?

It appears that we are confronted with a limit concept of the Roman social order that, as such, cannot be explained in a satisfying manner as long as we remain inside either the *ius divinum* or the *ius humanum*. And yet *homo sacer* may perhaps allow us to shed light on the reciprocal limits of these two juridical realms. Instead of appealing to the ethnological notion of taboo in order to dissolve the specificity of *homo sacer* into an assumed originary ambiguity of the sacred -- as has all too often been done -- we will try to interpret *sacratio* as an autonomous figure, and we will ask if this figure may allow us to uncover an originary *political* structure that is located in a zone prior to the distinction between sacred and profane, religious and juridical. To approach this zone, however, it will first be necessary to clear away a certain misunderstanding.

§ 2
The Ambivalence of the Sacred

2.1 Interpretations of social phenomena and, in particular, of the origin of sovereignty, are still heavily weighed down by a scientific mythologeme that, constituted between the end of the nineteenth century and the first decades of the twentieth, has consistently led the social sciences astray in a particularly sensitive region. This mythologeme, which we may provisionally call "the theory of the ambivalence of the sacred," initially took form in late Victorian anthropology and was immediately passed on to French sociology. Yet its influence over time and its transmission to other disciplines have been so tenacious that, in addition to compromising Bataille's inquiries into sovereignty, it is present even in that masterpiece of twentieth-century linguistics, Émile Benveniste *Indo-European Language and Society*. It will not seem surprising that this mythologeme was first formulated in William Robertson Smith *Lectures on the Religion of the Semites* (1889) -- the same book that was to influence the composition of Freud *Totem and Taboo* ("reading it," Freud wrote, "was like slipping away on a gondola") -- if one keeps in mind that these *Lectures* correspond to the moment in which a society that had already lost every connection to its religious tradition began to express its own unease. In Smiths book, the ethnographic notion of taboo first leaves the sphere of primitive cultures and firmly penetrates the study of biblical religion, thereby irrevocably marking the Western experience of the sacred with its ambiguity. "Thus," Smith writes in the fourth lecture,

> alongside of taboos that exactly correspond to rules of holiness, protecting the inviolability of idols and sanctuaries, priests and chiefs, and generally of all persons and things pertaining to the gods and their worship, we find another kind of taboo which in the Semitic field has its parallel in rules of uncleanness. Women after child-birth, men who have touched a dead body and so forth are temporarily taboo and separated from human society, just as the same persons are unclean in Semitic religion. In these cases the person under taboo is not regarded as holy, for he is separated from approach to the sanctuary as well as from contact with men. . . . In most savage societies no sharp line seems to be drawn between the two kinds of taboo just indicated, and even in more advanced nations the notions of holiness and uncleanness often touch. (Smith, *Lectures*, pp. 152-53)

In a note added to the second edition of his *Lectures*, under the title "Holiness, Uncleanness and Taboo", Smith lists a new series of examples of ambiguity (among which is the ban on pork, which "in the most elevated Semitic religions appears as a kind of no-man'sland between the impure and the sacred") and postulates the impossibility of "separating the Semitic doctrine of the holy from the impurity of the taboo-system" (ibid., p. 452).

It is significant that Smith also mentions the ban in his list of examples of this ambiguous power (*patens*) of the sacred:

> Another Hebrew usage that may be noted here is the ban (Heb. *ḥerem*), by which impious sinners, or enemies of the community and its god, were devoted to utter destruction. The ban is a form of devotion to the deity, and so the verb "to ban" is sometimes rendered "consecrate" (Micah 4:13) or "devote" (Lev. 27: 28ff.). But in the oldest Hebrew times it involved the utter destruction, not only of the persons involved, but of their property . . . and only metals, after they had passed through the fire, were added to the treasure of the sanctuary (Josh. 6: 24). Even cattle were not sacrificed, but simply slain, and the devoted city must not be revealed (Deut. 13: 6; Josh. 6: 26). Such a ban is a taboo, enforced by the fear of supernatural penalties (1 Kings 16: 34), and, as with taboo, the danger arising from it is contagious (Deut. 7: 26); he that brings a devoted thing into his house falls under the same ban itself. (*Lectures*, pp. 453-54)

The analysis of the ban -- which is assimilated to the taboo -determines from the very beginning the genesis of the doctrine of the ambiguity of the sacred: the ambiguity of the ban, which excludes in including, implies the ambiguity of the sacred.

2.2. Once it is formulated, the theory of the ambivalence of the sacred has no difficulty extending itself over every field of the social sciences, as if European culture were only now noticing it for the first time. Ten years after the *Lectures*, the classic of French anthropology, Marcel Mauss and H. Hubert "Essay on the Nature and Function of Sacrifice" (1889) opens with an evocation of precisely "the ambiguous character of sacred things, which Robertson Smith has so admirably made clear" (Essai, p. 195). Six years later, in the second volume of Wilhelm Max Wundt *Völkerpsychologie, the concept of taboo would express precisely the originary indistinction of sacred and impure that is said to characterize the most archaic period of human history, constituting that mixture of veneration and horror described by Wundt -- with a formula that was to enjoy great success -- as "sacred horror." According to Wundt, it was therefore only in a later period, when the most ancient powers were replaced by the gods, that the originary ambivalence gave way to the opposition of the sacred and the impure.*

In 1912, Mauss's uncle, Émile Durkheim, published his Elementary Forms of Religious Life, in which an entire chapter is devoted to the ambiguity of the notion of the sacred." Here he classifies the "religious forces" as two opposite categories, the auspicious and the inauspicious:

> *To be sure, the sentiments provoked by the one and the other are not identical: disgust and horror are one thing and respect another. Nonetheless, for actions to be the same in both cases, the feelings expressed must not be different in kind. In fact, there actually is a certain horror in religious respect, especially when it is very intense; and the fear* inspired by malignant powers is not without a certain reverential quality. . . . The pure and the impure are therefore not two separate genera, but rather two varieties of the same genus that includes sacred things. There are two kinds of sacred things, the auspicious and the inauspicious. Not only is there no clear border between these two opposite kinds, but the same object can pass from one to the other without changing nature. The impure is made from the pure, and vice versa. The ambiguity of the sacred consists in the possibility of this transmutation. (*Les formes élémentaires, pp. 446-48)*

What is at work here is the psychologization of religious experience (the "disgust" and "horror" by which the cultured European bourgeoisie betrays its own unease before the religious fact), which will find its final form in Rudolph Otto's work on the sacred. Here, in a concept of the sacred that completely coincides with the concept of the obscure and the impenetrable, a theology that had lost all experience of the revealed word celebrated its union with a philosophy that had abandoned all sobriety in the face of feeling. That the religious belongs entirely to the sphere of psychological emotion, that it essentially has to do with shivers and goose bumps -this is the triviality that the neologism "numinous" had to dress up as science.

*When Freud set out to write Totem and Taboo several years later, the field had therefore already been prepared for him. Yet only with this book does a genuine general theory of the ambivalence of the sacred come to light on the basis not only of anthropology and psychology but also of linguistics. In 1910, Freud had read the essay "On the Antithetical Meaning of Primal Words" by the now discredited linguist Karl Abel, and he reviewed it for Imago in an article in which he linked Abel's essay to his own theory of the absence of the principle of contradiction in dreams. The Latin term sacer, "sacred and damned," figures in the list of words with antithetical meanings that Abel gives in his appendix, as Freud does not hesitate to point out. Strangely enough, the anthropologists who first formulated the theory of the ambiguity of the sacred did not mention the Latin concept of sacratio. But in 1911, Fowler essay "The Original Meaning of the Word Sacer" appeared, pre*senting an interpretation of *homo sacer* that had an immediate effect on the scholars of religious studies. Here the implicit ambiguity in Festus's definition allows the scholar (taking up a suggestion of Robert Marett's) to link the Latin *sacer* with the category of taboo: "*Sacer esto* is in fact a curse; and *homo sacer* on whom this curse falls is an outcast, a banned man, tabooed, dangerous. . . . Originally the word may have meant simply taboo, i.e. removed out of the region of the *profanum*, without any special reference to a deity, but 'holy' or accursed according to the circumstances" (Fowler , *Roman Essays*, pp. 17-23).

In a well-documented study, Huguette Fugier has shown how the doctrine of the ambiguity of the sacred penetrates into the sphere of linguistics and ends by having its stronghold there (*Recherches, pp. 238-40). A decisive role in this process is played precisely by homo sacer. While in the second edition of A. Walde Lateinisches etymologisches Wörterbuch (1910) there is no trace of the doctrine of the ambivalence of the sacred, the entry under the heading sacer in Alfred Ernout-Meillet Dictionnaire étymologique de la langue latine (1932) confirms the "double meaning" of the term by reference to precisely homo sacer: "Sacer designates the person or the thing that one cannot touch without dirtying oneself or without dirtying; hence the double meaning of 'sacred' or 'accursed' (approximately). A guilty person whom one consecrates to the gods of the underworld is sacred (sacer esto: cf. Grk. agios)."*

> *It is interesting to follow the exchanges documented in Fugier's work between anthropology, linguistics, and sociology concerning the problem of the sacred. Pauly-Wilson's "Sacer" article, which is signed by R. Ganschinietz (1920) and explicitly notes Durkheim's theory of ambivalence (as Fowler had already done for Smith), appeared between the second edition of Walde Wörterbuch and the first edition of Ernout- Meillet's Dictionnaire. As for Ernout-Meillet, Fugier notes the strict links that linguistics had with the Parisian school of sociology (in particular with Mauss and Durkheim). When Roger Callois published Man and the Sacred in 1939, he was thus able to start off directly with a lexical given, which was by then considered certain: "We know, following ErnoutMeillet's definition, that in Rome the word sacerdesignated the person or* the thing that one cannot touch without dirtying oneself or without dirtying" (*L'homme et le sacré*, p. 22)

2.3. An enigmatic archaic Roman legal figure that seems to embody contradictory traits and therefore had to be explained thus begins to resonate with the religious category of the sacred when this category irrevocably loses its significance and comes to assume contradictory meanings. Once placed in relation with the ethnographic concept of taboo, this ambivalence is then used -- with perfect circularity -- to explain the figure of *homo sacer*. There is a moment in the life of concepts when they lose their immediate intelligibility and can then, like all empty terms, be overburdened with contradictory meanings. For the religious phenomenon, this moment coincides with the point at which anthropology -- for which the ambivalent terms *mana, taboo,* and *sacer* are absolutely central -- was born at the end of the last century. Lévi-Strauss has shown how the term *mana* functions as an excessive signifier with no meaning other than that of marking an excess of the signifying function over all signifieds. Somewhat analogous remarks could be made with reference to the use and function of the concepts of the sacred and the taboo in the discourse of the social sciences between 1890 and 1940. An assumed ambivalence of the generic religious category of the sacred cannot explain the juridico-political phenomenon to which the most ancient meaning of the term *sacer* refers. On the contrary, only an attentive and unprejudiced delimitation of the respective fields of the political and the religious will make it possible to understand the history of their intersection and complex relations. It is important, in any case, that the originary juridico-political dimension that presents itself in *homo sacer* not be covered over by a scientific mythologeme that not only explains nothing but is itself in need of explanation.

§ 3
Sacred Life

3.1. According to both the original sources and the consensus of scholars, the structure of *sacratio* arises out of the conjunction of two traits: the unpunishability of killing and the exclusion from sacrifice. Above all, the *impune occidi* takes the form of an exception from the *ius humanum* insofar as it suspends the application of the law on homicide attributed to Numa Pompilius: *Si quis hominem liberum dolo sciens morti duit, parricidas esto, "If someone intentionally kills a free man, may he be considered a murderer." The very formulation given by Festus in some way even constitutes a real exceptio in the technical sense, which the killer, invoking the sacredness of the victim, could have opposed to the prosecution in the case of a trial. If one looks closely, however, one sees that even the nequefas est eum immolari ("it is not licit to sacrifice him") takes the form of an exception, this time from the ius divinum and from every form of ritual killing. The most ancient recorded forms of capital punishment (the terrible poena cullei, in which the condemned man, with his head covered in a wolf-skin, was put in a sack with serpents, a dog and a rooster, and then thrown into water, or defenestration from the Tarpean rock) are actually purification rites and not death penalties in the modern sense: the neque fas est eum immolari served precisely to distinguish the killing of homo sacer from ritual purifications, and decisively excluded sacratio from the religious sphere in the strict sense.*

It has been observed that while *consecratio* normally brings an object from the *ius humanum* to the *ius divinum*, from the profane to the sacred (Fowler, *Roman Essays*, p. 18), in the case of *homo sacer* a person is simply set outside human jurisdiction without being brought into the realm of divine law. Not only does the ban on immolation exclude every equivalence between the *homo sacer* and a consecrated victim, but -- as Macrobius, citing Trebatius, observes -- the fact that the killing was permitted implied that the violence done to *homo sacer* did not constitute sacrilege, as in the case of the *res sacrae* (*Cum cetera sacra violari nefas sit, hominem sacrum ius fuerit occidi*, "While it is forbidden to violate the other sacred things, it is licit to kill the sacred man").

If this is true, then *sacratio* takes the form of a double exception, both from the *ius humanum* and from the *ius divinum*, both from the sphere of the profane and from that of the religious. The topological structure drawn by this double exception is that of a double exclusion and a double capture, which presents more than a mere analogy with the structure of the sovereign exception. (Hence the pertinence of the view of those scholars who, like Giuliano Crifò, interpret *sacratio* in substantial continuity with the exclusion from the community [Crifò, *"Exilica causa"*, pp. 460-65].) Just as the law, in the sovereign exception, applies to the exceptional case in no longer applying and in withdrawing from it, so *homo sacer* belongs to God in the form of unsacrificeability and is included in the community in the form of being able to be killed. *Life that cannot be sacrificed and yet may be killed is sacred life*.

3.2. What defines the status of *homo sacer*is therefore not the originary ambivalence of the sacredness that is assumed to belong to him, but rather both the particular character of the double exclusion into which he is taken and the violence to which he finds himself exposed. This violence -- the unsanctionable killing that, in his case, anyone may commit -- is classifiable neither as sacrifice nor as homicide, neither as the execution of a condemnation to death nor as sacrilege. Subtracting itself from the sanctioned forms of both human and divine law, this violence opens a sphere of human action that is neither the sphere of *sacrum facere* nor that of profane action. This sphere is precisely what we are trying to understand here.

We have already encountered a limit sphere of human action that is only ever maintained in a relation of exception. This sphere is that of the sovereign decision, which suspends law in the state of exception and thus implicates bare life within it. We must therefore ask ourselves if the structure of sovereignty and the structure of *sacratio* might be connected, and if they might, from this perspective, be shown to illuminate each other. We may even then advance a hypothesis: once brought back to his proper place beyond both penal law and sacrifice, *homo sacer* presents the originary figure of life taken into the sovereign ban

and preserves the memory of the originary exclusion through which the political dimension was first constituted. The political sphere of sovereignty was thus constituted through a double exclusion, as an excrescence of the profane in the religious and of the religious in the profane, which takes the form of a zone of indistinction between sacrifice and homicide. *The sovereign sphere is the sphere in which it is permitted to kill without committing homicide and without celebrating a sacrifice, andsacred life -- that is, life that may be killed but not sacrificed -- is the life that has been captured in this sphere*.

It is therefore possible to give a first answer to the question we put to ourselves when we delineated the formal structure of the exception. What is captured in the sovereign ban is a human victim who may be killed but not sacrificed: *homo sacer*. If we give the name bare life or sacred life to the life that constitutes the first content of sovereign power, then we may also arrive at an answer to the Benjaminian query concerning "the origin of the dogma of the sacredness of life." The life caught in the sovereign ban is the life that is originarily sacred -- that is, that may be killed but not sacrificed -- and, in this sense, the production of bare life is the originary activity of sovereignty. The sacredness of life, which is invoked today as an absolutely fundamental right in opposition to sovereign power, in fact originally expresses precisely both life's subjection to a power over death and life's irreparable exposure in the relation of abandonment.

The *potestas sacrosancta* that lay within the competence of the plebeian courts in Rome also attests to the link between *sacratio* and the constitution of a political power. The inviolability of the court is founded on the mere fact that when the plebeians first seceded, they swore to avenge the offenses committed against their representative by considering the guilty man a *homo sacer*. The Latin term *lex sacrata*, which improperly designated (the plebeians were originally clearly distinct from the *leges*) what was actually only a *charté jurée* (Magdelain, *La loi, p. 57) of the insurrectionary plebs, originally had no other meaning than that of determining a life that can be killed. Yet for this very reason, the lex sacrata founded a political power that in some way counterbalanced the sovereign power. This is why nothing shows the end of the old republican constitution and the birth of the new absolute power as clearly as the moment in which Augustus assumed the potestas tribunicia and thus becomes sacrosanctus. (Sacrosanctus in perpetuum ut essem, the text of Res gestae declares, et quoad viverem tribunicia potestas mihi tribuetur, "So that I may be forever sacrosanct, and that the tribunitian power may be attributed to me for my whole life.")*

3.3. Here the structural analogy between the sovereign exception and sacratio shows its full sense. At the two extreme limits of the order, the sovereign and homo sacer present two symmetrical figures that have the same structure and are correlative: the sovereign is the one with respect to whom all men are potentially homines sacri, and homo sacer is the one with respect to whom all men act as sovereigns.

The sovereign and homo sacer are joined in the figure of an action that, excepting itself from both human and divine law, from both nomos and physis, nevertheless delimits what is, in a certain sense, the first property political space of the West distinct from both the religious and the profane sphere, from both the natural order and the regular juridical order.

This symmetry between sacratio and sovereignty sheds new light on the category of the sacred, whose ambivalence has so tenaciously oriented not only modern studies on the phenomenology of religion but also the most recent inquiries into sovereignty. The proximity between the sphere of sovereignty and the sphere of the sacred, which has often been observed and explained in a variety of ways, is not simply the secularized residue of the originary religious character of every political power, nor merely the attempt to grant the latter a theological foundation. And this proximity is just as little the consequence of the "sacred" -- that is, august and accursed -character that inexplicably belongs to life as such. If our hypothesis is correct, sacredness is instead the originary form of the inclusion of bare life in the juridical order, and the syntagm *homo sacer* names something like the originary "political" relation, which is to say, bare life insofar as it operates in an inclusive exclusion as the referent of the sovereign decision. Life is sacred only insofar as it is taken into the sovereign exception, and to have exchanged a juridico-political phenomenon (*homo sacer*'s capacity to be killed but not sacrificed) for a genuinely religious

phenomenon is the root of the equivocations that have marked studies both of the sacred and of sovereignty in our time. *Sacer esto* is not the formula of a religious curse sanctioning the *unheimlich*, or the simultaneously august and vile character of a thing: it is instead the originary political formulation of the imposition of the sovereign bond.

The crimes that, according to the original sources, merit *sacratio* (such as *terminum exarare*, the cancellation of borders; *verberatio parentis*, the violence of the son against the parent; or the swindling of a client by a counsel) do not, therefore, have the character of a transgression of a rule that is then followed by the appropriate sanction. They constitute instead the originary exception in which human life is included in the political order in being exposed to an unconditional capacity to be killed. Not the act of tracing boundaries, but their cancellation or negation is the constitutive act of the city (and this is what the myth of the foundation of Rome, after all, teaches with perfect clarity). Numa's homicide law (*parricidas esto*) forms a system with *homo sacer*'s capacity to be killed (*parricidi non damnatur*) and cannot be separated from it. The originary structure by which sovereign power is founded is this complex.

Consider the sphere of meaning of the term *sacer* as it appears in our analysis. It contains neither an antithetical meaning in Abel's sense nor a generic ambivalence in Durkheim's sense. It indicates, rather, a life that may be killed by anyone -- an object of a violence that exceeds the sphere both of law and of sacrifice. This double excess opens the zone of indistinction between and beyond the profane and the religious that we have attempted to define. From this perspective, many of the apparent contradictions of the term "sacred" dissolve. Thus the Latins called pigs pure if they were held to be fit for sacrifice ten days after their birth. But Varro (*De re rustica, 2. 4. 16) relates that in ancient times the pigs fit for sacrifice were called sacres. Far from contradicting the unsacrificeability of homo sacer, here the term gestures toward an originary zone of indistinction in which sacer simply meant a life that could be killed. (Before the sacrifice, the piglet was not yet "sacred" in the sense of "consecrated to the gods," but only capable of being killed.) When the Latin poets define lovers as sacred (sacros qui ledat amantes, "whoever harms the, sacred lovers" [Propertius, 3. 6. 2]; Quisque amore teneatur, eat tutusque sacerque, "May whoever is in love be safe and sacred" [Tibullus, 1. 2. 27]), this is not because they are accursed or consecrated to the gods but because they have separated themselves from other men in a sphere beyond both divine and human law. Originally, this sphere was the one produced by the double exception in which sacred life was exposed.*

§ 4
'Vitae Necisque Potestas'

4.1. "For a long time, one of the characteristic privileges of sovereign power was the right to decide life and death." Foucault's statement at the end of the first volume of the *History of Sexuality* (*La volontà*, p. 119) sounds perfectly trivial. Yet the first time we encounter the expression "right over life and death" in the history of law is in the formula *vitae necisque potestas*, which designates not sovereign power but rather the unconditional authority [*potestà*] of the *pater* over his sons. In Roman law, *vita* is not a juridical concept but instead indicates either the simple fact of living or a particular way of life, as in ordinary Latin usage (in a single term, Latin brings together the meaning of both *zoē*; and *bios*). The only place in which the word *vita* acquires a specifically juridical sense and is transformed into a real *terminus technicus* is in the very expression *vitae necisque potestas*. In an exemplary study, Yan Thomas has shown that *que* in this formula does not have a disjunctive function and that *vita* is nothing but a corollary of *nex*, the power to kill ("Vita", pp. 508-9). Life thus originally appears in Roman law merely as the counterpart of a power threatening death (more precisely, death without the shedding of blood, since this is the proper meaning of *necare* as opposed to *mactare*). This power is absolute and is understood to be neither the sanction of a crime nor the expression of the more general power that lies within the competence of the *pater* insofar as he is the head of the *domus*: this power follows immediately and solely from the father-son relation (in the instant in which the father recognizes the son in raising him from the ground, he acquires the power of life and death over him). And this is why the father's power should not be confused with the power to kill, which lies within the competence of the father or the husband who catches his wife or daughter in the act of adultery, or even less with the power of the *dominus* over his servants. While both of these powers concern the domestic jurisdiction of the head of the family and therefore remain, in some way, within the sphere of the *domus*, the *vitae necisque potestas* attaches itself to every free male citizen from birth and thus seems to define the very model of political power in general. *Not simple natural life, but life exposed to death (bare life or sacred life) is the originary political element*.

The Romans actually felt there to be such an essential affinity between the father's *vitae necisque potestas* and the magistrate's imperium that the registries of the *ius patrium* and of the sovereign power end by being tightly intertwined. The theme of the *pater imporiosus* who himself bears both the character of the father and the capacity of the magistrate and who, like Brutus or Manlius Torquatus, does not hesitate to put the treacherous son to death, thus plays an important role in the anecdotes and mythology of power. But the inverse figure of the father who exerts his *vitae necisque potestas* over his magistrate son, as in the case of the consul Spurius Cassius and the tribune Caius Flaminius, is just as decisive. Referring to the story of the latter, who was dragged down from the rostra by his father while he was trying to supersede the authority of the senate, Valerius Maximus defines the father's *potestas*, significantly, as an *imperium privatum*. Thomas, who has analyzed these episodes, could write that in Rome the *patria potestas* was felt to be a kind of public duty and to be, in some way, a "residual and irreducible sovereignty" (Vita, p. 528). And when we read in a late source that in having his sons put to death, Brutus "had adopted the Roman people in their place," it is the same power of death that is now transferred, through the image of adoption, to the entire people. The hagiographic epithet "father of the people," which is reserved in every age to the leaders invested with sovereign authority, thus once again acquires its originary, sinister meaning. What the source presents us with is therefore a kind of genealogical myth of sovereign power: the magistrate's *imperium* is nothing but the father's *vitae necisque potestas* extended to all citizens. There is no clearer way to say that the first foundation of political life is a life that may be killed, which is politicized through its very capacity to be killed.

4.2. From this perspective, it is possible to see the sense of the ancient Roman custom according to which only the prepubescent son could place himself between the magistrate equipped with the *imperium* and the lictor who went before him. The physical proximity of the magistrate to the lictors who always accompanied him bearing the terrible insignias of power (the *fasces formidulosi* and the *saeve secures*) firmly expresses the inseparability of the *imperium* from a power of death. If the son can place himself between the magistrate and the lictor, it is because he is already originarily and immediately subject to a power of

life and death with respect to the father. The *puer* son symbolically affirms precisely the consubstantiality of the *vitae necisque potestas* with sovereign power.

At the point in which the two seem to coincide, what emerges is the singular fact (which by now should not appear so singular) that every male citizen (who can as such participate in public life) immediately finds himself in a state of virtually being able to be killed, and is in some way *sacer* with respect to his father. The Romans were perfectly aware of the aporetic character of this power, which, flagrantly contradicting the principle of the Twelve Tables according to which a citizen could not be put to death without trial (*indemnatus*), took the form of a kind of unlimited authorization to kill (*lex indemnatorum interficiendum*). Moreover, the other characteristic that defines the exceptionality of sacred life -- the impossibility of being put to death according to sanctioned ritual practices -- is also to be found in the *vitae necisque potestas*. Thomas refers ("Vita", p. 540) to the case recalled as a rhetorical exercise by Calpurnius Flaccus, in which a father, by virtue of his *potestas*, gives his son over to an executioner to be killed. The son resists and rightly demands that his father be the one to put him to death (*vult manu patris interfici*). The *vitae necisque potestas* immediately attaches itself to the bare life of the son, and the *impune occidi* that derives from it can in no way be assimilated to the ritual killing following a death sentence.

4.3. At a certain point, Thomas poses a question concerning the *vitae necisque potestas*: "What is this incomparable bond for which Roman law is unable to find any expression other than death?" ("Vita", p. 510). The only possible answer is that what is at issue in this "incomparable bond" is the inclusion of bare life in the juridico-political order. It is as if male citizens had to pay for their participation in political life with an unconditional subjection to a power of death, as if life were able to enter the city only in the double exception of being capable of being killed and yet not sacrificed. Hence the situation of the *patria potestas* at the limit of both the *domus* and the city: if classical politics is born through the separation of these two spheres, life that may be killed but not sacrificed is the hinge on which each sphere is articulated and the threshold at which the two spheres are joined in becoming indeterminate. Neither political *bios* nor natural *zoē*, sacred life is the zone of indistinction in which *zoē* and *bios* constitute each other in including and excluding each other.

It has been rightly observed that the state is founded not as the expression of a social tie but as an untying (*déliaison*) that prohibits (Badiou, *L'être, p. 125). We may now give a further sense to this claim. Déliaison is not to be understood as the untying of a preexisting tie (which would probably have the form of a pact or a contract). The tie itself originarily has the form of an untying or exception in which what is captured is at the same time excluded, and in which human life is politicized only through an abandonment to an unconditional power of death. The sovereign tie is more originary than the tie of the positive rule or the tie of the social pact, but the sovereign tie is in truth only an untying. And what this untying implies and produces -- bare life, which dwells in the no-man's-land between the home and the city -- is, from the point of view of sovereignty, the originary political element.*

Resisting the continuum of History: Messianic Time, Violence and Mourning in Palestinian Cinema Robert G. White

This paper situates Palestinian cinema within a theoretical framework of Walter Benjamin's notion of the 'messianic', articulated in both *On the Critique of Violence* and *On the Concept of History*. In his late work *On the Concept of History*, Walter Benjamin both poses and answers the question: 'with whom does historicism[1] actually sympathise? The answer is inevitable: with the victor.' (Benjamin, 2006, p.391) This notion of victor-history is something Benjamin seeks to undermine through messianic time, a temporal structure not built on linear notions of teleology, but rather a temporality of rupture, interruption and the rescue of a past lost to historicism's empty, homogenous time. Through the conceptual framework of time, this chapter seeks to explore the notion of time, mourning and violence in Palestinian Cinema, particularly in the work of Elia Suleiman and Kamal Aljafari, looking at the body and spectral lives through a theoretical framework of Derrida, Benjamin and Butler.

Before continuing, some terms, and how they will be used in this paper, need to be clarified. The use of 'messianic' employed in this paper draws on Benjamin's use of the term, a secularisation of the concept of Jewish messianism. Rather than the futural concerns of conventional uses of messianism, a Benjaminian notion of salvation refers to the past, and its rescuing from the oppression of historicism. Benjamin's understanding of the messianic is that of a radical interruption of historicism, the latter being seen as an imposed and naturalised form of continuity. The messianic opens a space in which time and history are rendered vertical and the present is situated within, but not sequentially, the entirety of history. Benjamin writes, with regard to the historian, that:

> 'He grasps the constellation into which his own era has entered, along with a very specific earlier one. Thus he establishes a concept of the present as now-time shot through with splinters of messianic time.' (Benjamin, 2006, p.397)

[1] Benjamin here is using the term 'historicism' to articulate a notion of history which naturalises time as continuity, and is bound up with ideas of progress and causality.

In this paper I intend to explore the relationship in Benjamin between history, violence and justice, and articulate the how these concepts relate to the contemporary Palestinian cinematic narrative.

The notion of spectrality, as used here, comes from Derrida's work; both in *Specters of Marx* (1994) and *Echographies of Television* (2002). Derrida initially uses the spectre in discussions around the proclaimed 'death' of Marxism. The spectre resists clear definition, and is thus both spatially and temporally problematic. Derrida (1994, p.6) describes the spectre as:

> 'A paradoxical incorporation, the becoming-body, a certain phenomenal and carnal form of the spirit. It becomes, rather, some "thing" that remains difficult to name: neither soul nor body, and both one and the other.'

It is this notion of in-betweeness, or the spatio-temporal problematic of present absence, which I intend to draw on in this paper.

Written out of history- the spectral, de-realized other

The spectral lives of those outside of the narrative of the victors, i.e. those with whom historicism sympathises, as Benjamin states, are neither acknowledged nor mourned, and are thus written out of a hegemonic historical discourse. Through such discourse, these lives are as Judith Butler (2010, p.33) states 'always already lost' since they are always viewed from a position of negation. Since these 'ungrievable' lives aren't given the same value as those that can be mourned in Western discourse they constitute something of an aporetical existence. If these lives are unreal, then no harm can be done them. A negated life cannot be injured or negated, from an *always already negated* subject position. However, while these lives are *empirically* unacknowledged, *corporeally* they remain animated and must therefore, as Butler states (2010, ibid.) 'be negated again (and again).' Lives which are always already lost cannot be mourned or grieved for. This perpetual spectrality can only be countered by a narrative of the liminal, the oppressed marginal narrative of the

periphery; a retrieval of a lost past, a recognition that nothing is lost to history and a rearticulation of how 'history' is understood.

Kamal Aljafai's *Port of Memory* (2010) ostensibly tells the story of Salim, who due to what might be termed administrative amnesia, is on the verge of losing his home. The loss of home works as an analogy for the wider disappearance of Jaffa, the city in which the film is set. The film foregrounds the architecture of Jaffa; a once thriving port city which has now been largely swallowed up by Tel Aviv. Characters are often framed in deep focus long-shots, with walls and windows geometrically framing the characters in both interior and exterior shots. A number of scenes deal with 'everyday life' in Jaffa, but these are heightened and rendered uncanny. An example of this is the scene in which Salim's wife washes her hands, one of the few close ups in the film. The scene is repeated, and its duration hints at something pathological, as opposed to routine. The film is not without moments of great warmth and humanity, in particular the scenes with the daughter feeding her elderly mother. However, the overriding sense the film conveys is that spatial relations being intact, while temporality is absent, due to the lack of any relationality between characters. The scenes in the café typify this notion of space without time. There are three characters in these scenes, two older men who remain seated, and one younger man, who wanders restlessly around the café, and holds a piece of hot coal precariously close to his neck. There is no interaction between the characters, who seem suspended in both space and time. This creates a dynamic of co-existence without relationality, or sociality, which as Levinas states, renders a subject without time:

> 'Is not sociality something more than the source of our representation of time: is it not time itself? If time is constituted by my relationship with the other, it is exterior to my instant, but it is also something else than an object given to contemplation. The dialectic of time is the very dialectic of the relationship with the other, that is, a dialogue which in turn has to be studied in terms other than those of the dialectic of the solitary subject. The dialectic of the social relationship will furnish us with a set of concepts of a new kind. And the nothingness necessary to time, which the subject cannot produce, comes from the social relationship.' (Levinas, 1978, p.96)

If time then, as Levinas argues, is sociality then this leaves subjects without sociality positioned as subjects outside of time. It might be argued that this is a subject positioned created under 'mere'[2] life, a position of living fatefully under the mythic violence imposed by a state that reduces Palestinian subjects to the status of mere biological life, but without a status beyond this. It is an interruption of such a subject position that, in this paper, I intend to argue provides the locus of resistance in *Port of Memory* and more widely in contemporary Palestinian cinema.

Aljafari's work, to a certain extent, deals with the notion of the spectral Palestinian in Israeli and Hollywood cinema. Working within what he has referred to as the 'cinematic occupation' (Himada, 2010) of Jaffa, Aljafari re-edits film stock of 1980s Jaffa, and works with both green-screen technology and live action. Aljafari's *Port of Memory* contains several scenes in the middle of the film where a character stoically watches *The Delta Force*, the Chuck Norris film, which depicts, in its mise en scene, a portrait of Jaffa as it was, complete with the spectral, liminal cinematic presences haunting the cinematic Jaffa (which was used as a stand in for both Beirut and Athens). These same streets are seen later on in the film as the main character of the film walks around the old port of Jaffa, the eponymous port of memory. The scene begins with a graphic match, as Salim (played by Aljafari's uncle) is inserted into the shots from which the scenes were taken, an Israeli film *Kasablan* (1973). This film manages to layer a fictional cinematic occupation on top of the factual occupation of Jaffa during this period, as the films tells a narrative of oppressed Mizrahi Jews living in Jaffa, and the scene in question is the sung lamentation of Ashkenazi oppression, a narrative which, as Aljafari states, 'completely elides not only Jaffa's Palestinian history, but also its remaining Palestinians, enacting a virtual, cinematic emptying of the city.' (Himada, 2010)

Jaffa is the object at the centre of *Port of Memory*. Aljafairi has acknowledged the influence of Suleiman on his work, and Suleiman's *Chronicle of a Disappearance* (1996) could provide a subtitle to this film since Aljafari, through a combination of documentary realism, subversion of fiction and special effects, Aljafari is

[2] Mere life is the term Benjamin uses to express a subject position that renders a subject bound to the fateful continuity of both historicism and mythic violence. Mere life is the subject position that needs to be liberated by some kind of interruption.

documenting the disappearance of Jaffa, from a thriving port city, to a few streets in the South of Tel Aviv. He both resists interrupts the continuum of victor history by foregrounding the spectral characters at the edges of the frame in 1980s action films, those who have been historically erased through a discourse of dehumanisation, but remain animated, haunting and disrupting the hegemonic, empty historical time of the Israeli narrative. Aljafari provides a counter-narrative, a narrative of the oppressed, a montage of history's rags, constructed of Benjaminian splinters, which constantly disrupt linear time's notions of past and future.

Benjamin: Violence, victor-history and the 'messianic cessation'

The notion of the messianic is present in both Benjamin's early work *The Critique of Violence* and the later *On the Concept of History*. One can see the messianic as a link between the two works, book-ending Benjamin's ideas about an alternative conception of historical time outside of Historicism's causal linearity. While Benjamin (2006, p.397) utilises the notion of the messianic in *On the Concept of History*, particularly as a counterpoint to Historicism's imposed, teleological victor-history by defining the interruption of this continuity as the 'messianic arrest of happening', this break with historicism can be read also in *The Critique of Violence*, a work preceding the former by almost twenty years. *The Critique of Violence* as its central thesis, contrast two notions of violence, *mythic* and *divine* which can be viewed in conjunction with Benjamin's historical project and his notions of historical time. Benjamin (2004, p.248) writes that 'mythic violence in its archetypal form is a mere manifestation of the gods'. Benjamin equated this mythic violence with that of the legal institutions of a state. Violence becomes a legitimising tool of preserving the duration, and arguably the continuity of victor-history. Benjamin draws on the legend of Niobe to illustrate fate as the founding principle of both mythic violence and lawmaking, that is, *state* violence. Benjamin informs us that:

> 'Niobe's arrogance calls down fate upon her not because her arrogance offends the law but because it challenges fate- to a fight in which fate must triumph and can bring to light a law only in its triumph.' (Benjamin, 2004, ibid.)

It is fate then, which preserves continuity and follows the linear trajectory of historicism. What links the two works, is the notion of fated history, illegitimately maintained as victor-history, and the necessity of break, or interruption. Mathias Fritsch recognises this link when he writes that:

> 'The contrast between victor history and its messianic interruption appears in the 'Critique of Violence' as the opposition between 'mythical violence' and what Benjamin calls 'divine violence'. (Fritsch, 2005, p.104)

Benjamin sees in mythic violence a circular problem. That is the problem of both natural and positive law. An originary violence is at the core of a circular means/ends problem that Benjamin (2004, p.237) states as thus: 'Just ends can be attained by justified means, justified means used for just ends.' Benjamin equates this problem of means, and their violence as inherent in law making and law preserving, thus requiring a consideration of 'ends' outside of 'means'. One can see here the parallels with violence and state power with the barbarism that Benjamin highlights in Thesis VII, the barbarism in which 'rulers step over those lying prostate' (Benjamin, 2006, p.391). The violence inherent in setting up the state is acted out in its preservation. This is why justice, for Benjamin cannot come from law, since law is the continuity of violent origin. Benjamin recognises that:

'For the function of violence in lawmaking is twofold, in the sense that lawmaking pursues its end, with violence as the means, *what* is to be established as law, but at the moment of instatement does not dismiss violence; rather, at this very moment of lawmaking, it specifically establishes as law not an end unalloyed by violence but one necessarily and intimately bound to it, under the title of power (….) Justice is the principle of all divine endmaking, power the principle of all mythic lawmaking.' (Benjamin, 2004, p.248)

Justice then, must find a locus outside of law, which constructs subject-positions of guilt through living fatefully. Whence then, comes justice? From divine power[3].

[3] Gewalt, in German translates as both 'violence' and 'power'. However a conscious choice is made at certain points to equate power with divine, mythic with violence, signifying a break

Justice, for Benjamin, has to come by creating an interruptive, destructive space that recognises the claim of the oppressed, those who have been written out of historical discourse, and thus the parallels between divine power and the messianic interruption can be seen. Benjamin (ibid, p.249) calls for a destruction of mythic violence (read legal violence) due to a 'perniciousness of its historical function'.

Elia Suleiman: *Divine Intervention*, *The Time That Remains* and Messianic Time

For Benjamin, the messianic is a rearticulation of the question of time and history that blows open historical time; thus providing a chance to reclaim history from its oppression under historicism.

Benjamin tells us that:

> 'The historical materialist approaches a historical object only when it confronts him as a monad. In this structure he recognises the sign of a messianic arrest of happening, or (to put it differently) a revolutionary chance in the fight for the oppressed past. He takes cognizance of it in order to blast a specific era out of the homogeneous course of history;' (Benjamin, 2006, p.396)

Benjamin, then, sees the messianic as a radical interruption of chronological time (i.e. the time of progress) necessary to retrieve the past from the 'continuum of history'. In Benjamin's eyes, the present viewed through the prism of historicism, is a dividing line between past and future in which the latter cannot be articulated, as Fritsch (2005, p.41) states 'in, of or from the past.' Thus the role of messianic time is to salvage a conception of the future of the past or of the present as a Benjaminian 'now-time', in which the whole of history can be called upon in the present moment.

Arguably, a messianic temporality can be seen in the work of Elia Suleiman, particularly in his two most recent works, *Divine Intervention* (2002) and *The Time That Remains* (2009). The titles of the two films are the first indication. Suleiman is rarely asked about the titles of his films, but both of these films allude to the concept of messianic time. *Divine Intervention* could be understood in relation to the Benjaminian concept of divine violence, that which creates the interruption necessary

for justice and life, as opposed to 'mere' life. *The Time That Remains* shares it title with Giorgio Agamben's book on the Pauline texts and Benjamin. Agamben's book explicates a concept of 'remaining time' as 'the time that time takes to come to an end' (Agamben, 2005, p.68). Suleiman's *The Time That Remains* is the first of his three films to deal explicitly with a personal and political past, a past which is narrated from a filmic future. Patricia Pisters (2012) argues that:

> 'the "time that remains" can be seen in a double way: on the one hand, it is the time that is preserved and thus time(s) from the past that remains, but on the other hand it can be considered the time that is still left open, the time still remaining to come' (Pisters, 2012, p. 266)

However, what might be seen as a missed opportunity in Pisters' discussion of the film and its politics, is a notion of the messianic, with the title referring to what Agamben (2005, p.68) describes as an 'operational time pressing within the chronological time, working and transforming it from within.' The politics of this temporality, the messianic time of *The Time That Remains* is that it subverts and transforms chronological time. It rescues the past, a past that for chronological time is lost to history, and thus is the dialectical opposite to homogenous, empty, linear time. The time of progress is the dominant time, a time in which nation-states are modelled on, a time which is the time the victor. The messianic 'cessation of happening' then, is the locus of revolutionary action. Messianic time is revolutionary, three- dimensional time that transforms the dominant narrative of linear historical time.

Agamben (2005) attempts to articulate messianic time as an 'operational time' juxtaposed in opposition to a linear representation of time. He draws on the work of Guillame, and defines operational time as a:

> 'chronogenetic time, which is no longer linear but three-dimensional. The schema of chronogenesis thus allow us to grasp the time-image in its state potentiality (time *in posse*), in its very process of formation (time *in fieri*), and, finally, in the state of having constructed (time *in ese*).' (Agamben, 2005, p.66)

The question arises then, of how such notions of time are rendered cinematically in Suleiman's work. All of Elia Suleiman's feature films are largely autobiographical, with the director playing the eponymous E.S. The two most recent, *Divine Intervention* and *The Time That Remains*, deal episodically with Suleiman's life in Nazareth, and specifically in the latter, Suleiman's father's experience of 1948. While *The Time That Remains* appears to be the most historically rooted of Suleiman's films, when read in conjunction with *Divine Intervention*, a mode of messianic time can be seen at work. Aspects of the past hinted at in *Divine Intervention* are explicated in *The Time That Remains*, such as the father's compulsive smoking in several scenes in the latter film, which connect to the scenes where E.S visits his dying father in hospital in the previous film. While *The Time That Remains* deals with ostensibly historically located events, what it actually does is open up the past fully and situate the present within it, thus interrupting and undermining notions of causal linearity. Patricia Pisters (2012, p.268), in an illuminating chapter on Suleiman in her book on Deleuzian film-philosophy, highlights this when she writes 'we access here "all of the past" leading to the construction of the Wall and to the increasing tensions of the contemporary situation in the Middle East.' Arguably, it is precisely this 'all of the past' that locates the messianic within the articulation of time in Suleiman's two most recent films. The past is 'blasted' out of a continuum and the present shot through with messianic time. Time and history in these two films are articulated almost as vertical temporality, with the past referencing and informing the present, and in a Benjaminian sense, nothing 'lost' to history.

Justice, messianic time and the claim of the oppressed

As can be seen from the earlier discussion of Benjamin, justice cannot be sought within the temporal boundaries of the barbarism and institutional violence of the state, as the state is a manifestation of historicism. A continuity of self-preserving violence, founded on a narrative that excludes the memory and narrative of those oppressed in its founding. Justice must be rescued through the messianic interruption, which rescues the lost past, the past of the oppressed, those lying 'prostrate', a counter-point to victor-history and its continuum of violent means and unjust ends.

How then can the messianic then and its relation to justice, be thought cinematically? How can one read film, particularly Palestinian film, through the framework of messianic time? With regard to Palestinian cinema, messianic time can be a way of locating the political in the temporal. A politics of time, or even time *as* resistance. A messianic reading can be applied to Aljafari's *Port of Memory*, a film through which a notion of victor-history, the dominant Israeli narrative is constantly subverted and interrupted by a messianic claim, from those outside of discourse. Aljafari recognises the occupation and the violence done by it as not only corporeal and empirical, but also extended to cinema, through the physical and cinematic occupation of Jaffa. The film foregrounds the liminal and spectral, taking the unwitting Palestinian extras in the *Delta Force*[4] and recognising their disruptive, spectral presence and undermining the continuity of that particular narrative. He also disembodies the Mizarhi song of oppression, without changing a single word or the language from Hebrew into Arabic, the scene allows the film to undermine its own authority, rendering it absurd yet simultaneously appropriating it as a song of Palestinian historical oppression. At work in the politics of Aljafari's film is an articulation of a claim, of the oppressed on the oppressor, the spectral on the corporeal a claim for justice based on understanding of time where, despite the erasure by the historicist narrative of both the *Delta Force Films* and *Kasablan*, an 'other' past remains, constantly disrupting and derailing the locomotive of historicism. Suleiman's films similarly articulate a time where the past isn't locked away as an object of history, but rather stakes a claim on the present. Within this claim, this interruption of historical violence, lies the claim to justice.

[4] At the 2012 Conference on the Palestinian Image in London, Aljafari, a Jaffa native, highlighted the presence of people he knew from growing up in Jaffa, who had been inadvertently caught in the filming of a number of Hollywood action films in Jaffa in the 1980s

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Selected Filmography

Balconies (Kamal Aljafari, 2009, Palestine)

Divine Intervention (Elia Suleiman, 2002, France, Germany, Morocco, Netherlands, USA)

Port of Memory (Kamal Aljafari, 2009, Germany, France, UAE)

The Time That Remains (Elia Suleiman, 2009, France, Belgium, Italy, United Arab Republic, Great Britain)

Chapter 1

✦

Biopolitics and the Politics of Sacrifice

Derrida on Life, Life Death, and the Death Penalty

Michael Naas

So, biopolitics.[1] Particularly, and no doubt more provocatively, *Derrida* on biopolitics, as well as on the death penalty, not to mention—for they are unavoidable here—Foucault and Agamben. In this chapter I would like to follow Derrida's references to biopolitics—and particularly the biopolitics of Foucault and Agamben—over the course of his two final seminars on *The Death Penalty* (1999–2001) and *The Beast and the Sovereign* (2001–3) in order to ask what Derrida finds useful about this notion, what he finds problematic about it, and what he believes we need to think in addition to it. We will see that while Derrida expresses skepticism in these seminars about the explanatory power of biopolitics (or biopower)—skepticism with regard to how the *term* is defined and deployed and skepticism with regard to the supposed novelty of the *thing*—he nonetheless recognizes both the significance of biopolitics and the new forms it is taking today.

But by attending closely to the contexts in which both this skepticism and this affirmation emerge—a two-year seminar on the various defenses of the death penalty in Western philosophy (and especially, as I will argue, in Kant) and another seminar on the way that same Western philosophy has tried to think the relation, in truth, the opposition, between the human animal and all other animals—we will see that, for Derrida, a thinking of *bio*politics must always be accompanied by another thinking of life, that is, by a thinking of the *sacrificial* economy of life which has always been intertwined in political institutions and in Western philosophy with biopolitics and has never simply been replaced or succeeded by biopolitics. As I will conclude, what Derrida will ultimately find insufficient about biopolitics—both the term and the concept—is the *horizon* against which, or the *topos* within which, it is being defined and thought, a horizon or a topos that, in the end, must problematize the notions of life and death that biopolitics usually presupposes.

It is thus in those two final seminars on *The Death Penalty* and *The Beast and the Sovereign*—close to the end of his life, therefore—that Derrida confronts most directly the meaning and nature of biopolitics or biopower as Michel Foucault began to develop it as early as 1976 in the first volume of *The History of Sexuality* (and then in 1978–79 in *The Birth of Biopolitics*)[2] and as Giorgio Agamben recast and redeployed it in his 1995 *Homo Sacer*.[3] The term "biopolitics" shows up for a first time during the first year of the seminar on *The Death Penalty* when Derrida makes a passing reference—just a single reference—during the sixth session (on February 2, 2000) to Nietzsche and "a biopolitics of peoples" (*DP1*, 149/213). The term emerges there with neither fanfare nor criticism. Indeed, it is not really remarked upon at all, and it is not accompanied by any comments about either Foucault or Agamben. While Foucault is in fact referred to earlier in the seminar, it is his claims in *Discipline and Punish* about the de-theatricalization or de-spectacularization of punishment that Derrida evokes, not his arguments regarding biopower or biopolitics in *The History of Sexuality* or anywhere else.

During the second year of the seminar, the related term "biopower" is referred to—though again only once—during the second session on December 13, 2000, as Derrida speaks, this time critically but without naming either Agamben or Foucault, of "everything that is today called—in an often confused way—biopower, a state sovereignty that would assume the right of life and death over the body of its citizen subjects" (*DP2*, 42/69). What happened, it might be asked, between Derrida's use of the term *biopolitics* the year before and this use of—or reference to—*biopower* some ten months later? Well, in the French editors' preface to the first year of *The Death Penalty* there is this tantalizing note:

> On the back of the last two pages of the ninth session (which are the photocopied pages of an American newspaper article), Derrida sketched a brief outline on the relation between biopower according to Michel Foucault and the question of interest in the death penalty. We have not transcribed it because, first, we have not included an oral exposé that a student presented on the chapter "Right of Death and Power over Life" in Foucault's *History of Sexuality*, volume 1, *An Introduction*, and, second, it is only partially decipherable. (*DP1*, xvi)[4]

We thus do not have, unfortunately, either Derrida's response to the student exposé presented during the seminar (presumably around March 2000) or Derrida's own thoughts about Foucault's notion of biopower and the death penalty, or about biopower more generally. But what we do have are Derrida's extended comments, approximately two years later, about biopolitics during the penultimate session (on March 20, 2002) of the first year of his subsequent seminar, *The Beast and the Sovereign*. Whatever the cause of

Derrida's interest in the question of biopolitics or biopower, the fact is that he would no longer use either term without a critical edge, one that seems to have been honed by a reading of Agamben just as much as Foucault.

It is thus in the seminar *The Beast and the Sovereign* that Derrida takes up most fully the term and the notion of biopolitics or biopower as it is developed by Foucault in the chapter of *The History of Sexuality* titled "Right of Death and Power over Life." While this chapter might just as legitimately have been treated, especially given its title, in Derrida's earlier seminar on the death penalty, it becomes almost unavoidable in *The Beast and the Sovereign*. For it is in this seminar that Derrida confronts most directly and explicitly the relation between the biological and the zoological (*BS1*, 14/35, 90/131, 277/373, 299/398, 305/407) and where he asks the question of the relationship between the animal in general and that animal, that *zōon*, first defined by Aristotle in the *Politics* as a *zōon politikon* (*BS1*, 25/49).[5] Given this configuration of concerns, it seems that Derrida could hardly avoid the question of the difference between *bios* and *zōē* as it is developed by Agamben in *Homo Sacer* in the course of what is presented as something of a defense of the Foucauldian thesis regarding biopower.

In the penultimate session, then, of this first year of *The Beast and the Sovereign*, Derrida begins by asking whether they will ever "succeed in unraveling, disintricating, as it were, unscrambling things between *zoology* and *biology*? Between the zoological and the biological, between these two Greek words, which are more than words, and are both translated as 'life,' *zōē* and *bios*?" (*BS1*, 305/407). It is at this point that Derrida, having himself already looked at a few key passages from Aristotle's *Politics* on the human as a *zōon politikon*, turns to Agamben's reading in *Homo Sacer* in order to raise a first red flag: "It is in this passage that, on the basis of a single occurrence of the word *bios*, in the midst of many uses of *zōē* or *zēn* (to live) . . . Agamben . . . thinks he can find a distinction between *bios* and *zōē* that will structure his entire problematic" (*BS1*, 315/419). As Derrida goes on to say a page later, amplifying his skepticism:

> All of Agamben's demonstrative strategy, here and elsewhere, puts its money on a distinction or a radical, clear, univocal exclusion, among the Greeks and in Aristotle in particular, between bare life (*zōē*), common to all living beings (animals, men, and gods), and life qualified as individual or group life (*bios: bios theōrētikos*, for example, contemplative life, *bios apolaustikos*, life of pleasure, *bios politikos*, political life). What is unfortunate is that this distinction is never so clear and secure, and that Agamben has to admit that there are exceptions . . . (*BS1*, 316/420)[6]

This, then, would be the first thing that Derrida finds problematic about biopolitics, or at least about Agamben's defense or development of this

Foucauldian notion, a defense based on the supposed distinction between these two different ways of saying "life" in Greek. The same criticism will return just a few months later in *Rogues* (first presented at a colloquium at Cerisy la Salle in July 2002) in Derrida's reading of yet another passage from Aristotle's *Politics*, this time on the theme of democracy:

> In this text, as in so many others of both Plato and Aristotle, the distinction between *bios* and *zōē*—or *zēn*—is more than tricky and precarious; in no way does it correspond to the strict opposition on which Agamben bases the quasi-totality of his argument about sovereignty and the biopolitical in *Homo Sacer* (but let's leave that for another time).[7]

Derrida's second complaint about Agamben's (and no doubt Foucault's) approach has to do with claims regarding the *novelty* of biopolitics. "What remains even more difficult to sustain"—more difficult to sustain than this supposed difference between *bios* and *zōē*—"is the idea that there is in this something modern or new" (*BS1*, 316–17/421). Though Agamben himself, says Derrida, is "keen to recall that [biopolitics] is ancient as can be, immemorial and archaic" (316–17/421), that "what appears to be modern . . . is in truth immemorial" (317/421), he also wants "to define the specificity of modern politics or biopolitics" as the moment when *zōē*, understood as bare life, enters into the polis, the moment of the politicization of bare life (*BS1*, 325/432–33).[8] Moreover, Agamben claims that this connection between modernity and biopolitics comes out of Foucault himself: "Michel Foucault refers to this very definition when, at the end of the first volume of *The History of Sexuality*, he summarizes the process by which, at the threshold of the modern era, *natural life* begins to be included in the mechanisms and calculations of State power, and politics turns into *biopolitics*" (Agamben cited in *BS1*, 328/436). Of course, Agamben's explicit crediting of Foucault with this thesis necessarily comes, as Derrida notes, with an implicit critique of Foucault for having missed the essential distinction between *bios* and *zōē*. For had Foucault seen this distinction, he would no doubt have spoken of *zoo*politics rather than *bio*politics insofar as it is the politicization of *zōē*, not *bios*, that marks the uniqueness of modernity. What is at issue here, on Derrida's reading, is the very epochality or periodizing—the epistemic shifts—assumed by Foucault's and Agamben's shared genealogical approach.

In addition to these claims regarding the supposed novelty of biopower, there is also, on Derrida's reading, Agamben's not unrelated penchant for claiming himself to have been the first to discover, recognize, or thematize these moments of novelty within Western philosophical thought or political practice. Derrida finds this tendency all the more problematic with regard to biopower, particularly when Agamben (like Foucault) neglects or passes over in silence Heidegger's own original critique of biologism and of "the

biologistic reduction" of the definition of man as a rational animal in his *Letter on Humanism* and elsewhere (*BS1*, 321/427).[9] Insofar as Heidegger begins exactly where Agamben does, namely, with a reading of Aristotle's *Politics* and the understanding of the human as a *zōon politikon*, this silence with regard to Heidegger and the claim to having been first are, for Derrida, all the more striking.[10]

Derrida goes on in this penultimate session of the first year of *The Beast and the Sovereign* to clarify that his questions or reservations with regard to Agamben are not meant to suggest that he himself has "no interest in anything that could be called a specificity in the relations between the living being and politics, in what these authors so calmly call 'modernity' " (*BS1*, 326/433–34). For there can be no doubt, says Derrida, that new things are happening today with regard to biopolitics, new things that are worthy of analysis. It is thus not the novelty of certain biopolitical things that is the problem, in Derrida's eyes, but the supposed novelty of biopolitics itself. As Derrida puts it, "what bothers me is not the idea that there should be a 'new biopower,' but that what is 'new' *is* biopower; not the idea that there is something new within biopower, which I believe, but the idea that biopower *is* something new" (329/437). Understood in the most general way as the control, management, or administration of life, of populations and peoples, by and within the body politic, biopolitics has no doubt always been a part of political life in the West. It has undergone all sorts of transformations or mutations in techniques and practices along the way, and perhaps particularly in modernity, but it did not emerge for the first time in modernity. In a word, "there are incredible novelties in biopower, but bio-power or zoo-power is not new" (330/438). (This is also similar, let it be said in passing, to Derrida's critique in *The Death Penalty* of Foucault's claim that we begin to see in the nineteenth century a de-theatricalization or a de-spectacularization of punishment; see *DP1*, 42–43/74–75; *DP2*, 220/294. Derrida will argue that there is indeed a displacement or transformation in the *mode* of theatricalization or spectacularization, a greater and greater virtualization of it, for example, but not a move from the theatrical or the spectacular to the de-theatrical or the de-spectacular.)

It is at this point that Derrida encourages his seminar audience to reread closely the chapter "Right to Death and Power over Life" in the first volume of Foucault's *The History of Sexuality*, which he says he himself once did, in " 'To Do Justice to Freud': The History of Madness in the Age of Psychoanalysis," an essay written in 1991 for the thirtieth anniversary of the publication of *History of Madness*, an essay that, it should be noted, attempts to follow Foucault's notion of power (including, as Derrida will suggest at the end, an even more originary *Bemächtigungstrieb*) but which makes no reference to either "biopolitics" or "biopower."[11] After referring to this previous work of his, Derrida goes on to cite an interesting claim regarding biopower and the death penalty from the aforementioned chapter of *The History of Sexuality*, the very chapter, let us recall, that was apparently treated in that student exposé two

years before during the seminar on the death penalty and the one that Derrida seemed to be alluding to in that single critical reference to biopower during the following year of that seminar. Derrida notes: "In passing, Foucault declares that he 'could have taken, at a different level, the example of the death penalty' " (*BS1*, 332/440; *HS1*, 137/181). Now were Foucault to have taken that example, which he does not, he would have, says Derrida citing Foucault, "related the decline of the death penalty to the progress of biopolitics and a power that 'gave itself the function of managing life' " (*BS1*, 332/440–41; *HS1*, 138/181). Foucault seems to be positing here, not uninterestingly, a certain correlation between the rise of biopower and the decline of the death penalty; as greater and greater emphasis was placed on the management and administration of life, less and less was placed on the threat to punish by death. To cite the full sentence from which Derrida extracts just a fragment: "As soon as power gave itself the function of managing life, its reason for being and the logic of its existence—and not the awakening of humanitarian feelings—made it more and more difficult to apply the death penalty" (*BS1*, 138/181).

Derrida's response to this claim is curious. He neither affirms nor denies it outright but opts instead to grant it for the moment, for the sake of argument, as it were, in order to pose other questions, such as whether Foucault's text does not compel us to think and to do history differently:

> Supposing . . . that things are this way, and that some decline of the death penalty is to be explained principally by the new advent < of biopolitics > . . . all of those things compel us, and we have to be grateful to them for this, to reconsider, precisely, a way of thinking history, of doing history, of articulating a logic and a rhetoric onto a thinking of history or the event. (*BS1*, 332/441; angle brackets in the original)

Derrida here claims that Foucault's work—perhaps despite itself—causes us to consider or to seek out other ways of "thinking history . . . or the event." Though he does not spell it out here, Derrida seems to be harkening back to his reading and criticism of Foucault some four decades earlier, in "Cogito and the History of Madness," where, already there, the question was whether Foucault's emphasis on epistemic shifts in the West's understanding of madness did not prevent him from taking into account a more fundamental *historicity* that at once founds and disrupts Foucault's more linear model. Derrida goes on to describe this linear model or this periodization as the "common temptation" of Foucault and Agamben:

> To call into question this concern to periodize . . . is not to reduce the eventness or singularity of the event: on the contrary. Rather, I'm tempted to think that this singularity of the event is all the more irreducible and confusing, as it should be, if we give up that linear history

> which remains, in spite of all the protests they would no doubt raise against this image, the common temptation of both Foucault and Agamben. (*BS1*, 333/441–42)

Despite this "common temptation," Derrida has to admit not only that Foucault and Agamben would have contested this characterization, but that there is also a countervailing tendency in both thinkers. We already saw how Agamben, while intent on demonstrating the novelty of biopower within modernity, nonetheless acknowledges its ancient roots. As for Foucault, it is clear just from the passage from *The History of Sexuality* cited above that biopower does not simply replace other forms of sovereign power but supplements and transforms them. Disciplinary practices to control or regulate the life of citizen-subjects were never absolutely opposed to and never simply came to replace a sovereign power that would expose these same citizen-subjects to death or keep them in check through the death penalty. In other words, a "horizontal" axis of biopolitics does not necessarily conflict with or contradict and can exist alongside a "vertical" axis of sovereign power that culminates in the sovereign's right to put citizens to death. The rise of one might signal or even contribute to the decline of the other, but there is no need to think that the one ever completely replaces the other. This would also be consistent with Derrida's own insistence on the continuing importance of a notion of life that is aligned much more with sovereign power than with biopower or the biopolitical, the notion of a life that is not so much managed or disciplined as *sacrificed* in the name of a life beyond life, a life that is higher than life.

As he concludes his reading of Agamben and Foucault on biopolitics, Derrida suggests that "we give up the alternative of synchronic and diachronic" and, especially, "the idea of a decisive and founding event"—the kind of idea that Foucault and, especially, Agamben tend to prioritize (*BS1*, 333/442). While all these texts on biopower and biopolitics are, says Derrida, "very interesting . . . and go to the heart of what interests us here" (332/441), he seems intent on turning our attention elsewhere. He suggests that we not give up reading and rereading figures such as Aristotle and Bodin, for example, on the question of sovereignty, all those texts that, "if we want to understand politics *and its beyond*, and even the bio-powers or zoo-powers of what we call the modernity of 'our time,' " must be perpetually taken back up, "difficult as they may be to decipher, indispensable in all their abyssal stratifications" (333/442; my emphasis).

That is more or less the extent of Derrida's engagement with the notion of biopolitics, at least in his final two seminars—for who knows what other, still unpublished texts or seminars in the archives will reveal one day. We will return later to the question of what, on Derrida's account, would precede or

condition this biopolitics, that is, what it is that must be thought in order to understand, as he puts it, "politics and its beyond." For the moment, let us heed Derrida's advice and return to one of the texts from the first year of *The Death Penalty* that he encourages us to read and reread—even when, and perhaps especially when, what is at issue there is a notion of sovereignty that we might all too easily and too quickly think we have surpassed. Though Foucault makes no mention of him in either *Discipline and Punish* or the first volume of *The History of Sexuality*, Derrida suggests that we need to return to Kant.[12] "One must read Kant and always begin by rereading Kant" (*DP2*, 37/62); this is the advice that Derrida offers his students at the outset of the second session of the second year of *The Death Penalty*. But this advice, or this methodological principle, was in evidence well before that session. Though it would take him more than a full year to get around to analyzing in any detail the letter of Kant's justification of the death penalty, that is, the six-page section of *The Metaphysics of Morals* devoted to the "Right to Punish and to Grant Clemency," Derrida revolves around Kant constantly, from the very first session of the first year of the seminar, on December 8, 1999, right up through the very last session of the second year, on March 28, 2001, evoking him—and more often than not spending significant time reading him—in all twenty-one sessions.[13] This is because Kant proves to be, for Derrida, at once the most rigorous philosophical advocate of the death penalty and the one who understood most clearly the need to ground his advocacy in another logic or economy of life, one that goes beyond the biological and the biopolitical. It is this emphasis on life, as we will see, on a life beyond all biological life, all biopolitical considerations, that Derrida will find so central not just to Kant but to the entire philosophical tradition of which he would be the most powerful spokesperson.

Derrida recalls in the opening pages of the seminar that, for Kant, the death penalty is not just one possible or optional element within law but the necessary foundation or "ultimate justification" of it (*DP1*, 9/33). Derrida writes, parsing Kant, "There is no law without the death penalty . . . The concept of law in itself would not be coherent without a death penalty. One cannot think a code of law without the death penalty" (*DP1*, 124n3/180n2; see *DP1*, 9/33, 129–30/187–88, and *DP2*, 47/76). Though others, from Hobbes and Locke to Hegel, to name just three, will have argued in a similar vein, Kant gives us, according to Derrida, "the purest ethico-juridico-rational formulation of the necessity of the death penalty" (*DP1*, 123–28/180–85). Kant will have been, says Derrida with a bit of sarcasm that in no way undermines his ultimate evaluation, "the greatest thinker of the purest morality in the history of humanity" (*DP1*, 158–62/225–30; see *DP2*, 11/31).

Now, the reason for calling Kant's thinking or morality "pure" here is that his justification for the death penalty is based on nothing other than the incalculable honor or dignity of the human.[14] Picking up an argument that he had made a quarter of a century earlier in *Glas* with regard to Hegel, Derrida

recalls that the death penalty is for Kant, and for Kant "par excellence" (*DP1*, 8/32), that which elevates the human above his natural condition by recognizing the incalculable dignity of man (*DP1*, 8–9/32–33; see *Glas*, 99a/114a).[15] The death penalty is thus not, for Kant, a debasement of human dignity but the ultimate respect for it. It is not a mistreatment of the human but the only punishment that recognizes man's unique and incalculable dignity, that is, man as an end in himself. Derrida writes: "To respect a man who has been judged by punishing him for his transgression, and not because his punishment would serve some purpose, is to respect his dignity as an end and not as a means" (*DP2*, 40/66).

Derrida underscores the fact that, for Kant, punishment must aim only to punish the wrongdoer, not bring about any change or even any good in either the wrongdoer or society more generally. For "if one punished the criminal with a view to and in view of something other than his crime, with other goals in mind (security, exemplarity, the greater well-being of society, etc.)," then "one would be treating the criminal, and law, and justice as a means with a view to an end" (*DP2*, 95/136; see *DP1*, 271–73/366–69). Derrida emphasizes the same point in an interview in *For What Tomorrow*:

> To this means/ends pair that dominates the debate on both sides (for and against the death penalty), Kant opposes an idea of justice and a "categorical imperative" of criminal law that appeals to the human person, in his "dignity" (*Würde*), as an end in himself. This dignity requires that the guilty party be punished because he is punishable, without any concern for utility, without sociopolitical interest of any kind.[16]

For Kant, therefore, the only legitimate consideration for punishment is the "inner wickedness" of the wrongdoer. It must have no other interest in view beyond this "inner wickedness" and in proportion to that wickedness (*DP1*, 272/367). In a word, punishment must be, for Kant, completely *disinterested* (see *DP1*, 133/191).[17]

Derrida thus recalls that, for Kant, the death penalty must be justified as a matter of principle, "independently of any consideration of utility, of setting an example, of deterrence" (*DP2*, 21/44), that is, as Derrida says in his recapitulation of Kant's critique of Beccaria, independently of "any consideration that tended to make the legal or moral subject, the human person, a means toward an end" (21/44). While an abolitionist such as Beccaria might argue that the death penalty should be abolished because it is useless, Kant claims that it must be retained precisely because and only insofar as it is useless (see *DP2*, 39–40/65–67). By insisting as he does on the priceless dignity of man above and beyond all other interests and values, Kant is able, says Derrida, to "disqualify" the claims of both advocates of the death penalty, who see the threat of death as a deterrent and a source of security, and abolitionists,

who claim that the death penalty must be abolished either because it has no such deterrent effect or because it contravenes the inviolable right to life (see *DP1*, 127/184–85, and 271/366–67).[18] While the first brand of abolitionists thus accepts the ends-means argument but simply concludes that the death penalty is not an effective deterrent, the latter places all value in empirical, natural, or, as Kant calls it, "phenomenal" life. But the pricelessness of human dignity requires that punishment be meted out not only beyond every "utilitarian conception of law" (266/360) or beyond all interest (140–41/201–3), but also beyond all "phenomenal calculation," that is, "without reference to the least phenomenal, empirical interest, for the body of society or the nation" (127/184–85).

Kant's emphasis on "dignity" thus depends on the distinction between the *phenomenal* and the *noumenal*, along with two kinds of calculation, a calculation of means and ends, and a calculation of the incalculable, where—in the case of a death penalty meted out for the crime of murder—one incomparable and incalculable dignity pays for another.[19] The very justification or indeed vocation of law is thus the elevation of humankind above all life, all calculable, phenomenal life: "If one wants to get beyond *homo phaenomenon*, the empirical attachment to life, one must raise oneself by means of law above life and thus inscribe from the height of noumenal man the death penalty in the law" (*DP1*, 124n3/180n2). As Derrida insists, the death penalty is what, in Kant, "testifies to human dignity and the remarkable possibility that properly distinguishes man by allowing him to rise above life" (*DP1*, 129/186; see also 179–80/252–53, 182/256, 195/271, and 271–73/366–69). Without the death penalty, mankind would never be able to rise above animal life through the law; without it, there would be no greater value than that animal life, no moral life beyond the world of mechanism and phenomena; in a word, no human freedom and no justice (see *DP2*, 84/123). For "what gives life its value is above life—and this has to do with justice, with a justice that is worth more than life" (*DP2*, 41/67; see also *DP2*, 90/130, and 95/136; and *DP1*, 271/366–67).

The death penalty is therefore not opposed to justice and human freedom but is, for Kant, the ultimate recognition of them. In other words, shocking as it may at first sound, the death penalty is what is *proper to man*, a claim Derrida repeats in *For What Tomorrow*: "The death penalty would thus be, like death itself, what is 'proper to man' in the strict sense."[20] This would of course be one of the central points of intersection between *The Death Penalty* and *The Beast and the Sovereign*, a seminar that focuses on the supposed difference between the human animal and all other animals. In the philosophical tradition that runs from Plato to Heidegger, it would be not only the ability to die that sets mankind apart from other animals, the ability to die as opposed to perish, but the possibility of law, freedom, and, indissociably, the death penalty. While Kant would be the clearest expression of this reliance of law itself upon the death penalty, he is only the culmination of a long

tradition. Insofar as the death penalty respects nothing less and nothing other than the dignity or honor of man, it is what raises man above other animals and so constitutes what is proper to him. It is the death penalty, then, that distinguishes the human from the animal by positing a value—a dignity, a freedom, man as an end in himself—which is above all interests and, indeed, beyond all life. Already in his reading of Plato's *Laws* in the opening pages of the seminar, Derrida finds the germs of a logic that, he says, we will "continue to find up to Kant and many others," though in "Kant par excellence," namely, that "access to the death penalty is an access to the dignity of human reason, and the dignity of a man who, unlike beasts, is a subject of the law who raises himself above natural life" (*DP1*, 8/32).

The dignity of man, beyond all phenomenal or all natural life, is thus a value for which one must be willing to sacrifice this phenomenal or natural life. Derrida writes: "The dignity of man, his sovereignty, the sign that he accedes to universal right and rises above animality is that he rises above biological life, puts his life in play in the law, risks his life and thus affirms his sovereignty as subject or consciousness" (*DP1*, 116/170). We thus find in the Kantian discourse justifying the death penalty a powerful resistance to all biopolitical considerations of life, a notion of dignity that goes beyond the biopolitical in going beyond all life. As Derrida says during the second year of the seminar, explicitly invoking the notion of biopolitics: "Kant wants this logic and this remark on the unacceptable transaction with the body of the one condemned or the legal subject to be beyond everything that is today called—in an often confused way—biopower, a state sovereignty that would assume the right of life and death over the body of its citizen subjects" (*DP2*, 42/69).[21]

But on Derrida's reading of Kant, that for which one must be willing to sacrifice phenomenal or empirical life—dignity, justice—can be understood not simply as the opposite or the other of life, as some principle other than life, but as another kind of life, as a higher, truer, and more dignified form of life. This is implied when Derrida argues during the second year of the seminar that "what gives life a price is worth more than life, by definition, and remains alien to life, *at least to literal and biological life*" (*DP2*, 96/137; my emphasis). This is a claim that becomes explicit in *For What Tomorrow*: "the proper to man would consist in his ability to 'risk his life' in sacrifice, to elevate himself above life, to be worth, in his dignity, something more and other than his life, to pass through death toward a '*life*' that is worth more than life."[22] We would thus find in Kant something like a willingness to *sacrifice* all merely biological or biopolitical life in the name of a conception of life that goes beyond the biological and the political, at the same time that it serves, and precisely because of this, as the ultimate justification for the political, that is, for law and the death penalty. For Kant, says Derrida, "no law will ever be founded on an unconditional love of life for its own sake, on the absolute refusal of any sacrifice of life" (*DP1*, 128/185; see 116/170). Only a system of law that is willing to sacrifice this life is thus able to take

the full measure of man's freedom and dignity, that is, the full measure of a freedom and a dignity that go beyond all measure and all calculation.

Kant's logic would thus be an essentially *sacrificial* one, a sacrifice of one life—or one *kind of life*—for another. As Derrida succinctly puts it, Kantian morality is a "sacrificial morality" (*DP2*, 245/327). In this respect, Kant would be just the most rigorous in a long line of philosophers in the West who have justified the death penalty on the basis of some version of this sacrificial morality.[23] It is perhaps no coincidence, then, that Derrida would be driven to talk about biopolitics in a seminar devoted to the supposed difference between the human animal and all other animals based on a relationship to death. For it could be argued that the very same sacrificial logic that sustains the death penalty also underlies a logic of carnivorous sacrifice that justifies the human domination and consumption of animals, the same sacrificial logic that, as Derrida reads the philosophical tradition, justifies at once the *making die* of animals—including the animal within man—and the *letting live* of humans, though often just certain humans, in the name of a conception of human life that goes beyond all phenomenal, empirical, animal life. In *For What Tomorrow* Derrida sees this Kantian logic as part of a long philosophical tradition in the West:

> This is Plato's *epimeleia tou thanatou*, the philosophy that enjoins us to exert ourselves unto death; it is the incomparable *dignity* (*Würde*) of the human person, who, as an end in himself and not a means, according to Kant, transcends his condition as a living being and whose *honor* is to inscribe the death penalty within his law.[24]

Philosophy as the practice of dying is thus not at all incompatible with an emphasis on the fundamental and incomparable dignity of the human, not at all incompatible with the sacrifice of one life for another. Indeed, they would even seem to be, as it were, two aspects of the very same sacrificial morality.

Now, it goes without saying that Derrida will be even more suspicious and critical of this sacrificial logic and morality in philosophy than he was of the notion of biopolitics. For while the latter notion came under scrutiny only in those two final seminars, the former was one of the essential targets of Derridean deconstruction from the very beginning. As Derrida puts it in "Abraham's Melancholy," from March 2004, which would turn out to be one of his very last interviews: "Often, everywhere, I am concerned with tracking sacrificial thinking. And it's present everywhere in philosophy."[25] Derrida will have thus "tracked" this sacrificial thinking from the beginning to the end of his work in order to develop not the opposite of this thinking but an alternative to it, a way of thinking the relationship between life and death that avoids both opposition (life as the opposite of death) and dialectical identification or sublation (life *as* death, life as the *truth* of death). The logic of sacrifice that situates life in relation to another, higher, and purer

life must ultimately be resituated or rethought in terms of another "logic" or another topos, one that is nonbinary, nonoppositional, and nondialectical, one where life is thought from the very beginning in relation to death, the organic always in relation to the inorganic, and so on. In his 1975–1976 seminar *Life Death*, for example, Derrida asks whether it is possible to think the "beyond" of both oppositional and dialectical logic by means of a notion such as "life death"—where "life" and "death" are to be thought with neither verb (*is*) nor conjunction (*and*) between them. Derrida writes—or, rather, says to his seminar audience:

> By saying, with the blank of a pause or the invisible mark of a beyond, "life death," I am *neither* opposing *nor* identifying life and death (neither *and* [et] nor *is* [est]), I am neutralizing, as it were, both opposition and identification, in order to gesture not toward another logic, an opposite logic of life and death, but toward another topos, if you will, a topos from which it would be possible to read, at the very least, the entire *program* of the *and* and of the *is*, of the positionality and presence of being, both of these being effects of "life death."[26]

"Life death" would thus be, in 1975–1976, the name or one of the names of this other topos. Some twenty-seven years later, in the second year of *The Beast and the Sovereign*, Derrida seems to suggest something similar. While referring throughout that seminar to biological life and death, to biological growth, biology, and biologism (*BS2*, 40/74, 76/120, 103/158, 117/175, 153/222, 195–96/275–77), everything seems animated, driven, in the end, by an attempt to think *physis*—or, in a reading of Heidegger, *Walten*—in an "originary and pre-oppositional sense" that "goes well beyond biological life, biological growth" (40/74)—to think *physis* before it became "opposed as nature or natural or biological life to its others" (76/120). In other words, Derrida seems to want to think *physis* in relation to this other topos, *physis* as the place of an even more originary *différance*, *physis* as the place of "life death."

This would be, it seems, Derrida's way of calling into question that epochality or that periodizing which appeared so problematic in Agamben and Foucault, the tendency to think in terms of epochs or periods and of the founding events that would mark them; it seems to be Derrida's way of suggesting that we attempt to think that other logic or topos that is at once assumed and concealed by this epochality. We find something similar in *Rogues*, written between the first and second years of *The Beast and the Sovereign*, as Derrida argues:

> What applies here to *physis*, to *phuein*, applies also to life, understood before any opposition between life (*bios* or *zōē*) and its others (spirit, culture, the symbolic, the specter, or death). In this sense,

> if auto-immunity is *physio*logical, *bio*logical, or *zoo*logical, it precedes or anticipates all these oppositions. My questions concerning "political" auto-immunity thus concerned precisely the relationship between the *politikon*, *physis*, and *bios* or *zōē*, life-death. (*Rogues*, 109/154–55)

The debate over *bios* and *zōē* was thus never merely philological. It concerned nothing less than the very horizon or topos for the question of life and death, or for the *event* that would precede the opposition between them. As Derrida says near the end of the first year of *The Beast and Sovereign* in those very pages where he is questioning Agamben and Foucault about the so-called novelty of biopolitics or today's novelties within the biopolitical:

> My doubts and my dissatisfactions concern the concepts or the conceptual strategies relied on in order to analyze and characterizes these novelties. I don't believe, for example, that the distinction between *bios* and *zōē* is a reliable and effective instrument, sufficiently sharp and, to use Agamben's language, which is not mine here, sufficiently deep [*profond*] to get to the depth [*profondeur*] of this "[so-called] founding event." (*BS1*, 326/434)

So, yes, biopolitics. But then also, at another depth, or in a different topos, following a different economy, *life death*. That would be the horizon or the limit that Derrida suggests we try to think, the horizon without horizon or the limit without limit, the unlocatable topos, for both the power over life and the right to death, both biopolitics and the death penalty, both the management of life and the sacrifice of it.

Notes

1. The reader is invited to hear in this opening phrase an echo of the opening of the eighth session of Derrida's seminar of 1975–1976, *La vie la mort* (Paris: Éditions du Seuil, 2019); trans. Pascale-Anne Brault and Michael Naas as *Life Death* (Chicago: University of Chicago Press, 2020). The session, which is devoted to Heidegger's understanding of Nietzsche's supposed "biologism," begins thus: "So, biologism [*Le biologisme, donc*]" (156/201). Page numbers refer to English and French editions, respectively.

2. Michel Foucault, *The History of Sexuality, Volume 1: An Introduction*, trans. Robert Hurley (New York: Random House, 1978); *Histoire de la sexualité 1: La volonté de savoir* (Paris: Éditions Gallimard, 1976), hereafter cited as *HS1*, with the English pagination followed by the French. It is in this first volume of *The History of Sexuality* that biopower is defined as "an explosion of numerous and diverse techniques for achieving the subjugation of bodies and the control of populations" (*HS1*, 140/181), and biopolitics, the executor of this biopower, is defined as what aims "to ensure, sustain, and multiply life, to put this life in order" (*HS1*, 138/181).