University of Colorado Law Review

Volume 92 | Issue 4 Article 5

Fall 2021

The Pure Theory of Law is a Hole in the Ozone Layer

Peter Goodrich

THE *PURE THEORY OF LAW* IS A HOLE IN THE OZONE LAYER

PETER GOODRICH*

Star date 2/7/2020. Author's log. I received an email from our Co-Editor, the double barrels of Desautels-Stein, relating to the now-virtual symposium, *What Should Critical Legal Theory Become?*[1] The electronic epistle, which lists the team of intrepid intellectuals contributing to the project begins:

> Friends and Colleagues,
>
> We are writing with regard to our upcoming symposium with the Colorado Law Review, *What Should Legal Theory Become?*

Sans critique. The word "critical" omitted. Where better to start than with a slip? Undoubtedly a verbal symptom, possibly a joke. Certainly a clue. The Symposium title was one word too long and the Editor had been editing, cutting the prolixity of the adjective, honing the scopic lens, and smoothing the path of theory. Condensing critique to a tweet. If critical legal theory is to matter—it must invade the institutional space of legal thought, the bastions of jurisprudence, the bastille of doctrine, the prison of practice, and become legal theory *tout court*, plain and simple.

---

*Professor of Law and Director of the Program in Law and Humanities, Cardozo School of Law, New York, and Professor of Legal Studies, School of Social Science, New York University, Abu Dhabi. My thanks, for such is the anthropological and amicable purpose of the asterisk footnote, to the symposium editors, single and several, and to Nathan Moore, Serene Richards, Thanos Zartaloudis, Neil Duxbury, Bill Bowring, and the student editors, who all share the fate of having read this article.

1. A stake has been driven through the heart of becoming. At the eleventh hour, long after the virtual symposium had taken its non-place, for reasons of acceleration, elegantior iuris, uncertainty or common ground, the Law Review changed the title of the colloquium from the aporetic yet prospective 'What Should Critical Legal Theory Become?', to the current recusant nomination 'The Stakes for Critical Legal Theory'. I am not privy to the reason, but it should signal a certain fulmination, that something burned, that in titular and combustive form critique became materially different.

The slip is a pathway, a launching point, a sudden change of course and commotion disrupting convention and dissipating melancholy through the act. It is, to cite Gandorfer's neologism, *matterphorical* in that it is always something, matter that slips, be it a pen, a tongue, a foot, or the jog occasioned by a sleight of mind, in this instance an omission.[2] The case of the missing "critical" is a minor point, an incident, that raises directly and says expressly what many had thought and some now dare engage, which is that the suspension of the critical, an abeyance from early on, a theoretical practice or propensity for abstraction that rapidly stalled the critical legal studies movement. The slip, the gap, the forgetting, I will argue, all mark a negation. The abbreviated appellation, the shortened nominate inscription, lacking the critical, announces a reformulation and, if initially lexically, a new and less restrictive sense of what legal theory should become. Saying that legal theory is critical does not matter. It can be omitted because it remains an abstraction, out of the air. What should matter is being critical, the practice and performance of a theory of becoming.[3] Who will we be? What is the entity to come? The "not yet" of legal theory, *terra incognita* in moments of crisis. Move, in other words, from the conditional, the vaguely moralizing "should," to the future tense of aspiration and imagination: What will legal theory be?

VIRAL PRAXIS

There is always a context, an historical conjuncture, a site and space, an institution and atmosphere, in which theory is encountered and intellective events occur. Page, screen, schola, or scholium, thought is never alone. Theory is incapable of immateriality because of the scene and space of its corporeal and

2. I borrow the term from DANIELA GANDORFER, MATTERPHORICS: ON THE LAWS OF THEORY 10–11 (Duke Univ. Press, 2021): "Concepts cannot be simply ideational, they are brought into existence by onto-epistemological practices, when electrons crash into language and an orchid and a wasp cross a letter," and also when "[i]n here and out there, atoms and ions, winds and rivers, attracting and repulsing each other in ways that reveal desire to be a feeble concept . . . ." What would legal force become, if legal thought were to operate matterphorically, and force is understood according to quantum physical rather Newtonian interpretations? For an introduction, see Daniela Gandorfer & Ayub Zulaikha, *Introduction: Matterphorical*, 24:1 THEORY & EVENT 2 (2021).

3. This is the editorial choice made, in a cogently critical fashion, by Andreas Philippopoulos-Mihalopoulos, in his *Introduction: The* and *of Law and Theory* to ROUTLEDGE HANDBOOK OF LAW AND THEORY (2019).

interlocutory performance, the sensibility of ideas, or, as Coccia frames it so well, "*[w]e are made of the same matter as the images that give body and consistency to our desires.*"[4] We become real in the world, as Carnevali argues, by virtue of appearance.[5] In the contemporary context of increasingly viral environments, the specters of critique haunt a diasporic residue of ideas and a disbanded, remediated, patulous social network. It is a question then of repetition, reproduction, the forming and reforming of groups, generations, connectivities, viral ensembles, and, in the case of critical legal theory, a momentary movement, a mobilization that was not without consequences and a degree of success.

To hark, however, to critical legal theory (even *sous rature* as Desautels-Stein, lacking perhaps an Anker, implicitly suggests) is to invoke a past. In the United States, it is to reference a threat that was quashed in law schools, a spirit that was anathematized, and a trajectory that splintered. What remains, bravely corralled in exploratory works such as *Searching for Contemporary Legal Thought*, a properly quizzical interrogation, or in the peculiarly nostalgic *Critical Legal Studies Archive* conference at Princeton in February 2020, is a feeling of senescence mingled with repetition compulsion.[6] Theory here seems doomed to search for a lost object or to pass unnoticed in the default mode of traumatic post-ignition, and in the shadow of white failure. It is somewhat different in Europe, or more specifically in the anglophone common-law world outside of America, where a cosmopolitan and constantly renewing critical legal theory and

4. EMANUELE COCCIA, SENSIBLE LIFE: A MICRO-ONTOLOGY OF THE IMAGE 65 (2016).

5. BARBARA CARNEVALI ET AL., SOCIAL APPEARANCES: A PHILOSOPHY OF DISPLAY AND PRESTIGE 32 (2020).

6. JUSTIN DESAUTELS-STEIN & CHRIS TOMLINS, SEARCHING FOR CONTEMPORARY LEGAL THOUGHT (2017), a collection incisively premised on the uncertain existence of any coherent contemporary, or more accurately critical, legal theory. The range of essays spans *Zombie Jurisprudence*, to accounts of *Legal Amateurism*, the *Ruins of Legal Theory*, to ruminations that theory does not in fact address law in any meaningful sense, mixed with questions of history, tradition and rule change. The context of the volume, it should be noted, was framed specifically in terms of critical legal studies and many of the papers were presented in a panel at Harvard Law School in the presence, and marking the retirement of Duncan Kennedy, a founding figure in U.S. critical legal thought. The Princeton Archive Conference, *Critical Legal Studies: Intellectual History and the History of the Present*, was held February 27–28, 2020 and offered a species of dirge for the critical legal studies movement as its records were entombed in an archive at a remote University in New Jersey.

conference continue unabated.[7] Critical legal theory may persist in inventive and novel forms outside the United States, in Finland and in international law, for instance, examples I will use, but it is marginal in institutional status and tenuously connected to the practice of laws it often seeks to escape or erase.[8]

If, in the United States, the question posed relates to reviving critical legal theory in the law school context in which it was anathematized, in the non-U.S. legal academy, the issue that continues to stall and distract critique is that of the separation of theory from practice. It is an old debate that returns to the 1980s and the philosophical and methodological confrontations of materialism and idealism, Marx and Hegel. The tropes and figures, the stereotypes and scarecrows, are familiar enough. Armchair theory stands off against activist practice. The scholar secreted in the ivory tower is pitched against the figure of the leftist practitioner. Postmodernism is confronted by capitalist realism, by feminist politics, by the moralizing exhortations of both professionalism and law. New materialism—matterphorics—in its turn battles abstraction. The next generation inherits from the last, but, by turning on its parents, risks looking in the wrong direction.

In sum, a re-centering of legal theory is needed, in the body, in the immediate space of the institution, in the community of theorists. It is a matter and desire of theory as the act of taking responsibility for and building the conceptual space for responding, analyzing, crashing into, and reverberating against, rather than flattering, law. It is politics and jurisprudence, not judges, that create the rules. Which is also to say that legal theory benefits from, uses, inhabits, and is paid by the legal institution, primarily within the university, and also propagates juridification in the form of a production line of law graduates. The *dispositif* of pedagogy, the faces of office, and the inhabitation of corporate spaces bring with them the demands of theory, of

7. There is the journal LAW AND CRITIQUE and various online critical legal theory-oriented periodicals. One should add NEW CRITICAL LEGAL THINKING: LAW AND THE POLITICAL (Stone et al. eds., 2012); DOUZINAS & GEAREY, CRITICAL JURISPRUDENCE: THE POLITICAL PHILOSOPHY OF JUSTICE (2005); and the expansive volume of studies, both prospective and retrospective, collected in RESEARCH HANDBOOK OF CRITICAL LEGAL THEORY (Emilios Christodoulidis et al. eds, 2020), particularly chapter one. For a German perspective, see WHAT'S LEGIT? CRITIQUES OF LAW AND STRATEGIES OF RIGHTS (Liza Mattutat et al. eds, 2020).

8. *See, e.g.*, Robert Knox, *What Is to Be Done (With Critical Legal Theory)?*, 22 FINNISH Y.B. INT'L L. 31 (2013); Bill Bowring, *What Is Radical in "Radical International Law"?*, 22 FINNISH Y.B. INT'L L. 3 (2013).

occupation of place and of law as praxis, as a complex and layered series of normative affects and political performances that benefit some and disadvantage others.[9] The need to attach intellection to action and to the theatre of the virtual propels, I will argue, a viral thought, and the movement of jurisprudence toward matter—that is, the improvised, experimental, and subversive prescience, as the future now. It is a question of making something of our experience, improvising in relation to events, of daring to do what you will in a manner that challenges, abrogates, and imagines beyond the structures of law and the laws of juristic thought.

A brief note on theory. Abaft the wake and wash of hashtags, tweets, Instagram posts, social media interlocutions, serial organizations, protests, likes and loots, Zombie jurisprudence, graphomania, and other appellations, designations, and irrigations of jurisprudential thought, it is as well to begin with the precarity of definition. To what do we refer by this curious and contested moniker, this saturated copulative symbol, this dangerous *duette*, "legal theory"? It might mean licit theory, legitimate thought, or jurisprudence as a legislative endeavor. But that would be to give law priority, and that is precisely what critique aims to question even in these post-critical climes. So, start with *theorein*, with the misleading etymological root of the concept, its use as descriptor in viewing or seeing, in ways of perceiving the world.[10] To see is, of course, to engage, and one can immediately refocus the sense of theory by acknowledging that it implicates a space and movement. The ambulation of the eye, the agitations of the sleeping body, the opaque scene of reverie. In the alternate connotation of theory as theater, it is the staging and inhabitation of thought as the dispositor of corporeality in

9. The concept of law as politics, and of occupying juristic spaces impudently or in contrary fashion, is borrowed from Honor Brabazon, *Occupying Legality: The Subversive Use of Law in Latin American Occupation Movements*, 36 BULL. LATIN AM. RSCH. 31 (2017), and Honor Brabazon, *Dissent in a Juridified Political Sphere*, *in* NEOLIBERAL LEGALITY: UNDERSTANDING THE ROLE OF LAW IN THE NEOLIBERAL PROJECT 167 (Honor Brabazon ed., 2017). For an application of the concept to Canadian student resistance, see *The Power of Spectacle: The 2012 Quebec Student Strike and the Transformative Potential of Law*, 32 LAW AND CRITIQUE (forthcoming 2021).

10. The etymology and connotations are elaborated in SAMUEL WEBER, THEATRICALITY AS MEDIUM 31–53 (2004).

relation to the world that instigates the performance of law.[11] To act is to think and to think is to act.[12] Confusions arise from the failure to account for the stratigraphic staging of action: it is a matter of thinking in stages, perambulating through layers, experiencing matter experiencing you. The starting point, thought zero, is an act of imagination, a deformation of the world as seen, an improvisation that generates an act.

The future can only be imagined. It is pure theory, the sensible aura and atmospheric we imagine, embody, and walk toward. Be it through reverie, dream, the repose of the daybed, the hammock, the armchair or couch, walking or running, it is the body that generates thought, that sees and theorizes. We start where we are, in who we are, and, in most instances, the critique of the soul, the imaginative exploration of potential and the unimaginable of futurity, takes the glorious initial form of de Maistre's *Voyage Around My Room,* narcosis in one's library, or stretching the legs.[13] There must be an inauguration, an expedition, an encounter toward which the fascia and face are turned. Space, matter, breath, and embodiment generate theory as an engagement constituted through the conceptual apparatus of being in the world. "The cosmos, in its entirety, courses physically through us," so intones the *Ars Magna*, referring to air, to nebula, to clouds, the community of thought, the sensibility of images interior and exterior, as constituting the medium of intimating intellection that itself is necessarily grounded and embodied, without flight.[14]

---

11. On the limits of critique, see RITA FELSKI, THE LIMITS OF CRITIQUE (2015). I am borrowing the term dispositor from GIORGIO AGAMBEN, WHAT IS A DISPOSITOR? (2009), https://eclass.upatras.gr/modules/document/file.php/ARCG2113/Agamben%20Dispositor.pdf [https://perma.cc/D97L-GVDG].

12. The sense of performance is one that is well elaborated, directly and indirectly, by Julie Stone Peters in a variety of articles and in her forthcoming book THEATRES OF LAW (2022). MARETT LEIBOFF, THEATRICAL JURISPRUDENCE (2019) is the other key source. Also important on incarnadine jurisprudence is DESMOND MANDERSON, KANGAROO COURTS AND THE RULE OF LAW: THE LEGACY OF MODERNISM (2012).

13. XAVIER DE MAISTRE, VOYAGE AROUND MY ROOM (Stephen Sartarelli trans., 1994) ("How glorious it is to blaze a new trail, and suddenly to appear in learned society, a book of discoveries in one's hand, like an unforeseen comet flashing through space! – I have just completed a forty-two-day voyage around my room."). On walking as intrinsic to thought, see Frederick Dolan, *Nietzsche's Gnosis of Law*, 24 CARDOZO L. REV. 2 (2003).

14. GASTON BACHELARD, AIR AND DREAMS: AN ESSAY ON THE IMAGINATION OF MOVEMENT 197 (2002) (citing O.V. DE MILOSZ, ARS MAGNA (1924)).

We cannot but start matterphorically, on the daybed, in an armchair, at repose, armed by the chair, then walking, conversing, singing, shouting, the ever active and fulminating combustion of cells and sense, perceptions and introspections, engaged with the theatrics and conceptual apparatus of being in the world. The armchair is not the enemy but rather the initiatory vehicle of theory. It encourages the practice of sitting and thinking, of developing a concept and schema, the *dispositif* of getting up and going out. By the same token, theory is not opposed to practice; rather, it is inseparable from it, imbricated in it, and embraced without hesitation in the very notion and performance of an act. Returning to our question, rejecting any separation, existential or philosophical, between theory and practice, the issue raised by this brief divagation is not the Leninist "what is to be done?" but rather what will we do? Where will we go? With whom and when? What is the future, near or far? For whom and when?

ARMCHAIR, ARCHIVE, ACTION

Pancalistics. Professor Bowring, in his homage to radicalism, is not in favor of armchairs. He laments, "[i]t is to be hoped that the scholar or for that matter practitioner, freed of illusion, eyes wide open, will not simply relapse into the armchair." At another point, he opines that the "armchair exercise" lacks revolutionary content.[15] It is an odd, though hardly original, stricture against a type of furniture, and perhaps it would be easier if it were an exercise on the couch or a relapse onto one's bed. Then theory could begin oneirically, hypnopompically, as reverie in the mode of horizontal genius, the sheets on the bed becoming momentarily the sheets of inscription. Just as it is hard to speak while eating, it is difficult to write while walking, swimming, running, bicycling, or skydiving; and so, armchairs probably have their place and proper appreciation in the process of thought. Bowring himself used his article to advertise his thenforthcoming book on the early Pashukanis, and whatever its merits, it is hard to imagine that his research in the library did not involve chairs with arms, the occasional relapse on the sofa, or the process of sitting back to get it done.[16] The call to arms

15. Bowring, *supra* note 8, at 16, 28.

16. EVGENY PASHUKANIS, THE GENERAL THEORY OF LAW AND MARXISM (Routledge 2017) (1924). The student editors have warmly recommended the

from the arms of a chair. Nor is there an iota of revolutionary content in what Bowring has written, a fact that is most glaring in an anecdote relayed of a most British internecine altercation, "a sharp clash" between John Fitzpatrick, "then a member of the Revolutionary Communist Party," and Stephen Sedley QC, "still a member of the Communist Party," at a Critical Legal Conference held at the University of Kent at Canterbury.[17] This was, he opines, a high point of Critical Legal Studies (CLS), an academic face to heated face with a practitioner. To this, however, and he says "nostalgically," he appends that "John Fitzpatrick was awarded an OBE for his work at the Kent Law Clinic; and Sir Stephen Sedley recently retired as a judge of the Court of Appeal." Here he informs us, the *soi-disant* revolutionary professor that he claims to be, that one protagonist was elevated by Royal Decree to membership of the Order of the British Empire, and that the other, Sir Stephen, was knighted and a Lord Justice of Appeal until his retirement. No inkling of any irony, no sense of theoretical antinomy, no revolutionary fervor in this approbative acknowledgment of preferment of status and catapulting class escalation, as if it were quite normal for revolutionaries to kneel before the monarch and accept ennoblement, indeed, as if this were Bowring's thwarted dream. A palace of critique.

Lest this seem a tedious distraction, the point is that the critic of the armchair has failed to sit down or, even more directly, is failing as a theorist, not an idea in sight. The point is made by his protagonist in the debate, Robert Knox, who makes the legitimate observation that there is nothing radical in Bowring's call to action, which is no more compelling than the dawdling inflection that politically inspired lawyers "can get on with what they are very usefully doing already."[18] This anodyne exhalation merits only the briefest riposte, which is that theory is the frame of such action, and politicization is the questioning

addition that Pashunkanis was a legal theorist of the Russian revolution, whose life was ended by Stalin in 1937.

17. It is noteworthy that Bowring repeats this self-same anecdote and identical footnote six years later in Bill Bowring, *Critical Legal Theory and International Law*, *in* RESEARCH HANDBOOK OF CRITICAL LEGAL THEORY (Emilios Christodoulidis et al. eds), *supra* note 7, at 503 n.58. It would seem that six years of praxis, over half a decade of activism, seventy-two months of vertical toil, free of armchairs, have not led to any change. Revolution on hold.

18. Knox, *supra* note 8, at 37.

of the structural constraints, normative and institutional, that limit such practice.[19]

As for Knox's own blast of the trumpet against the monstrous regiment of bourgeois law, "hashed out in angry discussions," it is in going beyond law, in transgressing disciplinary and institutional boundaries, in fighting back, that change is prefigured: "What is significant about all of these actions is that their radical nature inheres directly within them. In each instance, there is clearly action on the 'legal plane,' but action that goes beyond the accepted and recognized parameters of the law, in order to further the struggle."[20] I have extracted the anger and the aspiration, the affect and the drive for change that offers the slim glimmer of theoretical movement—the mobility of hope. It is not just that Bowring's exhortation of being "useful" and "getting on" is far from being any real challenge to the legal order. It is the resistance to theory, the not-so-subtle reference to the path of status enhancement, and the elevation of class place that hobbles thought or leaves the purported radical unthinkingly reciting the "honors" list, embedded in and inured to the very class system that they claim to wish to overthrow. The issue is that of how to use the law to break the law—that is, how to advocate, litigate, write, and speak in ways that change jurists and the juridical in the short term and prefigure structural change in the *longue durée*. *In nuce* and eggshell, can law be an avenue to escape from legality? Can jurisprudence change the world?[21]

The starting point, the node of exodus, the vista of radicalization, is not external but rather is encountered, interconnected, aspirational, and imaginative. Against the boredom of legality there is counterposed the excitement of taking to the streets, of impudently occupying legality, of seeing what happens to the forces in play, juridification, and change *in actu*. Anger, drive, and mobilization of thought are hedonic and affective enterprises, engagements in the fullest sense of the word. We make connections, build bonds of amity, forge allegiances, and create

19. In the conceptual idiom that Poulantzas developed, Bowring is locked in a concept of class place rather than class position, stasis rather than struggle. *See* NICOS POULANTZAS, POLITICAL POWER AND SOCIAL CLASSES (1975).

20. Knox, *supra* note 8, at 31 n.44.

21. A question lengthily elaborated by the German political philosopher Karsten Schubert. For a brief and hilarious instance, see Karsten Schubert, *The Dismantler*, *in* THE CABINET OF IMAGINARY LAWS (Peter Goodrich & Thanos Zartaloudis eds., 2021).

a space in thought that is also an alcove in the world. We play. We laugh. We dream. The trance of reverie, the flash of reciprocities, the call to arms, an occupation (why not?), and public demonstration—the pursuit of these and further specters are all intrinsic to the imagination that makes theory possible and likewise propels action, writing, speaking, and organizing into the communal spaces of intellection. Allow me then to talk briefly of pleasure, to admit the hedonism of theory, the desire to foster change and to make a difference. Reorientation, re-centering, relaxing, can lead to relexing.

In a work of magnitude and magnificence, a full 868 pages in densely fonted length, Anne Teissier-Ensminger expatiates upon the legal imagination, the history and diversity of law's literary and aesthetic expressions, the full panoply of ludic, hedonic, efflorescent dialogues, poems, amorous, and fictive works that lawyers have produced primarily for other lawyers.[22] This is not the *belle lettrist* sense of the legal imagination, although such need not be excluded. It is rather what she terms a jurisliterary tradition of legal aesthetics, a study in the art of *ars iuris* as instruction in forms of life and modes of living, and in sum and pestle an exploration of attempts to surpass, circumvent, expand, and change the structures of law. What is it possible to think, to imagine, to release from neoliberal juridification? Like the jurisographer, who embeds law in place, the jurisliterary inscribes law in the imagination and works to elaborate alternative, impossible, and less infeasible options and structures for thinking the associative commonality and the shared dimensions of the performative and social. If law is what holds and binds together a property, a person, a thing, then the imagining of that bond is an aesthetic and political question, a matter of invention and of creative depiction, of leaning forward and not back.

The prior, the precedent, has its place, not as law but as possibility. Noble defeats, fragments of wreckage, errant successes, one and all. The great works of jurisliterature are beautiful failures, reveries that have yet to come to pass—imaginary solutions, as the pataphysicians put it, to impossible problems.[23] The

22. ANNE TEISSIER-ENSMINGER, FABULEUSE JURIDICITÉ: SUR LA LITTÉRARISATION DES GENRES JURIDIQUES (2015); and note should also be made of her earlier work, DU DROIT LETTRÉ À LA JURISLITTÉRATURE (2013).

23. This is the key theme in SERENE RICHARDS, COURT OF MIRACLES: A GENEALOGY OF CONDUCT (2021).

science of holes requires art, patience, and a sense of conjuncture. Initially, if we track the history of jurisliterature, the study is that of poetry, returning to Plato and the deliberation in the *Laws* that legislation was the best *mousikos*, lawyers the best poets. If other rhymes qualified, then they too would be law. The poet is the constant companion of the Platonic legislator and the party who opens the discourse of legality, who engenders the dialogue that makes law accountable and questions its foundations in creative actions, in singing, dancing, reciting, chanting. Sound performances, speech acts—hustling, cavorting, rumbling—music with words were the accompaniments of the legislator, of "the law-giver instructed by the poet" whose art was that of a "dynamically *cosmopoietic* sphere of knowledge."[24] Those are the conversations worth having, directed at how to live, work, play, and create as facets of legal deliberation. The Roman tradition inherited that sense of creativity in the *responsa* of the jurisconsults and in the *fabulae antiquae* of law collected in Book Fifty of the *Digest*.[25] These, in turn, are tied to the rhetorical striving for *elegantior iuris*, jurisprudential elegance, the justice of speaking well. Poetry is the genre of opening discourse as well as being speech that opens and takes flight. It is in that dual sense of aperture and breach that the Renaissance inherited the poetic and creative tradition of classical law. Art, the aesthetic instruction of life, was understood to be intrinsic to the theorization of the juridical.

That zodiac of wit, Philip Sydney's *Defense of Poesy* is the most often remarked revivification of the creative tradition in the anglophone context, invoking as it does the bards and soothsayers as the first lawyers, those who engendered through verse and song the congregation of the social.[26] Slightly later, the magnificent Jean Broé published *Parellela poesis et iurisprudentiae*, a parallel between poetry and jurisprudence which begins with unstinting verve, arguing that "poets strive for inspired

24. THANOS ZARTALOUDIS, THE BIRTH OF NOMOS 344 (2019). In a similar vein, ANNE TEISSIER-ENSMINGER, FABULEUSE JURIDICITÉ (2015), notes the Ciceronian concept of law as *carmen necessarium*, the necessary song.

25. At the end of Book Fifty, the *Digest* collects the old legal stories, the fictions elaborated by the jurisconsults as the most ancient stories and sources of law. For an informative discussion, see David Pugsley, *Justinian's Welcome to the Constantinople Law School*, 24(1) FUNDAMINA 57 (2018); *see also* PETER GOODRICH, ADVANCED INTRODUCTION TO LAW AND LITERATURE (2021).

26. SIR PHILIP SIDNEY, DEFENSE OF POESY (1595), *reprinted in* SIDNEY'S 'THE DEFENSE OF POESY' AND SELECTED RENAISSANCE LITERARY CRITICISM (Gavin Alexander ed., 2004).

thoughts, sublime expressions, power and diversity of emotions, the characters of justice" so as to revive what quotidian juridical activity crushes.[27] It is because of poetry that law is respected, the *nomoi* or laws originally taking the form of songs, founding the bond of the social upon the assonance of verse and the virtues sung. To the standard arguments, he adds that it is from thespian poets that the lawyers borrowed the word "person," and they provide the idiom of legal trial, which is that of imagination, the process being designed to imagine, to put before the eyes the real vestiges of persons and events in the past.[28] The *corpus poetarum* is expressly one of the sources of authority for lawyers, a source of rules and maxims, a legislation in its own right. In the early legal treatises, the laws of Venus were the first law, poetry their medium, song their expression, and verses of dedication, homage, praise to the author, to the theme, to the laws would open a multitude of legal texts. Selden's *Jani Anglorum facies altera*, a history of common law, opens with a deluge of poems.[29] Abraham Fraunce's *Lawiers Logike* is suffused with impromptu poetry.[30] When Accursius, the great glossator, enters Forcadel's dialogue on jurisastronomy of 1549, he does so by way of a poem.[31] The autobiography of civil law, written by the great humanist jurist of Bourges, Barthélemy Aneau, takes the form of an extended poem. When Placentinus, early in the era of the reception, wants to introduce students to the study of law, he does so in his poem, *Sermo de legibus*, Sermon on the Laws, in which

27. JEAN BROÉ, PARALLELA POESIS ET JURISPRUDENTIAE [1664], *reprinted in* DU DROIT LETTRÉ À LA JURISLITTÉRATURE: SEPT OPUSCULES DE FRANÇOIS BROÉ ET DE JEAN BROÉ 385 (Anne Tessier-Ensgminger ed. &, trans., 2013).

28. *Id.* at 425, 427.

29. JOHN SELDEN, JANI ANGLORUM FACIES ALTERA (London, Helme 1610). The Elizabethan antiquary and leading jurist, John Selden, provides an inventive mix of fiction and history in tracing the origins, the two faces, of English common law in time immemorial. He cites the Samothes, Druids, and Celtic mother Goddesses (*Deis matribus*) amongst other early sources.

30. ABRAHAM FRAUNCE, THE LAWIERS LOGIKE: EXEMPLIFYING THE PRAECEPTS OF LOGIKE TO THE PRACTICE OF COMMON LAW (Steve Sheppard ed., The Law Book Exchange, Ltd. 2014) (1588). In a work that applies the logic of Petrus Ramus to the practice of common law, THE LAWIERS LOGIKE both prefaces and interweaves several poems and poetic turns of phrase in his effort to legitimate his work and to praise the proper practice of common law.

31. ETIENNE FORCADEL, SPHAERA LEGALIS, *reprinted in* LA SPHÈRE DU DROIT (Anne Teissier-Ensminger ed. & trans., 2011). This work takes the form of a dialogue between Momus, the figure of critique and Accursius the "Great Glossator" and author of the *Glossa Ordinaria*.

personifications of old law and new law, age and youth, wisdom and desire debate the regimen of inherited, scripted rules.[32]

Enough said, enough literalism, too much history, and too many Latin curiosities for the incurious of today. I mean simply to advert to the role of poetics as the inspiration for thinking through the art that instructs life and the scope for inventing novelties. In the Renaissance, to follow the tracks of *Fabuleuse juridicité*, law was pitched tonally in nature, amongst the spheres, as open source for interpretation and reinvention. Étienne Forcadel was author of a jurisastronomy which mapped the law according to the deities in the heavens, personifications of the stars, with Jupiter and Mercury, Accursius and Momus, in extensive dialogue on legal method from a sidereal perspective. Not surprisingly, after meeting the Roman jurist Ulpian in a field, a discussion of the circle of disciplines—*circulus disciplinarum*—follows, and music comes to the fore as one of the various and extraordinary forms of knowledge.

In a spirit close to Nietzsche's *Birth of Tragedy*, the laws of the lyric and the lyre, the harmonics of justice, come to play a primary, which is to say inaugural, rhythmic role. Citing to the exiled singer, Terpandre of Lesbos, it is music that founds the law and harmonizes the city.[33] Accursius goes on to cite Ulpian on the indispensable character of music for civil and political life and enters a not-uncommon argument as to the harmonies that underpin the polity. Referencing Terpandre again, there are seven modes, or rhythms, and the flow of cadences is foundational. There are seven days of the week, seven parts to the *Pandects*, seven unequal intervals to the spheres, the seventh art is astronomy, and a host of sevens follow: seven is the desirable number of judges, or as the English jurist Sir Edward Coke put it, *Numero Deus impare gaudet*, God desires uneven numbers, the rhythm of improv.[34] Symphony, a correspondence of timbre

32. BARTHÉLEMY ANEAU, JURISPRUDENTIA (Lyon: Rouille 1554) is an extended poem in praise of the juristic tradition, of its achievements and its leading figures. Aneau was also author of PICTA POESIS UT PICTURA POESIS ERIT, a work that expressly addresses the legal imagination, its figures and its images as part of the discourse of governance. BARTHÉLEMY ANEAU, PICTA POESIS UT PICTURA POESIS ERIT (Lyon: Rouille 1552).

33. *Ita musica instar legis civitatis composuit.* A reference to Plato follows shortly after. ÉTIENNE FORCADEL, SPHAERA LEGALIS (1549), *reprinted in* LA SPHÈRE DU DROIT (Anne Teissier-Ensminger ed. & trans., 2011).

34. SIR EDWARD COKE, 4 REPORTS: PREFACE 101 (1604), *reprinted in* THE SELECTED WRITINGS OF SIR EDWARD COKE (Steve Sheppard ed., 2003).

and norm, the consonance of music and law, common lilts and meters, sounds we often cannot hear, join us all.

The point is that music matters and that judicial and other modes of hearing might well be hugely improved by attending more closely to acoustic and rhythmic flows. Indeed, if music be the food of love, then it is predictable that Forcadel's subsequent and most celebrated work was *Cupido iurisperitus*, or *Cupid's Law*.[35] This is a work that compares the laws of love to those of the polity and sets out, with humor and seriousness, to argue: "Love and Law, which furnish to human beings the paths of concord, share the same frontiers." Myriad analogies and commonalities of philosophy, definitions, methods, and shared rules are then explored in doctrinal detail. Étienne proceeds to address Love as the deity sited at the entrance to the Academy as the signal of true philosophy and as the source of Justice, defined, by Ulpian again, as "the sure and perpetual will (*voluntas*) to give each their due." It is upon the constancy of volition, the desire and will to justice, and the persistence of the drive that Forcadel focuses, understanding the will in ethical terms as continuity and perseverance in a course of action. It is not appearance, and it is not a solitary act that constitutes justice, but rather an ethics of conduct over time, the amorous attitude and outlook that marks a movement toward becoming just and just becoming. As Aristotle puts it, "one swallow does not make a spring." This is the fiction of law that Forcadel seeks to write, the *coniunctio* or jointure of law and love as expressed in all the interrelated forms of juridical striving for concord, as through contracts, pacts, conventions, obligations, engagements, and marriage. The force of will that subtends those drives is lodged in the reveries of innermost affect.

There is also one other significant commonality, which is a shared propensity for enigma: "The Sphinxes pose enigmas relating to love; and the law, most of the time, is enigmatic."[36] These are to be solved, in both amatory and juristic contexts, by adopting the interpretation most favorable to furthering relationships and promoting amity. In hermeneutic contexts, the

35. ETIENNE FORCADEL, CUPIDO JURISPERITUS (1553), *reprinted in* L'AMOUR JURISTE (Anne Teissier-Ensminger ed. & trans., 2018). The work is a remarkable study, in the tradition of *serio-ludere*, of the parallels between law and the precepts of love.

36. *Id.* at VI.1 (*"Sphinges amatorial quœdam aenigmata proponent: et lex plurumque."*)

signs of love are indices of action to come, markers of the search for an effective method, and a certain secrecy or continuing enigma that indicates the persistence of a hidden, constant, and creative drive, the image and matter of the not yet. The amatory enigma is the affective substrate of law and decision. The will to justice that drives the future of the *legis actio*, the performativity of law, and that seeks to impact the community of thought to come. The work hints at different modes of judgment and offers glimpses of what is elsewhere termed the most intimate alcove of doctrine—*intimos recessus doctrinae* according to the Italian jurist Giuseppe Gennaro, the author of an imaginative jurisprudential history comprised of imaginary dialogues with the "great lawyers" of the past in the Western tradition.[37] The *scintillae iuris* or sparks of law could be elaborated further, but the juris-literary point is made, the archive is opened, the plentitude of sources and imaginative turnings of law to just ends, to non-law, *anarchos* even, are released as specters, winged ideas, communities of intellection to come.

MATTER AND IMPROVISATION

The past, of course, is also prologue. Acoustic jurisprudence, the nomos of reverberation, amatory laws, jurisastronomy, juridical atmospherics, the spatio-temporal anachronism of codes, legal poetics, affective justice, taste, smell, and other proboscations and frogs all re-emerge in variant forms in each new generation of jurists. They do so in more or less minor and marginal forms and at a distance from the centrifuge of the legal academy. As failures. Noble dead ends. Eccentricities and ornaments as often as they are interventions or Knoxian structural articulations of a normative shift toward egalitarian policies. The archive and specifically entering into, fighting with, challenging, extracting from, sleeping in, walking out of, breaking in and catapulting exodus, breaking down the walls of the bibliographic sepulchres are the modes of initiating critique, the first form of taking to the streets. Arlette Farge discusses it well in terms of a literal archive fever, the race to get in, the snaffling of an armchair—or at least a chair with arms—going out again, returning

37. GIUSEPPE GENNARO ET AL., RESPUBLICA IURISCONSULTORUM EDITIO ALTERA (1733).

to the streets, itinerant, back and forth.[38] These are records, the archive lies before the law as the hidden source and architectural origin of *ratio scripta*, of the law as text. There is an inevitable juridification even in the etymology of the word, signaling that here are the legitimate memorials, authentic inscriptions, vestiges, and relics that have been collected and preserved but also destroyed and replaced in the historical divagations of imperium and of scribble, as writing power.[39]

The archive, the records, the museum of texts, and the efflorescence of libraries have suffered constant battle emblematized early on by its literal destruction by Justinian in 635 CE to make way for the *Pandects*, the universal text of the laws.[40] Destruction and inscription, a law founded upon an erased memory, and war in the library all signal the intersection of the juridical and the anachronism of scripture, the battle of books being the very site and crisis of critique. It is, in the end, the archive that is buried beneath the streets. The struggle of memory and forgetting, precedent pitched against hypomnesia, the archiviolithic politics of administration inveighing upon the interred, textual vestiges of past lives, records of injustice, the columned structures of inequality. Guerrilla, rebel, and revolutionary, just as much as scholar, academic, barrister, attorney, and accountant, are triggered by the mediations of experience, the hermeneutics of conflict, and the texts that form the image of the future, of being to come. Both outside and inside law, inextricably entering and exiting, fighting and extracting from juridical institutions, at war with or in defense of the specific and momentary legal order, the apposite signal takes the form of a syllogism: "Since 'the law' and 'the archive' share, under the pain of forgetting, a *hypomnetic* existence, they become not only inseparable, but also commensurate. It is not simply that the archive is a 'juridical

38. ARLETTE FARGE, THE ALLURE OF THE ARCHIVES (2004), although the translated title does little for the French *Le gôut de l'archive* (1989). *See also* Jacques Derrida, *Archive Fever*, 25 JOHNS HOPKINS U. PRESS 9 (1995) (discussing the legalism of the *arkhê*).

39. The expression is taken from Jacques Derrida, *Scribble (Writing-Power)*, 58 YALE FRENCH STUDIES 117 (1979), although the insurpassable work on the topic is CORNELIA VISMANN, FILES: LAW AND MEDIA TECHNOLOGY (Geoffrey Winthrop-Young trans., 2008).

40. On which transition and opposition, see the brilliant essay on hypomnesis and archive by Hayley Gibson, *Reopening the Archive: From Hypomnesis to Legal Ontology*, *in* LAW AND PHILOSOPHICAL THEORY: CRITICAL INTERSECTIONS 63 (Thanos Zartaloudis ed., 2018).

structure,' but that the law itself is, and can only be, *archival*."[41] In the repositorial reverie of the collector, the law is the sum of all its records, the totality and Collect of the collection. To enter that space, as critic, hermeneut, jurist, or *iuris peritus* is necessarily to experience the repetition compulsion clangorously striking the repression barrier in the very moment of opening a doctrinal text. Such is the fate of the *académicas*, of the noisy silence of theory, of the vast dialogue of the dead.

Inevitably exterior and interior, critique is initially housed in that intangible space and atmosphere of prescription, which is theory before and in contestation of the law. It is thus and necessarily, intrinsically the case that the theoretical is not soliloquy and cannot be the pure hole through which the unconscious disappears.[42] Just as forgetting is no *vis inertiae*, so too is recollection, archival work, the intimations of symbolic capital, the material and haptic labor of extraction and engagement an embedding in the heteroglossia of incorporation and action. The archive is an ironically cacophonous, hermeneutic space. Not just the sneezes and sighs, whispers, injunctions, clacking and coughing, but the essential dialogue that is the lectoral process and the expression of law. Reader to reader, manuscript to manuscript—a chained and guarded orthography—nose to the parchment, day and night, the intimations of critique begin in the polyphony of sources, in the diversity of records, in text and tympanum, commentary and gloss, symbolization and manifestation of death. The choice is between friends and forgetting, choice of a path, fellow travelers and community to come.

The key—and here the short-life and lengthy post-ignition of the critical legal studies movement in the United States was not wrong—is that theory is critical when engaged with a community, a common intellection, an encounter and event in quotidian life. Dialogue, implicit or express, is its proper form and avenue, because it is in the mode, the poetics of exchange, as improvisation that we embody and live with the music and pillage of the archive. Theory is not above but within the specific

41. Gibson, *supra* note 40, at 76; *see also* Renisa Mawani, *Law's Archive*, 8 ANN. REV. SOC. SCI. 337 (2012).

42. For adumbration of the multiple functions of the hole, the burden of knowledge, and the weight of critique, and coming to terms with lack, see MARIA ARISTODEMOU, LAW, PSYCHOANALYSIS, SOCIETY: TAKING THE UNCONSCIOUS SERIOUSLY (2014). A version of this argument—feminine superiority—is offered in Duncan Kennedy's, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 LAW & CRITIQUE 91 (2014).

practice, the occasion of relationship, the reaching out and letting in. That is the virtue of a key, though little-discussed, text from 1984, *Roll Over Beethoven*, in which Kennedy and Gabel converse, enacting their friendship, with its differences, thinking in dialogue. They range in topics over music, kettles boiling, food, accusations of overreaching, intimations of amity and affect, and a project which gets articulated famously in the conclusion as "it looks like it's trench warfare for decades."[43] What does that mean in the context of the foundational, everyday dialogue?

The focus is upon how to live with the library, despite the records, using the gramophone, cooking well, while exercising the liberty of friendship—for texts, for treatises, for the dead, for the living, and for the not yet born. Trench warfare means do not give up, refuse to vacate, continue to irritate, confront, expose, engender subcultural panic, be where you are, and be intransigently manifest. It is the point that Felski picks up in delineating the limits of critique as a refusal of legalism, of its adversarial method of mistrust and auto-destructive cross-examination, as well as all the other abstract and monologic barriers to relationship.[44] Juridical negativity excludes, isolates, and hides behind vacancy of analysis and abstraction of office. It takes the increasing form of monologue, theory as legislation for no one, as against which method she proposes a sensible hermeneutics of the text, an acknowledgment of who we are and an appreciation of what we do as scholars, as inhabitants of the archive and the library, denizens of the didactic institutions, in the present tense, of law school and its lectoral and research routines. This is the heteroglossic dominion and relay of dialogue, of our everyday improvisations, the plenitude of what is written, to colleagues, lovers, friends, administrators, pupils, disciples, family, editors, publishers, periodicals, and social media. Many voices, numerous languages, dialects, positions, and places speaking from the past, contemporaneous, real, and imagined. This, she exhorts, is where we spend our time. This is our meaning as inhabitants, everyday readers, and commentators of these texts, in these spaces, in front of this screen.

Improvisation is best gauged in relation to comedy and to experimental music. Comedically, improv is the performing of the everyday, the theatricalization of quotidian and immediate

43. Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 54 (1984).

44. FELSKI, *supra* note 11, at 1.

situations, the unscripted prescript of the unconscious in encounter, making this occasion, in this room a stage and we all players on it. Nathan Moore captures this brilliantly in relation to improvised, non-idiomatic, experimental music:

> Improvisation is less about the pre-construction of musical tropes and figures, and more about the construction of social situations where such music can be played and heard. Sometimes (unhelpfully) referred to as "instant composition," it is better to think of free improvisation as being, first and foremost, a social composition that happens to find expression through the various technologies of sound.[45]

It is music that attempts in the process of performance to respond to its own sound. The immediacy, immanence, and reflexivity of the improvised combinatorial need recording and an archive for improvisation to be able to play with and in the sonic space of sound as sound, meaning as recorded, as remembered and played with, so that the process has sense and occasion. The musician is their style—the symphonic self—and this, in turn, is the consequence of their reaction to the archive, their belonging to the social situation in which, in responding to each other, they trigger what Eddie Prévost coins as a "re-wilding" of music, the extension of acceptable sounds.[46] Improvisation is dialogue in sound or polyphony and provides, as Moore moreover argues, the recordings, the musical archive, and the orientation of the musicians who come after. To play with, respond to, incorporate, extend, and alter self and sound is precisely the wild process of improvisation, the social form of music in its most radical because mutable and engaged, common form.

The analogy of music to law, again, is the movement of nomos as sound, and rhythm to appropriation and law, *nomos Mousikos* as Zartaloudis elaborates in erudite detail, as adverted earlier in relation to the early modes of social accord as

45. Nathan Moore, *Why Record Improvised Music?*, *in* LAW AND THE SENSES: SOUND (Danilo Mandic, ed. 2021).

46. I rely here upon Moore, and for greater detail Edwin Prévost, *An Uncommon Music for the Common Man*, WIRE, Oct. 2020, at 78, who instances also the rewilding "Punk riot." Prévost nicely notes Moore's editorial help and strong and measured guitar playing while also remarking the striking fact or nuance that Moore is a legal academic.

accordion.[47] Improv law is precisely law with sound and movement, the flesh of ideas, the blush, tone, affect, and mood of thinking the future in response to what is here and now, laws as currently occupied. This is a species of situationism and critique is encounter, zap in the argot of 1968 when dialogue took a nominally musical form. Process, the creation of social situations in which critique is possible, is the goal of radical thought. The building of communal ideas and spaces that allow for the immanence of sound, the phonograph of the soul, generate cochlear justice as the name for improvised performances of juristic deliberation, and for judicial decision-making that occurs in genuinely open, experimental spaces. Such is the long journey back to the self. The improvising subject is the performer who is able to hold on to their sense of being, their style, and to respond to the event with an expression of how their performance acts with and changes the jurisliterary, the inherited texts, and the archive—in sum, how it sounds as law.

MAKING SENSE OF MATTER OR PATAPHYSICAL JURISPRUDENCE

There is a story relayed by Michael Fischl, an early participant in the U.S. Critical Legal Studies Movement, author also of *The Question that Killed CLS*. He moved to the University of Connecticut, where they had in the Law School an outlying office for critical legal studies. Then the office closed and was converted to some other purpose, no doubt also critical in its way but designated differently. It became a restroom. The author of the "question that killed" is witness to the office that closed. The enigma and drive in relaying the anecdote is the invocation and instigation of the starter motor. Time to move. In the absence of an office, improvise, find new social spaces, and move forward to the social. Prow to the future, snoutfig west. What next? Make abstraction real, make sense of matter, address the cloying cult of the contemporary, the irreal of the present, the imaginal environment, through the plenitude of the future, the individual through the social, thought in its communities and fecund improvised atmospheres, music, and spaces. Office is a state of mind, a body—sound, verse, motion—in relation to

47. ZARTALOUDIS, *supra* note 24, at 396 (concluding that the poetic-musical ordering of a *kosmos-musikos* was an acoustic mode of thought, the pinnacle of the different uses of *nomos* that conclude that it must be sung and heard—our words are our *phōnē*, "our songs are our nomos").

environments, encounters, and the community of thought. The office of the impossible, because what else, in terms of theory, as criticism, is worth trying for? A search for holes.

Theory, and the enigma of the critical that is housed within it, is in significant part the apprehension of what is not yet. That is its uniquely human scope and prospect because its injunction and community is that of instigation, installation, and invention. Jurisliterature, the play of theory, the *poiesis* of jurisprudence, takes the form of "wilding" law, of making sense matter. Metaphor becomes matterphor in the expansion of thought from chair to cinema theatre, from subject to social, body to environment, across the texture, textiles, and texts of law. Improv jurisprudence is a matter of listening to the archive, a specular and imaginal process of being and thought, an encounter with prior optics and acoustics and, forward facing, a reaction and response that renew the scope of possibility and expand the creative range of invention and disturbance. What is at issue, as Moore delineates, is a process, "the construction of social spaces" in which such thought can occur, in which a common sensibility can inhere and expand, an instance and rite of thinking with, of wilding together. Immanent music is significant of an aesthetic and form of theory that recognizes the self in the reverberation of contact and acknowledges that "[t]he edge or border of a singularity is not distinct, but fuzzy in essence so that, all one can finally say, is that one has moved from one singularity to another, without being entirely sure just when or where the transition occurred."[48] And in jurisprudence, in the theory of the jurist, a hedonic progress. An angry dance, laughing play, heated, cold, dissipating melancholy, lifting the leaden feet of theory in ambulating through the *terra incognita*, the uncharted territory, of friendship with holes, with matter, with jurisliterary possibility, with ideas to come. Such is the pataphysical project, the science of absence, the construction of impossible solutions.

It is under the rubric and in the spirit of the pataphysical and its situationist encounters that improvisation occurs and the *poiesis* of jurisprudence expands. Dialogue and performance orient the auditor to respond, to contrive, concoct, invent, and devise spaces and sounds that make sense of the record of prior performance. Following Moore's argument, "the archive of improvised music is just as valid as any other human activity as a

48. Moore, *supra* note 45.

framing of questions of order and interactivity."[49] It is the process that creates the social situation and domain of possibility into which the sound of the performer reacting to the record produces novelty, a style and situation, an "exampleless example" that in turn becomes part of the record, in its dual sense. Music may seem a strange instance, but it is no stranger than any other and indeed is historically and socially closest to, and more amicable than, law. It is because of the process, the method of improvisation, however, that the highest level of affinity and, in Forcadel's lexicon, concordance is achieved. What affects me, affects you, as being, *in concreto*, which is to say existent only in relation to each other, the actualization of feedback, the wilding or, more accurately, re-wilding of sound. It is the eerie, non-human *plus ultra* of improvisation, sound as it escapes and returns to the subject in new forms that cracks the mold and cracks the pickle jar of precedent. There are no previous right answers, no staid, sclerotic, ossified rules or dictates of good or bad, but only the asymmetry and abnormality of breaking new ground.

The risk is abstraction. The alienation of law professors and the narcissism of small differences. Forget critique in the simple sense that theory does not directly wield any power. The community of legal theory is in every sense tiny, composed of a marginal group of legal academics with scholarly training. These are jurists concerned to understand and engage with the transhistorical, international, and interdisciplinary textual tradition and community of ideas that *nomos,* concord, amity, music, and movement—in short, the diversity of improvisations—implies.[50] Theory as process, as the construction of spaces receptive to thought, constitutes a chorography and choreography of scholarly manners, of ideas invented in transitory sites, and the perambulation of events in the life of the mind. It is the allure and productivity of the impossible that is at the root of pataphysics, the search for the harbingers of the future, the excitation of the new, of what has not been heard before. What improvisation teaches is that a historical sensibility is the precondition for apprehending and composing the spaces in which thought as

49. *Id.*

50. For a discussion on the present role of doctrine in the practice of international law, see generally ANTHONY CARTY, PHILOSOPHY OF INTERNATIONAL LAW 18 (2007) ("[T]he lawyer equips himself with the tools of ethnography and cultural anthropology if he is to understand the issues which arise in the context of contemporary international controversies.").

novelty can occur. Theory that matters is a quest for disquietude, for the moments of discomfort that generate affective and corporeal response, be it a smile, a blush, sweat, torpor, fidgeting, anger, scratching, a prickling in the scalp, an epiphany of new connections occasioned while walking.[51] There, in the body, in our sensibility, we can feel the beginnings of a style, the stirring of thought, the distant rhythm of a tune we cannot hear. If it is justice, the name that is used in doctrine for the incalculable futureity of decision, the impossible calculus of concatenation, of occasions not yet thought that needs to be heard, then the only possibility for a conclusion, for a schema of aspirations, for the return of critique lies in setting out the spaces of intersection in which theory as event and encounter can best occur. It is with such desiderata or simple observations that this episode will close.

Transhumusians. The place of the human accelerates at the intersection of the Novacene and the Anthropocene, two concepts which endeavor to link a panjuridical law to a sense of place as habit, habitus, and earth.[52] Nietzsche pointed to the pernicious character of the ecclesiastical dictate that the Church does not inhabit a territory—*ecclesia non habet territorium*—as ground for legitimating annexation and annihilation, because only the spectral and spectres, the ghosts of the great afterlife, matter. The call of the earth and the consciousness of the Anthropocene are a return to historical and locational sense, to spatial justice as awareness of common occupation of a globe, of living matter. The classical sense of the *leges terrae* is of the lawscape as a pattern of movement, a marking and transferring of earth, *humus*. The loss of this grounding is perhaps the most pernicious forgetting of the meaning of *nomos*, *an archos* or multiverse order predicated primarily upon myth and musical socio-harmonics. As Zartaloudis expatiates through the intricacies of etymological detail, the Homeric sensibility of the *nomos* of the earth is of an order prior to, and in excess of, a then non-existent law. In the pluriverse of myth, law is a word that is not there

51. For the classic discussion of epiphany and legal theory, see Anne Bottomley, *Theory is a Process Not an End: A Feminist Approach to the Practice of Theory*, *in* FEMINIST PERSPECTIVES ON LAW AND THEORY 25 (Ralph Sandland & Janice Richardson eds., 2000).

52. At the generous behest of my editors, I will note that the geological term "anthropocene" recognizes and references the dominant impact of the human upon Gaia, the Earth, while the "novacene" is a more recent coinage that notes and predicts the increasing hyperintelligence of machines as a global force in the future.

or—depending upon one's historical perspectives—preceded by myriad forms of life and ways of thought, expressive of and specific to particular communities.[53] *Nomos* as possession and sovereign imposition in this context is also and intriguingly linked to *nemesis*.[54]

A return to the Greeks, to the Hellenic age, to the classics, is necessarily prior to and precedent for the Hellenophile Roman tradition and allows for an interpretation of Virgil's *justissima tellus* (most just earth) as a recollection of provenance, a genealogy of matter as the semiotics of human interaction with *humus*, with tendrils and roots. It illustrates the *nomos* of the earth as our forebear, sustenance, and *nemesis* or end six feet below. Even such an English legal source as Sir Edward Coke cites Cicero to the effect that "amongst the Romans agriculture or tillage was of high estimation, insomuch as the senators themselves would put their hand to the plough; and it is said, that never prospered tillage better, than when the senators themselves plowed."[55] *Urbs* (town) comes from *urbare* (to plough). It is thus a reference to the figuration of the human in the tellurian, the symbols of manufacture in the tillage of the earth that prefigures the diagrammatology of urban spaces, that is the best evidence of the improvisation of social space, of inscription, writing on soil. The re-wilding of law is precisely the process of cognitive return to a form of life that acknowledges the vegetal and animal responses of the earth, of *humus*, to the interaction with the human as *humusian*. To attend, to hear, and to give hearing to the atmosphere and environment of inhabitation is to respond to the earth responding to its inhabitants. A simple concept but a strangulated legal practice that has led recently to ecological rebellion and to that version of legal Punk that is earth jurisprudence and the wild judgments project.[56]

The re-wilding of law is aligned to recognition of the being, the sentience and ontography of all organic life. Earth matters,

---

53. ZARTALOUDIS, *supra* note 24, at 117.

54. *Id.* at 120. Zartaloudis concludes of the Homeric family of *nemein* words that "[i]n the archaic period, we are confronted with something far richer and more complex than a 'primordial' act of 'sovereign' semantics, or the equally 'sovereign' constitutive disputations of politico-theological legal dogmatics."

55. 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON bk. 2, ch. 5, § 117, at 85.b. (Francis Hargrave & Charles Butler eds., London, J. & W. T. Clarke 19th ed. 1832) (1628).

56. *E.g.*, LAW AS IF EARTH REALLY MATTERED: THE WILD LAW JUDGMENT PROJECT (Nicole Rogers & Michelle Maloney eds., 2017).

rock responds, and there is a non-negligible duty of care, of *caritas*, owed to snails, to lungfish, to rivers, to moss, and to mountains.[57] Wild judgments take the form of unpacking the stratigraphy of collision between vegetal layers to hear the voice of migrating ducks, crustaceous creatures, trees, of course, but also coal and flowers—entities that law has yet to recognize by virtue of the exterminist history of juridical personality and of its sovereign acts. New improvisations, re-wilding of sounds, the judgment of plants, vegetal justice, and, in sum, the bigger pictures are the next stage in the potential and prospect of *sphaera legalis*, the panjuridism that jurisastronomy promised. This is what the zodiac of justice and antique Roman concept of *concordia discors*, the harmonics of difference, can potentially provide.

The transhumusian is a temporal concept, a recognition of the transmogrification that existence over time entails by way of exchange between body and environment, *humusian* and *humus*.[58] Plant life, as Coccia persuasively argues, is common to all life and is the very principle of both the organic and the organism:

> To be in the world is not simply to find oneself *in* a final horizon containing everything that we are and will be able to perceive, live, or dream. From the moment we start to live, think, perceive, dream, breathe, the world in its infinite details is in us . . . The world is not a place; it is a state of immersion of each thing in all other things.[59]

Legally we think of persons, actions, and things, with matter (*res*) as the bond that ties persons to actions. The *iuris vinculum* is nothing other than organic ontographics, the constantly mutating being of nature through which the human passes and which passes through the human. Pandemic is precisely a failure of comprehension, a conflation of immersion and exterminism, of commonality and superiority, in which the microbes respond to the humans in robes. As Coccia remarks of the

---

57. As expounded in Bee Chen Goh & Tom Round, *Wild Negligence: Donoghue v Stevenson*, *in* LAW AS IF EARTH REALLY MATTERED, *supra* note 56, at 91. In the United States law of negligence, the equivalent is *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (N.Y. 1928), where a duty would be owed to fireworks.

58. On this inelegant neologism, see Peter Goodrich, *Transhumusians: On the Jurisography of the Corpus Iuris*, 24:1 THEORY & EVENT 117 (2021).

59. EMANUELE COCCIA, THE LIFE OF PLANTS: A METAPHYSICS OF MIXTURE 66–67 (2019).

planetary scale of microbial organization and action, "the earth has no need of us in its composition of orders, invention of forms and changes of direction."[60] The alienated practitioners of legal dogmatics face the commonness of all life under the illusion that it can be owned, controlled, and subject to a sovereign will other than its own. Jurisography, the commitment to immersion *in situ* and *in actu*, a sensibility to place as the source of law, begins the task of expanding the re-wilding of legal thought into a theory of spatial mobility, of location as action, *ius* as *habitus*.

Corporeography. Matter is immediacy. It comprises the haptic quality of existence and is close to the heart. Immersion, obviously enough, is corporeal, and its laws are incarnadine, its medium sensory and sensible. Following the re-wilding of *nomos*, and the physicality of rhythm, melody and music, as improvised inventions of social spaces, jurisliterature turns again to performance, both to the chorography of the *leges terrae*—people and places as the particulars of any given legality—and to the theatre of enactment, the thespian quality and terpsichorean undertow of all legal events.[61] Theatrical experience, as Leiboff so well exemplifies, accords to the body a crucial pre-conscious space and training.[62] The jurisographer or re-wilding lawyer, the erstwhile crit, now a critter, is refocused upon the process of bonding, the ties of law, and the improvisations of the community of thought through which law occurs. It is the body that notices, senses, responds, thinks, and knows in that much-expanded sense of the laws of the earth that legal dogmatics has since the enlightenment been at war to exclude. The *Pure Theory of Law* is a hole in the ozone layer.

The fragments of critical legal thought coalesce in the improvisational and unknowable, vegetal origins of thought. Body, sex, color, class, dress, and the diversity of intersections are the apparent and performative inheritance of the critical legal studies movement in splinters toward things that matter more than

60. Emanuele Coccia, *La Terre peut se débarrasser de nous avec la plus petite de ses créatures*, MONDE (Apr. 3, 2020), https://www.lemonde.fr/idees/article/2020/04/03/emanuele-coccia-la-terre-peut-se-debarrasser-de-nous-avec-la-plus-petite-de-ses-creatures_6035354_3232.html [https://perma.cc/PRX2-AREH].

61. Of particular interest here is Andreas Philippopoulos-Mihalopoulos, *To Have to Do with the Law: An Essay*, *in* ROUTLEDGE HANDBOOK OF LAW AND THEORY, *supra* note 3. On lawscape and spatial justice, the avenues and alleyways of the norm, see his SPATIAL JUSTICE: BODY, LAWSCAPE, ATMOSPHERE (2014).

62. LEIBOFF, *supra* note 12, at 27 ("[D]rama has other requirements: *catharsis*; responses, affects and feelings that are borne out of a sense of pity and fear.").

law as then-defined and practiced. Put differently, intersectionally, dreams populate the unconscious and order the body, the micro-ontology of the imaginal being, the person as a concatenation of microbes, a being adrift in sleep across the interior planet of images. The corporeal and oneiric sensibilities, the imaginal *phantasmata,* arrive hypnopomically, preconsciously, in reverie, in trance as the inspiration of thought, as the art of law and the poetics of justice. It is this corporeal character of intellection which, as Leiboff defines it, is the haptic form of noticing, of recognizing and acknowledging, of allowing the sensory response, the image and affect that precede and instigate thinking. In new materialist terms, consciousness does not define the body, rather the body defines consciousness. To be aware of corporeality as thought, as the cognitive state of being in the world, is to begin to understand the social process of theory and the possibilities of the community of thought.

Jurisliterature, the future of legal theory, must pursue the terrestrial lesson of our time, the *justissima tellus* of today, which is that, for good or ill, precedent is dead. We can stand on the shoulders of giants, but the purpose is to stare further into the future, to face toward the planet and the time to come. The past will not save us. Exterminism will not save us. The gift of law and specifically of the jurisliterary is that it is planetary, without boundaries either national or disciplinary, an astronomical narrative that collects the juristic fables, narratives, myths, artworks, utopias and dystopias, the science fictions, and other pataphysical elaborations that allow a glimpse of the future. The performance, the play of improvised music, is the death knell of precedent as dogmatics, as the priority of the past, as opposed to the advenience of the future. No rules will fully bind the future. We must respond to it as it responds to us and that is a question of opening, of being open, and of opening being. A question of crevasses, fissures, and apertures. Of what we do not know and of what is not yet. A matter of the unfinished, the trance of futureity, the delirium in which thought figures imaginary transitions and incompatible syntheses, the pattern of absences and holes. This is the comedy of law. The beauty of its inventions lies in the phantasmagoria of asserting a truth that does not exist in the face of being real. And the next step? The becoming of legal theory is extant in the concept of becoming as the actual state of being and law. An unfinished, open, future-oriented being open to presence, temporary and itinerant, striving to formulate the

pattern of events and the harmonics of occasions and responses, in sympathy with the poetics of evanescence and the chimera of encounter.