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Law As ... IV: Minor Jurisprudence in Historical Key. An Introduction

Christopher Tomlins*

‘Minor Jurisprudence’ was an invention of the mid-1990s. For that reason alone, the song ‘Damnation’s Cellar’, released by Elvis Costello and the Brodsky Quartet in 1993, offers an appropriate soundtrack for this introduction to our exploration of the concept.¹ But as we shall see, minor jurisprudence renders sound more than merely accompaniment (Rajah 2017: 266-7), more than just an element of the ‘context’ that law inhabits. No: here law is sound and sound is law – they are together, a songline (Chatwin 1987; but cf Barr 2017: 232, citing Neidjie 1989: 18-19). Materiality is not context. Instead materiality gushes out of many of the essays in this volume *as law*, law instantiated as sound, touch, appearance, imprint; in motion, in rhythm, in liveliness. Minor jurisprudence is ‘grounded jurisprudence’ in Kirsten Anker’s apt description (2017: 193). Here also is a jurisprudence that is light to the major’s ‘dark side’ (Davidson 2017: 100). But the minor itself can be dark – in its silences (Rajah 2017: 266), in masquerades of misunderstanding and deception (Painter 2017: 278-9), in mourning and death no less than life (Minkkinen 2017: 158). Looks can deceive, the material is just as wily as the ideal (Goodrich 2017: 44). Costello asks whether the minor (no less than the major) is tallow or tar? Tallow can be molded. Tar? Apparently nothing but a sticky mess. Is minor jurisprudence a mistake? Genevieve Painter asks.

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Painter's question is to the point. These essays do not simply explore minor jurisprudence, they assess it. Minor jurisprudence appears to us as an interesting and potentially productive way of engaging law that promised much when it first took the stage in the mid-1990s, but which has remained relatively undeveloped since that initial entrance.² These essays seize the opportunity to develop the concept. In doing so they also test it. What is the outcome? Tallow or tar? Tallow become tar? Both?

1. The Beginnings of Minor Jurisprudence³

At its inception, minor jurisprudence had two distinct incarnations. In 1994, Panu Minkkinen published an intriguing essay entitled 'The Radiance of Justice: On the Minor Jurisprudence of Franz Kafka', in which he deployed the concept of 'minor literature' developed by Gilles DeLeuze and Félix Guattari to interrogate Kafka's conception of law (Minkkinen 1994). In Minkkinen's view minor jurisprudence stood for a mode of jurisprudence that (like Kafka's literature) resisted accommodation within any established canon or genre. Its resistance signified that it was something completely new, simply unlike the known 'major' canons of jurisprudential orthodoxy. Two years later, Peter Goodrich gave minor jurisprudence a different inflection, as any species of legal knowledge that had escaped 'the phantom of a sovereign and unitary law'. The product of 'rebels, critics, marginals, aliens, women and outsiders', in this register 'minor jurisprudence' is simultaneously plural, subaltern and subversive (Goodrich 1996: 2). We might say that at this point of origin both Minkkinen and Goodrich conceived of the minor as other to the major's tar: each formulation is a metaphor for difference and escape, and as such movement away. The reader might expect a molding of the idea to have ensued. But none took place. In 1999 Minkkinen responded, briefly, that in his view Goodrich's formulation was 'too much of a "critical oeuvre" of its author', but otherwise did not take any further the matter of conceptual definition (Minkkinen 1999: 159). So there, with a few exceptions, the matter rested.

2. The Beginnings of ‘Law As ...’

At this point it is appropriate to introduce a third actor, the symposium that goes by the title ‘Law As ...’ Begun as a conference held in April 2010 at the University of California, Irvine, and continued there (2012, 2014) and at Berkeley (2016) as a biennial symposium, ‘Law As ...’ has accumulated a bank of scholarship and commentary that represents a double move in legal scholarship: to deploy history as an interpretive practice – a theory, a methodology, a philosophy – with which to engage law; and simultaneously to offer history as a substantive site upon which other interpretive practices from across the broad spectrum of the humanities and social sciences can undertake their own engagement with law.

A. Legal history as target of opportunity⁴

As the founding literature of the first conference makes clear, at its outset ‘Law As ...’ was addressed specifically to the question of theory and method in legal history. Legal history is no more often given to explicit theorizing of itself than history at large, but to the extent it has a “default” theoretical orientation as a scholarly activity, legal history in its modern (post-1950) Anglophone form has adopted the rubric of ‘law and’. Invented in the early twentieth century’s distinction between ‘books’ and ‘action’, grounded in realism, and popularized by the law and society movement, ‘law and’ relies on empirical context to situate law as a domain of activity. It explains law through its relations to cognate but distinct domains of action – society, polity, economy – by parsing the interactions among them. The mainstream *theory* of legal history has exhibited the influence of ‘law and’ in its resort to synchronic relational metaphors of conjunction/disjunction, to which it adds diachronic temporality as a further and essential relational index. Legal history’s mainstream *method* is comparative – it historicizes phenomena by situating them in temporally discrete empirical contexts (for example, periods), and attempts to reveal the effect of law, or to explain the reality of law, by assessing change over time in law relative to the contextualizing domain (society, polity, economy) from which it is held relationally distinct.

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Legal historical scholarship relies on the same broad relational hypotheses that at successive moments have preoccupied ‘law and’ theory: autonomy/instrumentalism, relative autonomy, mutual constitutiveness, legal constitutiveness, autopoiesis, and most recently contingency/complexity. To structure its narratives legal history draws on the same range of relational characterizations (functionalism, managed conflict, coercion-resistance, legitimation-disruption, agency-disempowerment) and distributive effects (plurality, equilibrium, efficiency, utility) that have preoccupied ‘law and’ scholarship.

The 2010 conference accepted that participation in ‘law and’ theorizing had been highly productive in legal-historical scholarship. ‘The question nevertheless arises whether we have arrived at an intellectual moment in which, a century after its invention, the relational perspective on law developed by “law and” theorizing has run its course. If so, what might be the implications for legal history?’ (Tomlins and Fisk 2009). In America, Holmes and Pound, and in the United Kingdom, Maitland, substituted society for history as law’s principal signifier as a matter (so to speak) of policy. ‘They fated legal history to become what it is – an account of relationality. If we now look past their “law and” what other possibilities might become available’ (Tomlins and Fisk 2009)?

Two scholarly tendencies sharpened the question: the first, long-term, considers the social to be law’s most important determinative context, and the social to be empirically verifiable, such that law is held to be an empirical and social phenomenon. The second is the current scholarly tendency (which emerged dialectically from the first and is not confined to legal history or to law and society studies) to fetishize relational complexity and contingency to the point where relationality simply produces more of itself. The first tendency produced a causally functional and empirical account of law; the second tendency produced a devastating critique of that functional and empirical account to the point that, whatever realm of action in relation to which law is situated, the outcome can be shown to be indeterminacy marked by complexity and contingency. One should note that the critique has not dispensed

with the components of the received account. It did not produce a new account. It simply made any and every expression of the received account inexpressible in causal or functional terms.

B. Legal history as possibility

Suppose, asked ‘Law As ...’, we let go of theory built from the conjunctive metaphors of the relational approach and its broken conception of causality, and instead reach for different metaphors. What would they be? They might be optical metaphors – of appearance or image, of focal length (blurring), of ‘looking like’. Instead of parsing relations between distinct domains of activity, between law and what lies ‘outside’ it, the objective of legal historical research might be to imagine them as the same domain: what do we get if we imagine law and economy as the same phenomenon – that is, law *as* economy (or economy *as* law)? Likewise, what of law as art, as science, as war, as peace? Or they might be material metaphors – of person in place, of the elements (earth, water, fire, air) from which lawscapes are created (Philippopoulos-Mihalopoulos 2015; Bachelard 2002 [1943], 2011 [1948]). Notably, we seem to have no difficulty in thinking of law imagistically in some domains but not in others: for example, law *as* expertise or even law *as* economy seems to pose less conceptual dissonance than law *as* forest (but see Anker 2017).

‘Law As ...’ imagined at least two possible routes such an exercise might open up. One was the creation of a distinct (and historical) account of relationality. The very tenacity of the conjunctive conceptualizations that underpin modernity’s ‘law and’ theorization raises the question, why did differentia of appearance (of economy, polity &c) come about? How did they become so powerful? By interrogating the production of differentiation we are led to questions of purpose and effect. As appearance came to distinguish cognate phenomena from law, what optics, aesthetics, functions or claims did law take up, and why? How did law represent or explain its own differentiation? With such an agenda the objective is not to ‘get rid’ of relationality or to challenge the familiar domains of polity, society and economy, but to discuss whether current relational theorizations are insufficient for the purposes of legal history and to explore what other theorizations might offer.

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But one might also take the optical metaphor further – indeed beyond the metaphorical – to the point where one imagines law as a system of allegorical representation that completely displaces what is being represented. What would history become if relationality were foreclosed? How would our perspectives on purportedly familiar domains change if the economic, the social, the political were imagined historically as appearing only from and in law?

Here the differentiation between optical and material collapses. We find ourselves inhabiting lawscapes in which distinct materialities find their expression in distinct legalities, and in which encounters between these legalities emerges as the fundamental question (Barr 2017: 223; Dorsett and McVeigh 2012; Tomlins 2001, 2016). How then would law's history appear?

3. The Meeting of Minor Jurisprudence with 'Law As ...'

'Law As ...' purposely defined itself with modesty, 'not by any means another proclamation of a new currency over outworn forms', not a manifesto nor prescriptive statement of intent nor paradigm (Tomlins and Comaroff 2011:1040, 1079). Its intent has always been to serve as an opening that, as its signature ellipsis suggests, was simultaneously unfinished and beckoning. As a result, each of its events and resulting collections of articles⁵ had its own character. Still, the outcome has been a work in progress that has arced in the direction of situating 'Law As ...' in the realm of jurisprudence. That arc first became apparent in the 2012 symposium, in which the most marked tendency was exploration of the constellations that historical inquiry can create between past and present. This identified the 'Law As ...' enterprise as one that could generate practical knowledge for the here-and-now, 'the moment, it might be said, when the origins of the present "jut manifestly and fearsomely into existence", spirit into experience, metaphysics into materiality' (Tomlins and Comaroff 2011: 1044. On jurisprudence as practical thinking, see Minkinen 1999:3, 34, 97). A key outcome of the second conference was the possibility that 'Law As ...' could indeed become a kind of jurisprudence (Tomlins 2014: 18). But what kind?

The answer began to appear in the third ‘Law As ...’ symposium (2014), which is where our actors first began to congeal. The kinds of jurisprudence suggested in the papers presented in 2014 were not ‘sovereign or major jurisprudence’ (Goodrich 1996: 4), the jurisprudence that would have us understand law holistically, ‘as being all one thing or all another’ (Fisk and Gordon 2011: 525), that represents the legal order ‘as a system’, as ‘a relational structure formalized from normative phenomena and stratified within a framework of hierarchical rationality’ (Minkkinen 1994: 349, 350). Rather, the jurisprudences that ‘Law As ...’ had begun to explore were jurisprudence in a minor key, a jurisprudence of plurality – of *glossolalia*.

Hence the fourth symposium (2016), the objective of which was to come to a clearer conception of what ‘minor jurisprudence’ entailed, how this somewhat dormant idea might be revived, what theoretical, conceptual, and/or methodological work it might do, and to what extent ‘minor jurisprudence’ and ‘Law As ...’ might coalesce.

To identify minor jurisprudence as an objective for the ongoing ‘Law As ...’ project is not to embrace a singular intellectual program, but rather the prospect of plurality. *Glossolalia*, after all, suggests the attractiveness (and mystery) of speaking of law and justice in different tongues. In some respects the difference between the varieties embraced by Peter Goodrich and Panu Minkkinen seems slight. Each after all is ‘other’ to the rule of law imagined by major jurisprudence, ‘as a conceptual construct the creation of which is regulated by the reason of modern science’ (Minkkinen 1994: 350). Each invokes Nietzsche, and Deleuze and Guattari, as inspiration (Minkkinen 1994: 357–62; Goodrich 1996: 175–78; Goodrich and Valverde 2005). Each recognizes that to attend to the history of legal science is necessarily (if not, in Minkkinen’s case, sufficiently) to attend to a history of power. Each is, to that extent, a critical jurisprudence that addresses law, whether ‘as such’ or as ‘deep structure’. That said, their valences for the future of ‘Law As ...’ are clearly distinct – the one (Goodrich) oppositional and antifoundational, the other (Minkkinen) initiatory and so, to that extent, foundational. To the extent that the legacy of post-structuralism

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has been to trap the activity of critique in an endless loop that begets nothing other than more of itself, it is worth assessing whether, without sidestepping critique, ‘Law As ...’ can offer means to benefit tangibly from critique while also moving through it, toward new foundational positions.⁶

4. Minor Jurisprudence in Historical Key

In the remainder of this introduction I describe, briefly and provisionally, the essays collected here. Together they represent the fullest and most complete interrogation of ‘minor jurisprudence’ since its inception. Individually they offer a cornucopia of provocations that advance jurisprudence in a minor and historical key. In a short conclusion I assess their implications for the future of ‘Law As ...’

A. Characterizations

The first two essays in this collection offer us historical encounters with minor jurisprudence, and conceptual definitions. In ‘How Strange the Change from Major to Minor’, Peter Goodrich speaks of minor jurisprudences as ‘lifestyles, existential modes of inhabiting institutional space ... that entail an open, plural and expansive thinking’ (30).⁷ In a striking image he declares the goal of a minor jurisprudence to be ‘to cut holes in the fabric of law ... to tear the seamless web’ (30) in order ‘to insist upon more than law within the institution of legality’. For ‘[t]he minor is the crack in the edifice, the fissure in discourse, a site of incompatibility and novelty’ (32). But the minor does not come from without. It is ‘included in the major ... of significance only in becoming part of the greater but is nothing of itself’ (33). As such, if it ‘is not to be entirely oppositional, if it is to take its place as part of the legal institution it requires its own positivity. Critique is admirable as far as it goes, as method, as the child on the back of the norm, as rectitude of practice, but its tendency is to remain critique “of” rather than substantive expression’ (42). Hence Goodrich enlarges on minor jurisprudence as a becoming, its trajectory toward the major, toward becoming the major, but a becoming that preserves its own original trace: ‘The major can be minor because the foetus invariably remains

present at the heart of being' (45). Here is a dialectics of growth that invokes 'the radicality of the child, the force of the inaugural in the free play of thought' (42). In radicality and free play we encounter, of course, path-independency, the absence of any necessity. 'The minor can be radically evil, dangerous, tortured, or open and full of aura and potential, fantasm and truth for you. Take your pick' (44). We will return to this observation.

Mark Antaki's 'Making Sense of Minor Jurisprudence' attempts to unravel both the concept and its relationship to the evolution of 'Law As ...'. Stated generally, the appeal of minor jurisprudence, and its potential for 'Law As ...' rests in its apparent 'celebration of difference, of resistance, of refusal to conform, to grow up and become staid' (54). This appearance of immanent critique is different from Goodrich's 'becoming'. For Antaki, however, this is *not* the promise of the concept. Instead he points toward two specific separations that minor jurisprudence implies – the juridical-political separation 'of law and justice from state and officialdom' and the metaphysical separation of law from 'the so-called metaphysics of presence', from *being*, such that it might be (re)habilitated to *becoming* (59).

Thus we encounter a convergence in comprehension of minor jurisprudence in our first two essays. And here too we find a connection to 'Law As ...' which describes itself '(as its ellipsis is designed to suggest)' as an enterprise 'in progress, underway, *becoming*' (Tomlins 2015: 247). 'Law As ...' has made a jurisprudential turn toward a form of jurisprudence that evinces a similar orientation to the world. Antaki supplies a welcome intellectual history of the impulse to minority in jurisprudence that recommends 'Law As ...' temper its desires to move beyond post-structuralism by embracing the initiatory rather than seeking new foundations. Uniting his twin themes of un-stating law and displacing being for becoming, Antaki finds minor jurisprudence (and implicitly 'Law As ...') to be an essential component in 'the attempt to think through the 'art of not being governed' (72, referencing Scott 2009).

B. Applications

Following ‘Characterizations’, and the definitions and encounters there described, we move to a group of four essays that employ the idea of minor jurisprudence to clarify the specificities of distinct forms of legal-historical action. The first is Julieta Lemaitre’s ‘Manuel Quintín Lame: Legal Thought as Minor Jurisprudence’. As Lemaitre explains, Lame (1880-1967) was a leader of indigenous peoples in southern Colombia during the first half of the 20th century, and an autodidact who wrote profusely about law and justice, focusing on land rights and employing ‘a creative interpretation of statutory law ... a strategic use of neo-scholastic jurisprudence and ... his own reported visions and hallucinations’ (76). Asking ‘what kind of legal theory can be written by indigenous legal activists’, and whether the study of jurisprudence can ‘take them seriously’, Lemaitre turns for elucidation to minor jurisprudence, understood as ‘the jurisprudence of a minority, of the situated, historical subordinate position that uses the dominant language of law, its ideas and canon, as it were, not to represent or speak-for a group, but instead to destabilize the complacency of the majority, and suggest alternatives’. She finds minor jurisprudences ‘located in a place in history – the Jewish ghetto of pre-war Prague, the *terrajero* indentured servitude of the Cauca Andes’ – places and experiences from which minor jurisprudences arise to create ‘marginal and subversive account[s] of the formalisms, fictions and justifications of established law’ (77). In Lame’s case it appears in the form of profuse but scattered writings, ‘letters and newspaper articles ... interrupted by lapses into poetry and mystic visions ... extended paraphrases of well-known legal authorities’ in which Lame ‘chang[ed] words to suit his needs’. Lame’s writing had ‘a disturbing and alluring effect, deterritorializing legal expertise by both claiming the authority to speak as a lawyer, and performing that authority in tandem with appeals to poetry and emotion, and with odd forms of legal bricolage and innovative interpretations’. Lame paid the price of ‘speaking in law’: his ideas accepted the colonial violence that denied cultural differentiation to indigenous peoples, lumping them together as ‘*los indios*’, inferior and weak, whose rights would be defined by the colonizer (81). But

he challenged the liberal jurisprudence of a social contract amongst putative equals, describing law instead as ‘a fragile armistice between an invading army and a vanquished people ... between the strong and the weak’, between the white and mestizo public and the conquered indigenous population ‘whose grief and dissolution and land loss seem to be inevitable as much as invisible, inaudible, meaningless’ (78). Crucially, this did not mean that the law was immune to a concept of justice the measure of which was indigenous suffering. Lane ‘builds on a colonial tradition of indigenous legalism, re-links it to collective resistance, and lays the way for the contemporary indigenous movement’s rebellious legalism. That innovative use of legal arguments merits his consideration as an author of minor jurisprudence [...] a tragic jurisprudence, rooted in loss and sorrow, destitute and yet still appealing to law and justice’ (87, 91).

Natalie Davidson’s ‘Toward a Self-Reflexive Law? Narrating Torture’s Legality in Human Rights Litigation’ engages minor jurisprudence in a distinct fashion, less as a matter of legal thought’s substance than as an artefact of how law is presented in action. Davidson asks: to what extent can law know itself and so combat itself? Can law recognize itself ‘as a tool of physical atrocity’ or will it always deny that atrocity could be legal? The question is fundamental to Nazi law and its judgment at Nuremberg, but Davidson finds the question just as pressing in the reliance on courts of current ‘authoritarian regimes’, and the growing, paradoxical obsession with legal form accompanying widespread violence in the neo-liberal era’ in which ‘rule by law’ challenges ‘rule of law’ (101, citing Rajah 2012, 50; and see Rajah 2017). Davidson’s measuring stick is a case study – ‘a class action filed in a Hawaii federal court on behalf of 10,000 Philippine victims of torture and other gross abuses against Ferdinand Marcos, one month after his ouster from power in 1986, a suit ‘in which the key part played by law in atrocity was made explicit’ because of Marcos’s careful creation of modes of legal legitimacy for his regime – ‘constitutional amendments and Supreme Court approvals of his concentrations of power’ (102, 105). Davidson treats the suit as a site for minor jurisprudence in the sense advanced by Peter Goodrich in

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1996: her goal is to recover practices ‘denied or ignored’, ‘repressed or absorbed’ (Goodrich 1996: 3) so as ‘to disrupt assumptions prevalent in mainstream legal scholarship’ (104). But she finds those disruptions not outside but within the processes of orthodox law itself, in this case in trial proceedings. ‘While trial proceedings are of course conventional sources of sociolegal history, neither they nor the historical narratives contained in them are conventional sources of normative legal analysis’ (104) which overwhelmingly turns on the ‘mandarin’ texts (Gordon 1984: 120) of appellate doctrine and commentary. Even as they have ‘historicized the law in order to recover alternative paths’ critical scholars, too, have neglected the dross of proceedings to emphasize doctrinal texts. Like Goodrich’s work in this collection, Davidson’s analysis of the trial proceedings in *Marcos* points to ‘the minor within the major’ (104). Like Manuel Quintín Lame she brushes law against the grain. In *Marcos* ‘trial proceedings offered opportunities for rich, detailed discussions of constitutional structure, legal formalism and victims’ experiences of law’ – here is the minor key, the legality of violence and death, which is then ‘erased and obscured’ by ‘the more abstract discussions of higher courts ... that are diffused throughout the legal community. In *Marcos*, ‘the insights gleaned during the lower court proceedings’ expose ‘the close imbrication of brutal violence [and] law’. They also expose ‘the difficulties of undoing such violence’ within a legal framework that soothes itself with doctrinal lullabies that such law is not law at all. Davidson’s prescription is ‘detailed historical analysis’ to reveal ‘the web of contingent doctrinal limitations, litigation strategies, political constraints and cultural assumptions that shaped the historical narratives in this case’ beginning in its actual trial proceedings and ‘suggesting paths for reconstruction’. This analysis is, for Davidson, minor jurisprudence in action: ‘a mode of legal theorizing beyond critique’ (119, 120).

Laurent de Sutter’s ‘On the Magic of Law’ also uncovers the minor within the major, and in a fashion not unlike Davidson’s analysis, although at a remove. Davidson tells us that the minor can be uncovered within the major though an exercise of patient historical digging. De Sutter reports on just such an exercise, undertaken at the

turn of the twentieth century by the French jurist and legal historian Paul Huvelin (1873-1924), a moment when Huvelin's form of legal inquiry was being overwhelmed by 'the social' or 'socially-oriented legal thought' (Kennedy 2006: 21) such that Huvelin was rendered an obscure, forgotten figure. Yet Huvelin's question was crucial: 'What makes law into something different than a mere set of words whose only power would lie in the force of those strong enough to make sure that one could not escape the consequences of one's actions – what makes law something else than brute strength' (125)? Huvelin's search was for 'an explanation for the obligatory effect of obligations'. His answer, understated, 'was both curious and timely: what if, he more or less wrote, there was yet something to investigate apropos the relationship between law and magic' (126)? Huvelin's answer was unacceptable to the group of French sociologists led by Émile Durkheim with whom he was in conversation, for whom 'the efficiency of magic' was 'the mere set of social conventions through which a community would illusion itself, so fulfilling some collective needs that could not be fulfilled otherwise ... shared beliefs, responding to some social requirements' that 'as such, it belonged to the realm of representations, and not to the realm of reality or of practices' (127). But Huvelin persisted: 'being a lawyer, he knew that if anything happens in the world, it is because of details being carefully envisaged ... Society never entails any effect; what entails an effect always is one singular detail, one specific gesture or given set of words, inserted into a broader context that only provides the ecology for this detail to lead to the results being expected from it to produce'. The result was Huvelin's *Magie et droit individuel*, a minor jurisprudence of ritual that recovered the 'magic' of obligation from the detail of a multitude of cases obscured by social generalization. The book 'resembled an anthology of disparate cases and examples from which no overarching story seemed to unfold, and about which no explanation seemed completely satisfactory. In the course of his listing of cases, Huvelin would only offer glimpses at a possible general view, through short sentences resounding like hard-to-decipher oracles, left suspended in the air, waiting for someone to interpret them in one way or another' (131). De Sutter calls Huvelin's interests 'timely'

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for, as he observes, ‘the end of the nineteenth century, and beginning of the twentieth, was a moment when magic was everywhere’ (138). But it was also the moment of Weberian disenchantment, and ‘the social’ – the moment when both the substance, and the method, and the abiding assumptions of Huvelin’s mode of legal inquiry was being subjected to sustained, withering critique. ‘What Huvelin wanted was a theory of the legal act that was not dependent upon the person who would utter the word (or make the gestures), but on the words (or the gestures) themselves – and not because of their meaning, but because of their, say, “genre”. There must be a certain type of words or actions that can be called “magic”, and whose use within a legal context produces necessary consequences, whatever the social context is ... *There must be an inner necessity of law*, or else it is only void – that is, pure force, pure application of the relationship of power within a certain group of human beings, pure legitimization of something that would have happened anyway ... this is precisely what Huvelin was looking for and that he found, thanks to the concept of magic. What he found was the inner necessity of the form, understood not in the sense of respect due to some formalities, but in the most specific sense of *forming* – the giving of shape to what had none before’ (141).⁸ Unfortunately for Huvelin, he was an untimely guest at the triumphant birth of socially-oriented legal thought. Its ferocious critique both of his question and of his methods rendered him and his answer obscure. His major was made minor.

Finally, Panu Minkkinen returns to the concept of minor jurisprudence that he helped to bring into being more than twenty years ago in his essay “‘Life Grasps Life’: Wilhelm Dilthey’s Minor Jurisprudence’. A polymath – historian, psychologist, sociologist, and hermeneutic philosopher, elected in 1859 to Hegel’s Chair in Philosophy at the University of Berlin – Dilthey (1833-1911) was older than Huvelin but like him became intellectually located amid the ‘rise’ of ‘the social’ and its disciplines at the turn of the twentieth century. He sought to create a grand substantive foundation for the new human sciences (the social sciences and humanities) ‘as disciplines clearly distinct from the natural sciences’ (144) by mobilizing the concept *Geisteswissenschaft* – the ‘science of the spirit’. Collectively the

Geisteswissenschaften would map and analyze the entire human social formation on the basis of their unique capacity to grasp the human ‘inner experience’ scientifically, ‘to develop verifiable “first-order truths” about the “psychophysical life-unit” in the different social and historical contexts in which she acts’ (146-7). Dilthey, then, was on the opposite side of the substantive and methodical transition to ‘the social’ that claimed Huvelin. He had ‘an explicit scientific agenda’ (144). The law that his agenda would pour forth would be animated by the ‘first-order truths’ that science would discover. Yet, Minkkinen tell us, the moment claimed Dilthey too. ‘[H]is original aim of providing a scientifically feasible foundation for all the human sciences gradually los[t] its plausibility’ (144). As it did so, a second influence emerged to enliven Dilthey’s purpose, that of *vitalism*: ‘the vitalistic nature of his life-philosophy becomes ever more prominent. *Life*, then, not only animates the incompatible taxonomies of the human sciences, but it is also responsible for the “repulsive” force that ultimately prevents the human scientist from fixing her concepts and doctrines into the systemic frameworks that “major jurisprudence” insists on’ (144). Unable to create an integrated and holistic scientific foundation for all the human sciences in the face of their incompatible taxonomies, Dilthey’s schema became a duality of second-order systems: ‘cultural systems’ on the one hand – ‘collaborative networks into which individuals enter with the aim of achieving designated purposes that can be reached through cooperation either more efficiently or exclusively’; and on the other the ‘external organization of society’, by which Dilthey meant ‘existing structures that make up the institutional framework of the world’ into which individuals are born and which they inhabit – the family, the state and so forth (149-50). Between these two unintegrated components, Dilthey nominated law as the shuttle, the means of communication between. Dilthey’s background in legal analysis was not dissimilar to Huvelin’s – ‘hermeneutics and interpretation’ – but unlike de Sutter, for Minkkinen these are ‘little more than historical curiosities’ (149) that (unlike Huvelin) Dilthey left behind him for law as social mediator. Minkkinen labels this a form of ‘law and society’ jurisprudence, a jurisprudence in which law is neither positivist nor

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natural, ‘belongs’ to neither second-order system, but instead exists always in-between, constituted wholly by ‘constant cross-referencing’ (151), animated by ‘the sense of justice of individuals’ (154). Why call this jurisprudence ‘minor’? ‘Like its “major” counterpart,’ Minkkinen tells us, ‘Dilthey’s jurisprudence begins with an attempt to provide a scientific foundation for understanding law as an element of human life. The attempt ends in failure, not because of a deficiency specific to law, but because all such foundationalist aspirations are destined to fail from the beginning ... Like a mistake that we can foresee but must, nonetheless, make, a minor jurisprudence would, rather, involve the acknowledgement of a “tragic failure” by embracing the full potential of the vitalism that Dilthey ends up with. In those vitalistic terms, the “minor jurisprude” is no different to the psychophysical life-unit that she studies. She is driven by the same conative impulses, and she encounters the same resistances as the being whose world she attempts to grasp. Indeed, her grasping can itself only be a conative impulse among others, a desire to understand, and her understanding can only take place at the pressure points where that impulse meets its resistant counterparts ... the ‘minor jurisprude’ is not fully determined by the failure of her foundationalist task because the task itself is animated by life. And so the jurisprude is doomed – or more appropriately, perhaps, delivered – to her tragic fate’ (160). The impossibility of realizing Dilthey’s original foundationalist project necessarily renders his jurisprudence minor. Implicitly Minkkinen suggests that all claims for ‘major’ jurisprudences are built on the mistake, or tragic failure, or lie, of a false foundationalism, that the minor is all there can ever be.

C. Materializations

From ‘Applications’ we move on to three essays that I have grouped under the title ‘Materializations’. Each interrogates minor jurisprudence from a materially grounded standpoint. In Shaun McVeigh’s case, the ground is a specific locale – London – transected by lines of communication (notably bus routes, which are modern traces of much older lines of communication) that offer a representation of the city ‘mostly through its absence, as a city of justice, reason, civility, commerce and asylum’,

and that, by offering access to that *imaginaire* of the city, are means to train subjects as jurists, means to cultivate ‘the persona of the jurist and the conduct of the office of jurist’ through an education in the order (whether real or desired) of the city as place (165). McVeigh’s essay in this collection is one of several such projects (see, for example, McVeigh 2016). Together they can be considered exercises in minor jurisprudence because they are conceived in sympathy with the traditions cultivated by minor jurisprudence. ‘For some the central concern of a “minor jurisprudence” has been the conduct of lawful relations apart from the major political and philosophical jurisprudences of State and Reason. Others have been more concerned with differentiating jurisprudences from the variety of modes and styles of lawful existence expressed in the major legal western legal traditions ... Finally, there has been a distinct concern with judgment and the genres of jurisprudence writing. The style of minor jurisprudences has been pitched against those that are general and systematic and in favour of those that are particular ... Here attention is turned towards how a jurist might take up responsibility for a pattern of lawful relations of a place (such as London)’ (166-7). In McVeigh’s case both the idea of pattern or patterning – ‘patterning might be thought of as a way of finding, or finding yourself in, relations of law’ – and the conceit of lines of communication are derived from Australian indigenous jurisprudence (see Black 2011, Chatwin 1987). ‘What is followed here is the training in the patterning of lawful relations suggested in a number of minor jurisprudences across a part of South London ... In the varied European jurisprudences, “being placed” and being patterned into relations has become a complex matter of engagement and dispute. The jurisprudence of a place or the way “we” are placed, for example, as “of London”, rarely settles into one form of relationship whether it be authorised through the conduct of lawful relations or other forms of association. The minor jurisprudences are addressed here through the way they introduce, and respond to, a patterning of material, institutional and ideational existence into place’ (167). These are not jurisprudences of rejection. ‘If the exercises and training in office offered in forms of minor jurisprudence were to be

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encapsulated in one gesture it would not be a training in disgust or indignation (although it might involve a training in ability to be joyful and dignified). All, for example, are concerned with maintaining the office of the scholar and with countering the deadening effects of state law and major jurisprudences. They seek to cultivate something like a cosmopolitan ethic and to enliven law by educating students into “breakthrough” experiences that move beyond, interrupt or rupture the everyday experience of law’ (172). McVeigh pursues his theme with reference to three accounts of minor jurisprudence – those of Panu Minkkinen and Peter Goodrich, about which much has already been said here, and that of Andreas Philippopoulos-Mihalopoulos, whose concept of ‘lawscape’ (2015) offers a new materialist vein of spatial justice.

The second essay in this group is also the most ‘grounded’ in the collection. Kirsten Anker’s ‘Law As...Forest: Eco-logic, Stories and Spirits in Indigenous Jurisprudence’ is written from the perspective of Mount Royal, in and above Montreal. “The Mountain is a lawscape, and the neologism speaks not just to the knowledge that law must have a material existence in some place, but also to the way that law authorises and enacts the mark of humans on the land’ (191-2). But this is only one way of understanding the interaction of law and ground. ‘I am reminded of Indigenous friends and colleagues who claim that the law is “in” or “of” the ground ... that “the land is the source of the law”’(193). Which enacts which? As Anker introduces and encapsulates the problematic we find ourselves pulled backward to that turn-of-the-twentieth-century upheaval that ensnared Huvelin and Dilthey. “That human minds are the only source of law designed to act on the world (and for that matter, that humans are the only legal subjects) speaks to a set of distinctions provoked and amplified by modernity’s rationalisation of mysticism, a condition that Max Weber called disenchantment ... in which the world came to be seen as “knowable, predictable, and manipulable by humans” ... Disenchantment divides mind from matter, human from non-human, culture from nature’ (193). Anker’s essay is about the multiple standpoints – the plurality of minor jurisprudences – from which this division might be overcome, from

the Earth Jurisprudence that even in its critique of the Anthropocene maintains the Western logocentricity that persists in privileging minds, to 'Indigenous forms of deep participation in ecological process [that] suggest that the mythos of storied places is more apt to account for grounded jurisprudence than logos' (194). Along the way Anker ensnares critical scholars whose metaphors – precedent as a 'forest of constraint', for example – speak of their inability to escape a 'linguistic memory [in which] trees constituted an obstacle to cultivation' for an experience of forests 'as a co-evolved network of relationships' (196). The remedy for disenchantment, Anker concludes, requires more than an imagination enlivened to new patterns. It requires 'attention to the way the world is enchanted, the ways in which its mind manifests. Most obviously, this requires direct experience with forests and so on. But disrupting our cognitive schemas also requires attempting to privilege, within our own thought patterns, those modes that reflect the way that forests think' (208).

The final essay in this group is Olivia Barr's 'Legal Footprints', the most self-consciously methodological approach to minor jurisprudence in this collection. Barr has already made her own substantial and original contribution to the literature on minor jurisprudence (2013, 2016), thus joining Minkkinen and Goodrich in particular as a principal innovator of the idea. Here she pursues her analysis of the meaning of legality through how we walk and where we walk – 'the movements of laws, the laws of movement, and the place of our feet, legally, in this maze of non-linear movements' – in an 'autoethnographic' essay that unites poetry, prose and picture as three genres of representation of locality, globality, and place, of their 'intense materiality' (233), and of 'how we notice, experience and understand the active nature of laws' moving places in the world, and how this relates to walking' (214). For Barr, minor jurisprudence is as much method as interpretation or imagination. Like Davidson, her minor jurisprudence 'requires drawing out certain strands of legal practice, often working in less visible archives' (221). For Davidson, the 'less visible archive' of legality is that of trial proceedings. For Barr it is 'feet on the ground, a local mural, cycling through a park or a bus ride' (221). As method,

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minor jurisprudence ‘provide[s] space for otherwise jurisprudentially overlooked topics, techniques, concepts, practices and sites to slowly, incompletely, yet gently emerge’. Her approach, like all the essays in this group, is intensely materialist. As such it offers ‘radical new possibilities for jurisprudential thought ... deepening our understandings of where laws are, how they work, and how we might better live “with” not only our own forms of law, but the laws of others’ (221). The discovery of such a method is of crucial importance to the jurist. ‘[T]he office of the critic inherits a tradition of critique and is able to step outside law, yet for the office of the jurist or jurisprudent, such an escape is not possible. For the jurist, the challenge becomes one of remaining critical without abandoning law or official responsibilities to the act of exercising sound judgment in practical matters of law’ (221). McVeigh has offered one method that allows the jurist to remain within law, and with law, while also remaining critical. Barr, more explicitly, offers another.

D. Hesitations

From ‘Materializations’ we pass, finally, to ‘Hesitations’, so entitled because of all the essays in this collection, those that appear in this final section are the most reserved in their assessments of the utility of minor jurisprudence. The first is Jothie Rajah’s ‘A Minor Jurisprudence of Spectacular War: Law as *Eye in the Sky*’. Rajah’s essay is a critical analysis of Gavin Hood’s movie *Eye in the Sky*, released in 2016. As Rajah explains, the movie is a fictional depiction of the legalities of drone warfare, in the setting of an Anglo-American drone assassination of Al-Shabaab militants in Kenya, who include U.K. and U.S. Nationals, and who are in the final stages of preparation for a terror attack assessed as likely to result in multiple civilian casualties. ‘With lives at stake’, notably the life of a child innocently occupying a position within the drone missile’s strike zone, ‘we watch elite, mid- and low-ranking American and British state actors – military personnel, cabinet ministers, the British Attorney General, the Senior Legal Advisor to the U.S. National Security Council – as the decision

is made to conduct the targeted killing. In the process, against the urgency of a ticking bomb scenario, these various lawyers, politicians, and military personnel express competing values and understandings of law and reality'. Rajah argues that 'the contestation around law and values animating *Eye* might be seen as an expression of jurisprudence', and further that a minor jurisprudence is expressed in those elements of the contestation that evince a particular suspicion of 'the complacency and status or establishment of law' (Goodrich 1996: vii). So far, so good. But a problem arises from the depiction of the contest between major and minor jurisprudence in *Eye*. 'As jurisprudence, *Eye* represents contemporary drone warfare as a highly regulated legal system structured around an ethical valuing of civilian life' (253-4). It is also a highly undemocratic system – a system predicated upon 'spectacular war' that dazzles citizen-subjects with glamorized technological gadgetry which reduces them to a state of complacent non-participatory deactivation (254). In *Eye*, the only trace of the non-technocratic questioning citizen-subject who speaks ethically for civilian life in defiance of roomfuls of politicians, legal advisors, and military superiors appears in the unlikely shape of the lowest-ranked military personnel – those responsible for actually prosecuting the mission – whose questions (on our behalf) are answered, indirectly but conclusively, by a final icy retort to a hectoring politician from the highest-ranked general-in-charge: 'never tell a soldier that he does not know the cost of war' (Rickman 2016). In its acute questioning of drone warfare, a system serviced, not scrutinized, by law, *Eye* appears to fit the role of a minor jurisprudence. But it does so, Rajah argues, only to pursue other distractions: first, from the 'de-democratizing and dehumanizing concealments and erasures that accompany drone warfare' – after all, the low-ranking soldiers (young, attractive and thoughtful, one male, one female) do speak up and are heard, and after they are reluctantly satisfied and their job is done they suffer for all of us, morally and physically, on *Eye*'s cross (see Tomlins 2016: 2); and second, from the 're-making of lawful authority, and of nation-state sovereignty, through a dramatization of the (highly contested) international law principle, responsibility to protect' which becomes the

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moral of the putatively tragic story, the justification of a child's death for the greater good of preventing a deadly terror attack. By engaging in its own careful erasures and concealments – 'by rendering visible a particular set of actors, narratives, and questions, while concealing and erasing others' – *Eye* ends up offering a powerful legitimization of drone warfare on its own terms. It chooses its own set of 'actors, institutions, practices, and technologies' and valorizes them (254). 'In this alternative legal system, it is military and counterterrorism personnel (not lawyers, and certainly not politicians!) who can be trusted to be protective of innocence, and ethical in their decision making. In short, *Eye* convinces us that the experts able to meet the demands of planetary jurisdiction are military, technological, and counter-terrorism experts operating beyond the sphere of nation-state sovereignty' (258). *Eye in the Sky* offers its audience a minor jurisprudence of spectacular war more disturbing than the major jurisprudence that the minor criticizes.

Genevieve Painter's 'Law as Minor Jurisprudence: Is it a Mistake?' is no less critical. Starting from an 'innocent' question, 'what is law as minor jurisprudence' (276), Painter argues that claims made on behalf of the transformational capacities of minor jurisprudence – whether revelatory/unmasking or initiatory/foundational – are overblown. For one thing, taken on their own terms, the claims assume some *thing* to be unmasked or replaced – minor jurisprudence, it seems, cannot exist in its own right, but only in relation to that whose transformation or replacement is desired. Second, the claims themselves impute intention to transformation. But, as illustrated in historical examples of indigenous-settler encounter, mistake – error – can be just as transformational as intention. In that regard, minor jurisprudence offers no intrinsic capacity to guide action. Finally (and here Painter is at one with Rajah), if 'minor jurisprudence' is simply an ambition to transform, any form of transformation becomes admissible, including those that are morally and politically reprehensible. Painter offers 'the early days of the Trump Administration' and its assault on 'human and non-human flourishing' (277) as an example of an assault on an existing state of affairs with intent to transform, qualifying as a harmful expression of minor jurisprudence. Summarizing, then: '(1) minor

jurisprudence requires major jurisprudence to be cognizable; (2) little intrinsic to the concept of minor jurisprudence offers normative political guidance' leading us to '(3) the idea of law as minor jurisprudence may be a mistake' (277).

How might one respond to Painter's critique? First, it seems clear that among the 'Applications' and 'Materializations' of minor jurisprudence that we have encountered, there are certainly those that, implicitly or explicitly, embrace a 'major' as their stage or backdrop. The essays by Anker, Lemaitre, and particularly Davidson serve as examples, as do those (less overtly) by de Sutter and Minkkinen. But in all these essays minor jurisprudences also exist normatively cognizable for themselves (see e.g. Eiss 2011: 713-14 and compare Lemaitre 2017: 83-7), not simply as phenomena called into existence and defined by that to which they are other, merely elements in a dialog. Minor jurisprudences are equally cognizable on their own terms in the more methodological attempts by McVeigh and Barr to locate bases and spaces for 'living well' with the law that we have. Goodrich and Antaki, we have seen, both render minor jurisprudence conceptually as a becoming, on a trajectory, but a becoming that yet preserves itself. These examples do not refute Painter's point, but they do soften its impact, particularly in their plurality.

As to the sufficiency of the transformational ambition, Goodrich, too argued that. '[t]he minor can be radically evil, dangerous, tortured, or open and full of aura and potential, fantasm and truth for you. Take your pick'. There is nothing to the standpoints that embody the minor that provides any per se justification for their content. Fascism was/is a minor jurisprudence. So are 'the streets' (295) where, of course, fascists fight many of their battles. Rather than seek normative political guidance from the minor, it is to the minor – in particular to its trajectories – that normative political judgment must be applied. Here there is no disagreement

We are left with 'mistake'. Does mistake render minor (and major) standpoints meaningless? Perhaps – if one accepts speech act theory as determinative, susceptible to no 'Archimedean "outside context"'

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point from which a speech situation can be analysed' (281). Painter puts it thus: 'Speech acts that are legal claims illustrate how vantage point shapes expectations about how words work. The law contains vantage-point specific conventions for speech that determine whether utterances succeed' (281). One cannot escape by alleging error or miscreance. 'Perceiving a mistake requires comparing speech against the expectations embedded in the speech situation. The words themselves don't offer a neutral vantage point for determining their felicity. The context of those words does not solve the problem either. Moving the problem of perspective from "accepted convention" to "appropriate context" is no help because there is no view from outside context and no "within context" criteria for choosing context' (281). One can acknowledge the argument, and add that if we are nevertheless still to write history Painter's argument teaches us that we must use our own criteria. This is one of the principles that 'Law As ...' has generated for itself. 'There is no way for us to say what *they* were doing unless we commit ourselves to the criteria on which the meaning of *our* words depends. This is a political commitment. Reducing history entirely to understanding the people of the past means making no commitment to any political community. That makes the truth about the past impossible to tell'. (Fasolt 2015: 458; Tomlins 2016: 16-17).

5. Conclusion

In its brief life, 'Law As ...' has never attempted to be much more than a place for inspections of law that offer novelty, dissonance, and creativity to the practice of legal history. As an activity 'Law As ...' has arced toward jurisprudence, a site where ideas from law and from history, and from the philosophies of both, can intersect productively (see e.g. Del Marr and Lobban 2016; Desautels-Stein and Tomlins 2017). But to what kind of jurisprudence might 'Law As ...' aspire? The fourth symposium has examined minor jurisprudence as an option and has found it to be a creative standpoint on law, although – as the essays by Rajah and Painter in particular attest – not one to be embraced injudiciously. As they remind us, the minor as well as the major is tar

as well as tallow.

‘Damnation’s Cellar’ canvassed the end of history in the invention of a time machine (Costello et al. 1993). We cannot escape history. But if we are to escape damnation’s cellar we have little choice but to use all of what is to hand, not leave it behind. Indeed, it is our obligation. The Benjamin whom Painter cites desired that ‘nothing that has ever happened should be regarded as lost for history’, and so exhorted history’s chroniclers to narrate events ‘*without* distinguishing between major and minor ones’ (Benjamin 2006: 390, emphasis added). The recovery of the minor, the struggle to redeem all of the past – ‘the “refuse” and “detritus” of history, the half-concealed, variegated traces of the daily life of the collective’ (Eiland and McLaughlin 2002: ix) was the obligation of the historical materialist, even in the face of its acknowledged impossibility in that ‘only a redeemed mankind is granted the fullness of its past’ (Benjamin 2006: 390); which is to say (Costello et al. notwithstanding) that only God can grant mankind a past ‘become citable in all its moments’ (390). For ourselves, we must recover the minor to create the possibility of seizing the past ‘as an image that flashes up at the moment of its recognizability’. For only then can the historical materialist ‘brush history against the grain’ (Benjamin 2006: 390, 392). If, then, ‘Law As ...’ can indeed be a minor jurisprudence in a historical key, and if, further, that jurisprudence can be given a task, it is this. ‘The historian is the herald who invites the dead to the table’ (Benjamin 2002: 481).

Endotes

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1. For reasons of copyright I am foreclosed from demonstrating the aptness of Costellos’ lyrics. Those who would see for themselves are urged to do so.
2. Beyond this collection, and works cited in this introduction, other examples of work invoking or examining ‘minor jurisprudence’ include Barr 2013, 2016; Green 2008; Loizidou 1999; and Van Marle 2012.
3. This section and the next rely on Tomlins 2015.

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4. This section and the next rely on Tomlins and Fisk 2009.
5. See “Law As...” Theory and Method in Legal History *UC Irvine Law Review* (2011) 1: 519-1079; “Law As . . .” II, History As Interface for the Interdisciplinary Study of Law *UC Irvine Law Review* (2014) 4: 1-491; “Law As . . .” III, Glossolalia: Toward A Minor (Historical) Jurisprudence *UC Irvine Law Review* (2015) 5: 239-511.
6. In contrast to the suggestions of immanent critique Barr (2013: 73) situates her embrace of minor jurisprudence as one ‘that accepts the institution of common law’ and attends to ‘the place of jurisdictional testimony in historical vignettes’, by which means ‘it becomes possible to attend to the substrate of how common law comes to be in place through technologies of jurisdiction’. Dorsett and McVeigh describe their approach as one that ‘does not look for ways and means of transcending or escaping law but seeks to deepen and expand the ways of engaging with law’ (2012: 20, and generally 20-29).
7. All unattributed parenthetical page citations in this introduction refer to pages in this volume of *Law Text Culture*.
8. For further discussion of the speech act, see Painter 2017.

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