

Foreword:

“Law As . . .” III—*Glossolalia*:

Toward a Minor (Historical) Jurisprudence

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*It’s a peculiar apparatus.*¹

This issue of the *UC Irvine Law Review* contains nine articles based on papers originally presented at the third “Law As . . .” conference, held March 7–9, 2014, at the University of California, Irvine School of Law. Collectively, the articles comprise a further deposit in a bank of scholarship and commentary begun at the inaugural “Law As . . .” conference held in April 2010² and continued at the second conference held two years later in March 2012.³

Although each of the three conferences, and resulting collections of articles, has its own character, on each occasion the intent has been to engage in a double move: 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 arena in which other interpretive practices from across the broad spectrum of the humanities and social sciences can undertake their own engagement with law. The result has been a work in progress that has arced in the direction of situating “Law As . . .” in the realm of jurisprudence. That tendency is rendered explicit in this issue.

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1. FRANZ KAFKA, *IN THE PENAL COLONY* 5 (Willi Muir & Edwin Muir trans., The Ltd. Editions Club 1987) (1935).

2. Symposium, Catherine L. Fisk & Robert W. Gordon, *Foreword: “Law As . . .”: Theory and Method in Legal History*, 1 U.C. IRVINE L. REV. 519 (2011).

3. Symposium, “Law As . . .” II, *History As Interface for the Interdisciplinary Study of Law*, 4 U.C. IRVINE L. REV. 1 (2014).

I. MINOR JURISPRUDENCE

The first “Law As . . .” conference addressed itself quite squarely to the field of intellectual endeavor known as legal history. The conference was premised on an asserted necessity that legal historians reconsider their default participation in the theory and practice of “law and.” Grounded on the early twentieth-century distinction between “law in the books” and “law in action,” honed by legal realism, and generalized by the law and society movement, “law and” explains law as a domain of activity by parsing its interactions with cognate but distinct domains of activity (society, polity, economy, culture, and so forth) that furnish law with an exterior context. Legal history conceived in accordance with this approach attempts to reveal the effect of law, or to explain the reality of law, by assessing change over time in law vis-à-vis the contextualizing domains (society, polity, economy, and culture) from which it is held relationally distinct.⁴ The objective of the first conference was to force legal history out of this mainstream sociolegal comfort zone by proposing, first, that historical explanations of law “are not to be found, either necessarily or sufficiently, in its relations to other things,”⁵ that rather than parse relations “between distinct domains of activity, between law and what lies ‘outside’ of it, the objective of historical research about law might be to imagine them as the same domain”;⁶ and second, that legal historians refine their own interpretive practice by interacting much more extensively with scholars engaged in distinctively interdisciplinary projects throughout the realm of legal studies. Invited to dispense with theory built from the “law and” conjunction, sixteen authors responded by “conceptualiz[ing] law variously as text, peace, politics, silence, claims, justice, consciousness, resistance and that which is resisted, drama, tragedy, enchantment, sacred ritual, spectacle, allegory, war, empire, the Crown, money, economy, and more.”⁷

The second conference underscored the twinned elements at the center of the “Law As . . .” enterprise, and the synergies existing between them. The first element, of course, is history, its task clarified by the first conference as the identification of that which conceals in order to open up to discovery that which is concealed. Nothing is more concealing than legality, the magical power to measure and define—to *constitute*—that makes so much, including itself, disappear.⁸ The

4. *Id.* at 1–2; Christopher Tomlins & John Comaroff, “Law As . . .”: *Theory and Practice in Legal History*, 1 U.C. IRVINE L. REV. 1039, 1040–41 (2011).

5. Tomlins & Comaroff, *supra* note 4, at 1041.

6. Catherine L. Fisk & Robert W. Gordon, *Foreword: “Law As . . .”: Theory and Method in Legal History*, 1 U.C. IRVINE L. REV. 519, 523–24 (2011).

7. *Id.* at 524.

8. *Id.* at 538 (“The magical power of law is to make the state and its exercises of power—sometimes coercive, sometimes liberatory—disappear. The violence of the law, as Robert Cover said, disappears when law makes its operations seem to be the product of consent, custom, contract, or civilization. The law accomplishes its own vanishing when it makes the movement of money, land, or other resources seem to be the product of putatively autonomous institutions like the market, the employment contract, or the family.” (citation omitted)); *see also* Tomlins & Comaroff, *supra* note 4, at 1078.

second element is the “concealed” substrate opened by historical inquiry to the interpretive play of a multiplicity of intellectual practices. In the eighteen papers presented at the second conference, plural modes of historical inquiry were to be found in intimate dialog with sociologies, anthropologies, and multiple forms of critical literary, political, and legal theory.

Most exciting at the second conference was the appearance of a tendency toward exploration of the constellations that historical inquiry can create between past and present. This tendency identifies the “Law As . . .” enterprise as one that can 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.”⁹ As this suggests, a key outcome of the second conference was the clear possibility that “Law As . . .” could become a kind of jurisprudence.¹⁰

But what kind of a jurisprudence? The answer to that question lies within the articles comprising this collection.¹¹ Clearly, the jurisprudence they canvas is not of a piece with what Peter Goodrich has termed “sovereign or major jurisprudence,”¹² the kind of jurisprudence that would have us understand law holistically, “as being all one thing or all another,”¹³ the kind that represents the legal order, in Panu Minkinen’s words, “as a *system*”: “a relational structure formalized from normative phenomena and stratified within a framework of hierarchical rationality.”¹⁴ The jurisprudence we encounter here, rather, is a “minor” jurisprudence.

Minor jurisprudence comes to us principally in two registers. The leading register is that associated with Goodrich, for whom “minor jurisprudence” describes any species of legal knowledge that has escaped “the phantom of a sovereign and unitary law.”¹⁵ The product of “rebels, critics, marginals, aliens,

9. Tomlins & Comaroff, *supra* note 4, at 1044.

10. Christopher Tomlins, *Foreword: “Law As . . .” II, History As Interface for the Interdisciplinary Study of Law*, 4 U.C. IRVINE L. REV. 1, 18 (2014). On jurisprudence as practical thinking, see PANU MINKINEN, THINKING WITHOUT DESIRE: A FIRST PHILOSOPHY OF LAW 3, 34, 97 (1999).

11. Of the eleven papers presented at the third conference, nine appear in this collection. Two of the participants—Shaun McVeigh and Annelise Riles—were prevented by professional and personal circumstances from revising their papers for inclusion here. It is a pleasure, however, to welcome the presence here of Shaun McVeigh as collaborator on the “Afterword” to this collection. Others participating in the conference as commentators were: Nahum Chandler, Justin Desautels-Stein, Sora Han, Jeffrey Helmreich, Michelle McKinley, Bill Maurer, Renisa Mawani, Michael Meranze, Kunal Parker, Brook Thomas, and Christopher Tomlins. Shaun McVeigh delivered an impromptu ventriloquization of Bill MacNeil, who was prevented from attending the conference by urgent family circumstances.

12. PETER GOODRICH, LAW IN THE COURTS OF LOVE: LITERATURE AND OTHER MINOR JURISPRUDENCES 4 (1996).

13. Fisk & Gordon, *supra* note 6, at 525.

14. Panu Minkinen, *The Radiance of Justice: On the Minor Jurisprudence of Franz Kafka*, 3 SOC. & LEGAL STUD. 349, 350 (1994) (emphasis added).

15. GOODRICH, *supra* note 12, at 2.

women and outsiders,”¹⁶ in this register “minor jurisprudence” is simultaneously plural, subaltern, and subversive.

A minor jurisprudence is one which neither aspires nor pretends to be the only law or universal jurisprudence. Its referent is a law whose jurisdiction is neither jealous of other jurisdictions nor fearful of alternative disciplines. It represents the strangeness of language and so the possibilities of interpretation as also of plural forms of knowledge. A minor jurisprudence . . . is a challenge to the science of law and a threat to its monopoly of legal knowledge.¹⁷

Precisely because minor jurisprudences “challenge[] the law of masters, the genre and categories of the established institution of doctrine and its artificial and paper rules,” their history is tragic, even nightmarish—a history of marginality and effacement, “of repressed, forgotten and failed jurisdictions,” of knowledge and practices “denied or ignored,” “discarded or failed,” “repressed or absorbed” by “the phantasm of an all-powerful law.”¹⁸ Minor jurisprudences are legion, but they are also fleeting. Their existence is unsettling to “the monistic imagination and the unifying logic” of “the procedures and the norms of positive law”¹⁹—hence, their fate is co-optation or repression. The task of history is to recall minor jurisprudences from oblivion so that they can interrupt those who occupy “the seats of legal power.”²⁰ It is to destabilize, break into, and transgress the “modernist project of legality”—closed and predetermined—by counterposing to it “the contingencies and heterogeneities of different jurisdictions and alternative forms of law.”²¹

Minor jurisprudence in this register is disruptive, its position vis-à-vis law external and antagonistic, its historicity deeply antifoundational. In all these senses it is of a piece with the historicism that has come to characterize the encounter between history and law, that identifies history above all as a contextualizing practice and fetishizes thick description, contingency, and complexity.²² Like historicism, minor jurisprudence in this register is synonymous with critique. It begins and ends with critique. But minor jurisprudence also exists in a second register, in which it is—at least in essence—something rather more than only critical and antifoundational, and hence has more to offer history as practice than historicism. Minor jurisprudence in this register is associated with Panu Minkinen and expressed most notably in his interpretation of Franz Kafka’s novella *In der*

16. *Id.*

17. *Id.*

18. *Id.* at 2–3.

19. *Id.* at 4.

20. *Id.* at 5.

21. *Id.* at 4, 7.

22. See, for example, Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023 (1997). For a response, see Christopher Tomlins, *After Critical Legal History: Scope, Scale, Structure*, 8 ANN. REV. L. SOC. SCI. 31 (2012); and Christopher Tomlins, *What is Left of the Law and Society Paradigm after Critique? Revisiting Gordon’s “Critical Legal Histories,”* 37 LAW & SOC. INQUIRY 155 (2012).

Strafkolonie (In the Penal Colony).²³ Kafka, says Minkkinen, stands outside all major literary traditions, and cannot be read in their terms (as “self-evident proponent of a ‘negative theology’ of modernity,” as visionary chronicler “of the painful destiny of modern man”); he is the initiator of a new “minor literature” and hence of a new politics.²⁴ So also, Kafka stands outside any and all major jurisprudential traditions; he should be read as the initiator of a new “minor *legal* literature” or “minor jurisprudence” that is “a generalization of the world of law, a political statement about law” which can be “the foundation of a new law.”²⁵ Quite forcefully, Minkkinen distinguishes the quality of foundational innovation in Kafka’s minor jurisprudence from antifoundationalism’s commitment to incessant critique:

The danger lies in the interpretative naïveté affecting most political readings of Kafka’s minor jurisprudence. “In der Strafkolonie” is read as if the text represented a form of literary justice that *e contrario* condemns the forceful functioning of law in modernity. By unveiling the violent nature of legal power in modern society and the inability of modern jurisprudence to assume responsibility for it, it is claimed that, in his literature, Kafka sets a normative standard for moral and ethical reform within the traditional notions of social justice.²⁶

23. See Minkkinen, *supra* note 14, at 352, 358; see also MINKKINEN, *supra* note 10, at 150–64 (reproducing the original version of Minkkinen’s article with minor revisions). Minkkinen appears to have been the first scholar to use the term “minor jurisprudence,” which appears in his 1994 article. Publication of *Law in the Courts of Love* two years later firmly associated the term with Goodrich, from whose usage, however, Minkkinen demurs. “According to Goodrich, a ‘minor jurisprudence’ escapes the phantom of a sovereign law by challenging ‘the law of masters’ and the science that embraces it. I find this formulation . . . too much of a ‘critical *oeuvre*’ of its author[.]” MINKKINEN, *supra* note 10, at 159 n.28. Minkkinen’s contrasting conception of minor jurisprudence is less developed than Goodrich’s, and as a result has not been as influential. But see William P. MacNeil, *From Rites to Realities (And Back Again): The Spectacle of Human Rights in The Hunger Games*, 5 U.C. IRVINE L. REV. 483 (2015).

24. Minkkinen, *supra* note 14, at 357 (citing GILLES DELEUZE & FÉLIX GUATTARI, KAFKA: POUR UNE LITTÉRATURE MINEURE [TOWARD A MINOR LITERATURE] (1975) (Fr.)). For details of the English translation, see *infra* note 25.

25. Minkkinen, *supra* note 14, at 357, 358 (emphasis added). In her foreword to the English translation of DELEUZE & GUATTARI, *supra* note 24, Réda Bensmaïa observes that by mobilizing the concept of “minor literature,” Deleuze and Guattari enable the reader “to enter into Kafka’s work without being weighted down by the old categories of genres, types, modes, and style” that “imply that the reader’s task is at bottom to *interpret* Kafka’s writing.” Réda Bensmaïa, *Foreword: The Kafka Effect* (Terry Cochran trans.), in GILLES DELEUZE & FÉLIX GUATTARI, KAFKA: TOWARD A MINOR LITERATURE, at ix, xiv (Dana Polan trans., Univ. of Minn. Press 1986) (1975). For Kafka was engaged, self-consciously, in the invention of a new kind of literature.

Kafka does not read and admire Goethe and Flaubert to imitate them, much less to move beyond (*aufheben*) them according to some teleological schema like that of Hegel, but to determine and appreciate the incommensurable distance that separates him from their ideal of depth or perfection. Writing against the current and from a linguistic space that is radically heterogeneous with respect to his great predecessors, Kafka appears as the initiator of a new literary continent: a continent where reading and writing open up new perspectives, break ground for new avenues of thought, and, above all, wipe out the tracks of an old topography of mind and thought.

Id.

26. Minkkinen, *supra* note 14, at 358.

Though nothing in “In der Strafkolonie” (or for that matter in Kafka’s other “legal” texts) supports the interpretation, says Minkkinen, Kafka is read as if he were engaged in a critique of modern jurisprudence that consisted in no more than simple reversal of its “basic systematics of hierarchy,” as if he were simply “spokesman for an anti-positivistic ‘ethics of justice.’”²⁷ Kafka has become, in effect, the victim of massive interpretive overdetermination, of “prestructuring expectations created by the proper name and law of the Kafkaesque.”²⁸ In the Kafkaesque, “labyrinthine legal institutions seem to function according to their own internal rules” and “law evades the well-meaning attempts of the man of reason to subject it to the rational dictates of Enlightenment thought”; it ceases to comply “with the procedural form of logical sequences.”²⁹ In the Kafkaesque, law fundamentally disobeys the principles of modern jurisprudence. In a world of reversal, one might ask, what could more comfortingly express the restoration of justice than modern jurisprudence itself?³⁰

Most assuredly, that is *not* Kafka’s purpose. In what, then, does the jurisprudential “supplement” generated in Kafka’s minor literature, his minor jurisprudence, consist? What statement about modern law is to be found in “In der Strafkolonie” that is an opening not to critique’s reversals but to a new and foundational conception of law “as such,” of law’s “deep structures”?³¹ Kafka’s

27. *Id.* at 350, 358.

28. *Id.* Minkkinen invokes “the Kafkaesque” to refer to what one might term the “anticipation effect,” derived from interpretations of Kafka’s writing, that identifies Kafka with the “real life” of modernity, notably the nightmarish disorientation and helplessness that accompanies the relentless complexity of bureaucracy. *Id.* at 352. Minkkinen explains:

A paradox is embodied in such a conception of literature and the law written with Kafka’s name. The text is read as a preset assortment of signs and structures of the world of the Kafkaesque while the reader merely recognizes something which was already dictated by the promises of the signature, by the law of the Kafkaesque. Kafka’s literature does not generate a world *ex nihilo* but merely verifies attributes of the world that precede the text.

Id. The act of reading Kafka, then, becomes “a verification of the Kafkaesque assumption,” and Kafka becomes prophet. *Id.*

29. *Id.* at 350.

30. For as Minkkinen puts it, “In the critique of modern jurisprudence, the basic systematics of hierarchy may be reversed by, for example, subjecting positive law to the ethos of popular justice, but hierarchy in itself is rarely—if ever—questioned.” *Id.*

31. *Id.* at 353. Describing the confrontation between contemporary critical legal scholarship and contemporary jurisprudence, Minkkinen refers to Goodrich’s “radical variant of critical legal studies” as a self-distancing “from the grand theories and the abstractness of modern jurisprudence.” MINKKINEN, *supra* note 10, at 10. Minkkinen continues:

Goodrich’s radicalism rejects the descriptive theories of “law as such” and the programmatic political theories that envelop them; the “patronising dogmas of truth” must now make way for theories of the particular. Radical critique abandons the “uninteresting” questions of what law is—an ontological question—or how one can know about law—an epistemological question—but, partly restating what has just been denounced, takes up “the historical and ontological question of how law is lived, what are its habitual forms, what is its deep structure that allows its repetition in ever different forms”. The initial arguments of the debate emphasise, then, the issue of scientific relevance and interest. Goodrich’s dispute with the traditions is not merely about the essential characteristics of a particular entity, but also about how law should be studied. For my purposes here, it is only a matter of taste whether the object of the science of law is defined as “law as such” or as “deep structures”.

Id. (citation omitted).

yearning for truth, says Minkinen, allows him “to unravel the essence of law and see the legal phenomenon as it truly is.” Through Nietzsche he arrives at a “*Wesen* [essence] of law” that is expressed “by way of negation in relation to the narrative, in another law.”³² The result, “contrary to the common interpretation,” is not an account of law as “an image of horror that demands justice through [its] negation.” Kafka’s account of law “is much more disquieting than that.”³³

First comes description, undertaken with all the “pedantic accuracy of the entomologist:” of the penal colony, of its law, and of law’s machinery—the mighty engine that executes law’s sentences:

Physical punishment is a ‘mnemonics of pain’, a painful way of reminding forgetful man of her commitments and promises, of her social duties and responsibilities to the community. Nietzsche’s mnemonic technique is simple: the promise that one has broken is written on the skin of the criminal with fire because only that which causes ceaseless pain will be remembered. The community partakes in this literary torture but not through identification with the victim and the sensation of just revenge, but by experiencing pure pleasure in inflicting pain to another; punishment is a feast of cruelty.³⁴

Here is no allegory of modernity. When Kafka writes about suffering, says Minkinen, “there is no room for metaphor or figuration but only literal truth. There is no *als*, no ‘as’ to mute the coupling of world and penitentiary: for Kafka, the world *is* a penal colony.”³⁵

Second, and more important, Minkinen refers us to the literal truth of the law and justice to which the community’s festive cruelty has opened our eyes. “For Nietzsche, law as *Gesetz* is law which is posited and, hence, ‘positive’ law. Law exists only in as much as it conforms to validity (*Geltung*), and law is valid if the will (*Wille*) that has posited it has the power (*Macht*) to do so.”³⁶ The rule of law of modern jurisprudence does not exist. Or rather, the actual relationship between law and rule of law is the inverse of that which modern jurisprudence posits.

The rule of Law and justice are creations of the law-giver, creatures of law. The commanding activity of the highest power is positing laws, law-giving, the powerful manifestation of what is right (*Recht*) and what is wrong (*Unrecht*). According to Nietzsche, the right and the wrong can only exist through law-giving as posited laws . . . to talk of them as such would be senseless.³⁷

What, finally, of the law-giver? Where lies the foundation of the law-giver’s power to command, to posit laws? Not in any “transcendental requirement of

32. Minkinen, *supra* note 14, at 358. On the salience of “another,” see MINKKINEN, *supra* note 10, at 147–49, 166–67, 172–73, 177–82; *id.* at 160 (rewriting “another law” as “an other law”).

33. MINKKINEN, *supra* note 10, at 152.

34. Minkinen, *supra* note 14, at 352, 359.

35. *Id.* at 351–52 (citation omitted).

36. *Id.* at 359.

37. *Id.* at 360.

justice”³⁸ or rule of law but in will—will to truth (which was Kafka’s will) which is also will to power:

As an expression of a commanding will, law is, for Nietzsche, the rule of Law or justice which justifies or condemns, and the just or unjust nature of any procedure is ultimately based on the positing of laws, not on the rule of Law. The power to command and to posit laws is, accordingly, the foundation of the rule of Law, of all conceptions of right and wrong.³⁹

To identify minor jurisprudence as an objective for the ongoing “Law As . . .” project is to embrace not a clarion intellectual program, but rather the prospect of plural invocations of what the description “minor jurisprudence” entails. *Glossolalia*, after all, suggests the attractiveness (and mystery) of speaking of law and justice in different tongues. We can note that 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.”⁴⁰ Each invokes Nietzsche, and Deleuze and Guattari, as inspiration.⁴¹ 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 oppositional and antifoundational, the other initiatory and so, to that extent, foundational.⁴² To the extent that the legacy of post-structuralism has

38. *Id.* at 361.

39. *Id.* at 360. Hence, Minkkinen argues, the figure of the explorer, who appears in “In der Strafkolonie” to epitomize a (compromised) ethics of justice, in fact represents will to power, giver of law, philosopher “of the dangerous ‘Perhaps,’” no matter that—and in fact confirmed because—he flees his destiny. *Id.* at 361–62; see also DELEUZE & GUATTARI, *supra* note 25, at 45. On the possibility of a Nietzschean minor jurisprudence, see Jonathan Yovel, *Gay Science as Law: An Outline for a Nietzschean Jurisprudence*, in NIETZSCHE AND LEGAL THEORY: HALF-WRITTEN LAWS 23 (Peter Goodrich & Mariana Valverde eds., 2005).

40. Minkkinen, *supra* note 14, at 350.

41. *Id.* at 357–62; see also GOODRICH, *supra* note 12, at 2, 175–78; Peter Goodrich & Mariana Valverde, *Introduction: Nietzsche’s Half-Written Laws*, in NIETZSCHE AND LEGAL THEORY: HALF-WRITTEN LAWS, *supra* note 39, at 1.

42. Beyond this collection and works already cited, other examples of work invoking or examining “minor jurisprudence,” generally in Goodrich’s register, include Christine L. Green, *The Tribunal de las Aguas: A Minor Jurisprudence, Not Jurisprudentially Minor*, 20 LAW & LITERATURE 89 (2008); Elena Loizidou, *Sex @ the End of the Twentieth Century: Some Re-marks on a Minor Jurisprudence*, 10 LAW & CRITIQUE 71 (1999); Karin Van Marle, *‘We Exist, but Who are We?’ Feminism and the Power of Sociological Law*, 20 FEMINIST LEGAL STUD. 149 (2012). But see also Olivia Barr, *Walking with Empire*, 38 AUSTL. FEMINIST L.J. 59 (2013), who situates her embrace of minor jurisprudence, explicitly in contrast both to Goodrich and to the tendencies associated here with Deleuze and Guattari, 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.” *Id.* at 73. For commentary on the implications for jurisprudence of this third and distinct “minor” register, which they term “a critical jurisprudence of jurisdiction,” see SHAUNNAGH DORSETT & SHAUN McVEIGH, JURISDICTION 20–29 (2012).

been to trap the activity of critique in an endless loop, which leads to nothing other than more of itself, it is worth assessing whether, without sidestepping critique, “Law As . . .” can offer means both to benefit tangibly from it and to move through it, toward new foundational positions.

In the remainder of this Introduction I offer my own assessment of the differing valences of these distinct invocations of minor jurisprudence by examining to what extent they are manifest in the articles that comprise this third iteration of “Law As . . .”. As in earlier collections, it is the articles themselves rather than any introductory gloss that demonstrate whether “Law As . . .” continues to be “not without its uses, its promises, its provocations.”⁴³ But because the enterprise remains (as its signal ellipsis suggests) one in progress, underway, *becoming*, it may be of use to offer a provisional assessment of the direction of its jurisprudential turn. I do so by considering first matters of substance: What is the subject of this jurisprudence? Then, matters of means: How are its inquiries organized? And finally, outcomes: What are its goals?

II. “BUCKET-LOADS OF EXTINGUISHMENT”⁴⁴

Although all the articles presented in this issue address matters of substance, the first three do so with particular attention to the intersection of the art of historical description and analysis with “the historical and ontological question of how law is lived, what are its habitual forms, what is its deep structure.”⁴⁵

In *Colonialism and Constitutional Memory*, Aziz Rana firmly attaches the history of the United States to that of worldwide Anglophone settler-colonialism, its “indescribable consanguinity of race,” and its commitments to white settler dominance, also known as enlightened “European civilization.”⁴⁶ Rana also addresses the purposeful century-long “forgetting” of this history, once proudly acknowledged, such that “Today . . . to describe in mainstream public discussion the United States as part of an imperial family of settler societies would be deeply jarring.”⁴⁷ How has memory of American settler-colonialism been extinguished? How has exceptionalist civic uniqueness, binding together “a nation of immigrants,” smothered awareness of a colonialist past? Rana points to a symbolism of the Constitution arising not at the Founding, but at that extraordinary moment more than a century later when the continental settlement frontier closed and,

43. Tomlins & Comaroff, *supra* note 4, at 1079.

44. Jodie Brough, *Wike Draft Threat to Native Title*, SYDNEY MORNING HERALD, June 28, 1997, at 3 (quoting the Honourable Timothy Andrew Fischer, AC, GCPO (Companion of the Order of Australia; Knight of the Grand Cross of the Order of Pius IX), Member of the Australian Parliament for Farrer, New South Wales (1984–2001), ninth Leader of the National Party of Australia (1990–1999), tenth Deputy Prime Minister of Australia (1996–1999), Australian Ambassador to the Holy See (2009–2012)).

45. PETER GOODRICH, *LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS* 2 (1990).

46. Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 264–65 (2015).

47. *Id.* at 266.

simultaneously, the United States became itself a transoceanic imperial power. The repurposing of the Constitution, he says, “reimagined the country in more inclusive terms” while providing “an ideological framework that allowed classically privileged American insiders to still preserve the basic institutional structures of the polity—those of an increasingly completed settler project—while at the same time asserting greater authority abroad.”⁴⁸ Twentieth-century America embraced its own postcoloniality—erased its own colonialism—but by discursive sleight of hand, its new civic consciousness amending none of the deep structure of embedded privilege that an honest rupture with past exploitation required. In place of “the type of sustained policies—such as those of reparations, land return, material redistribution, or respect for shared indigenous sovereignty—that marked decolonization efforts elsewhere,” those who had been the “historically excluded” of the United States were required to manifest “unconditional attachment to the nation, its central symbols at home, and its practices abroad,” and to accept as historical gospel the nation self-imagined as “a liberal society engaged in a process of self-fulfillment” before their exclusion might be ameliorated by a modicum of careful “reform.”⁴⁹

Leti Volpp’s *The Indigenous As Alien* also addresses U.S. history as a history of erasure, specifically erasure “of preexisting indigenous peoples”;⁵⁰ that is, those of the “historically excluded” over whom the nineteenth-century flood tide of Anglophone settler-colonialism most fiercely rolled. The extinguishments she recounts are multiplicitous: Indians erased by the Westphalian territorial sovereign’s redefinition of prior indigenous space; Indians condemned to isolation in a “before” time, out of any current state of mind; Indians not taxed—that is, tribal Indians—repetitiously deported to a jurisdictional locale beyond the settled homeland, beyond polity and civic identity, there to be beaten into admissible shape by Teddy Roosevelt’s “mighty pulverizing engine”;⁵¹ Indians admitted only to be assimilated, dispersed, disappeared through a carefully-managed “intolerance of [their] difference”;⁵² Indians falling through the cracks of Michael Walzer’s sloppy account of immigration sovereignty, fetching up—when noticed—not as indigenous at all, but as alien;⁵³ Indians as transborder aliens—“the real Americans . . . called aliens”⁵⁴—immobilized in their own blood, dying the slow

48. *Id.* at 268.

49. *Id.* at 266, 286.

50. Leti Volpp, *The Indigenous As Alien*, 5 U.C. IRVINE L. REV. 289, 289 (2015).

51. *Id.* at 303.

52. *Id.* at 292. Or as Alain Badiou famously puts it, “Become like me and I will respect your difference.” ALAIN BADIOU, *ETHICS: AN ESSAY ON THE UNDERSTANDING OF EVIL* 25 (Peter Hallward trans., Verso 2001) (1998).

53. Volpp, *supra* note 50, at 299. Sloppy, because Walzer appears to draw no distinction between the situation of a settler polity confronting an indigenous population (as in the United States) and an indigenous population confronting a population forcibly introduced by a colonizer (as in the case of Asian indentured labor imported into British sub-Saharan Africa). In both cases the oppressed minority is “alien.”

54. *Id.* at 314.

torturous death of waiting for naturalization; Indians—Locke’s natural men—unnaturalizable by the polity whose settler compact extinguished their state of nature.⁵⁵

How to understand the substance of these dual histories of a polity that, as Volpp puts it (borrowing from Leila Kavar), “has been juridically formulated into a state with immigration problems rather than a state engaged in a project of conquest and settlement”?⁵⁶ How to understand not just the substantive manifestations of erasure, but the theory and practice—the jurisprudence—of it? Stewart Motha’s *Law, History, Ontology* provides important clues.⁵⁷ Concerned with the displacement of “the problem of justice,”⁵⁸ Motha references political and historical debates arising from the High Court of Australia’s remarkable 1992 decision in *Mabo and others v Queensland (No. 2)*, which recognized, for the first time since European occupancy of the continent, a qualified concept of indigenous land title in Australian common law.⁵⁹ *Mabo*’s qualification—that native title rights might be held to have been extinguished by governments manifesting a clear and plain and legal intention to do so—was tested in 1996 in *Wik Peoples v Queensland*, in which Justice John Toohey stated, for the Court majority, that a government grant of a pastoral lease did not amount to a grant of exclusive possession and therefore “was no necessary extinguishment” of a coexisting native title. Toohey also wrote that “[i]f inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under the statutory grants, those rights and interests must yield, to that extent, to the rights of the grantees.”⁶⁰ The Australian federal government’s response to *Wik* was peremptory statutory action to protect pastoral leaseholders from native title claims.⁶¹

55. *Id.* at 316–17.

56. *Id.* at 316.

57. Stewart Motha, *As If—Law, History, Ontology*, 5 U.C. IRVINE L. REV. 327 (2015).

58. *Id.* at 337.

59. According to Penny Pether, *Mabo* was “arguably the most potentially constitutionally radical, and almost certainly the most politically contentious decision of the Australian High Court in its history.” See Penny Pether, *Principles or Skeletons? Mabo and the Discursive Constitution of the Australian Nation*, 4 LAW TEXT CULTURE 115, 116 (1998). The salient features of *Mabo* are discussed in TONY BLACKSHIELD & GEORGE WILLIAMS, AUSTRALIAN CONSTITUTIONAL LAW AND THEORY: COMMENTARY AND MATERIALS 154–63 (5th ed. 2010).

60. *Wik Peoples v Queensland* (1996) 187 CLR 1, 83 (Austl.) (*Pastoral Leases case*). As of 1993, a very large proportion of the land mass of Australia was subject to pastoral leases—38% of Western Australia, 41% of New South Wales, 42% of South Australia, 51% of the Northern Territory, and 54% of Queensland. See Paul Keating, *The 10-Point Plan that Undid the Good Done on Native Title*, SYDNEY MORNING HERALD, June 1, 2011, <http://www.smh.com.au/federal-politics/political-opinion/the-10point-plan-that-undid-the-good-done-on-native-title-20110531-1feec.html>.

61. *Native Title Amendment Act 1998* (Cth) (Austl.). According to Maureen Tehan, The overall effect of the amendments was to significantly diminish the area of land and water over which native title might exist and the areas of land or water and the types of activities over which indigenous people have meaningful rights in relation to future uses. . . . The Aboriginal and Torres Strait Islander Social Justice Commissioner argued that rather than building on the principle of shared land use and coexistence underpinning the *Wik* decision, the amendments not only amounted to a lost opportunity but were also ‘destructive of the most valuable resource . . . trust’. Indigenous people made it clear that they rejected the

Australian native title law is thus an archive of erasure, of erasure hesitantly undone—a corner of the historical veil lifted—and erasure redone, brutally, by the bucket load.⁶² It is also, necessarily, an archive of sovereignty: of Crown claims “built on the monstrous fiction that the native inhabitants were barbarians without a settled law,” followed by an indigenous counterclaim that burdens “the radical title of the Crown” and suggests the possibility of innovation (an opening “towards a future ‘post-colonial’ sovereignty and law”), followed by a preemptory closure—reassertion of the Crown’s “monistic plenitude” in the form of comprehensive retrospective extinguishment.⁶³ In all respects it is a case study of the consanguineous settler-colonialism to which both Rana and Volpp annex U.S. history.

Motha also addresses history as an agency of minor jurisprudence. Australia’s “history wars” refer in general to the venomous response of right-wing historians, like Keith Windschuttle and Michael Connor, to the work of Henry Reynolds on the violent dispossession of Aboriginal Australians, and in particular to the reliance upon elements of Reynolds’ work by the High Court in *Mabo*.⁶⁴ Motha calls our attention to a distinct and later skirmish turning on Ian Hunter’s critique of Reynolds’ subsequent attempts to ground an Aboriginal sovereignty right in the claim that in the law of nations prevailing at the time of colonization, “Aboriginal territorial self-governance was legally recognisable as sovereignty . . . such that the actions of the British and Australian states in denying Aboriginal sovereignty are morally or legally ‘justiciable’ under the *jus gentium*.”⁶⁵ Hunter terms Reynolds’ attempt “a history of the moral nation’s originary fall into injustice”⁶⁶—in other words an attempt to counter “the forceful functioning of law in modernity” with a redemptive “ethics of justice”⁶⁷—to which Hunter responds with an

amendments and that they were not consulted nor did they consent to the Act. It was clear that native title was a subordinate right. This appeared to conflict with the requirement of non-discrimination and the goal of substantive equality

Maureen Tehan, *A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act*, 27 MELB. U. L. REV. 523, 555–56 (2003) (second ellipsis in original) (citations omitted). Aboriginal activist Mick Dodson said at the time:

By purporting to “confirm” extinguishment by inconsistent grants, the Commonwealth is purposely pre-empting the development of the common law—not allowing sufficient time to integrate the belated recognition of native title into Australia’s land management system. This does not require the obliteration of indigenous interests so as to favour non-indigenous interests.

Keating, *supra* note 60.

62. See Brough, *supra* note 44, at 3.

63. Motha, *supra* note 57, at 330, 331.

64. See, e.g., HENRY REYNOLDS, *THE LAW OF THE LAND* (1987); Andrew Fitzmaurice, *The Great Australian History Wars*, UNIV. OF SYDNEY, Mar. 15, 2006, <http://sydney.edu.au/news/84.html?newsstoryid=948>.

65. Ian Hunter, *Natural Law, Historiography, and Aboriginal Sovereignty*, 11 LEGAL HIST. 137, 142 (2007); see also HENRY REYNOLDS, *ABORIGINAL SOVEREIGNTY: REFLECTIONS ON RACE, STATE, AND NATION* (1996).

66. Hunter, *supra* note 65, at 141.

67. Minkinen, *supra* note 14, at 358. For the implications of Reynolds’ position, see *supra* notes 27–30 and accompanying text.

antimetaphysical contextualist-historicist analysis that comprehensively undermines the legal basis of Reynolds' argument. For Hunter, "contextualist historiography of political thought and public law constitutionalism views the state not as an agent responsible to and for the moral history of the nation, but as one whose normatively ungoverned actions—including colonisation—give rise to history as their uncontrollable consequence."⁶⁸

There is foundation, however, in Hunter's antifoundationalism. Hunter's normatively ungoverned state giving rise to law and history counterposes power to command—will to power—to Reynolds' ethics of justice. That is, his conclusion implies a Nietzschean minor jurisprudence, one that we can extend to encompass Rana's and Volpp's accounts of the consequences of U.S. settler-colonialism, one that, if genuinely Nietzschean, can fashion an opening to an other law.⁶⁹ And as Motha points out, even taken on his own terms Hunter has not in fact fully succeeded in discarding metaphysics. Though its actions are normatively ungoverned, "as if" remains the state's essence. "The fictional assertions of the sovereign remain inchoate. The imagery and symbolism of sovereignty assert a unity that is nowhere to be found."⁷⁰ Motha's purpose, his historical ontology of an endlessly iterated "as if," is to make that metaphysics plain.⁷¹

III. SCATTERGORIES⁷²

Tentatively, then, we can identify concealment and erasure, the means of their effectuation, and attempts not simply to criticize but to depart from them, as subjects for "Law As . . ." as a minor historical jurisprudence. We turn now to how inquiry might be organized. Three essays offer an array of possibilities, each constituting a contemporary form of disciplined inquiry, or prudence.

In *Speaking Imperfectly: Law, Language, and History*, Marianne Constable calls to

68. Hunter, *supra* note 65, at 167.

69. MINKKINEN, *supra* note 10, at 160. *See generally supra* notes 23–39 and accompanying text.

70. Motha, *supra* note 57, at 342. Olivia Barr writes of the imagined slide from the law of England to the law of the territory evok[ing] a very familiar image of legal place; one of sovereign authority as an image of law attaching to land, translating today as a common law imagining of a landmass covered by Anglo-Australian common law. This is an image and representation of place, both then and now, of singular common law fullness; of one empty space filled with and only with common law; no gaps, complete, exclusive, everywhere; a non-textured, evenly distributed, perfectly well-buttered smothering of law across land.

Barr, *supra* note 42, at 61. But

it is through practices of movement in both space and time that common law comes to rest in place. Holding questions of movement and place to law through the practice of a minor jurisprudence . . . it becomes possible to attend to the substrate of how common law comes to be in place through technologies of jurisdiction: tacitly, hesitantly, incompletely. Paying attention to movement and its remnant remains, therefore, offers a way of accounting for different textures of legal place.

Id. at 73.

71. Motha, *supra* note 57, at 328.

72. "Scattergories" is a creative-thinking category-based game first produced by Hasbro in 1988. Players score points by nominating objects within a set of categories, given an initial letter, within a time limit. *Scattergories*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Scattergories> (last visited Dec. 17, 2014).

our attention an important contrast between sociolegal and humanistic modes of inquiry into law and legal studies. In Constable's account, the sociolegal mode associates law with causality and the expression of interest. The sources and methods of study it embraces are selected in accordance with their capacity to elucidate how law functions as an index of power and control. The humanistic mode attends to law as language. It investigates how the sources we use come to be produced and identified as such, how events gain (or do not gain) recognition as "legal." To treat law as language—Constable's preference—is to treat it as "imperfect," that is, "incomplete, ongoing, continuous, routine, habitual, or interruptible action or activity, in the context of which other acts or events occur."⁷³ It is to attend to activity being undertaken, to "the ways that legal acts appear against and disappear into the background of practices that authorize them."⁷⁴

Constable provides two vignettes of humanistic legal history in action—her well-known study of the English mixed jury,⁷⁵ and current research on a phenomenon that became known as "the new unwritten law" in later nineteenth- and early twentieth-century Chicago—the exoneration of women who killed their husbands. Each illustrates Constable's career-long critical encounter with positive law. The mixed jury was in its early medieval origin, a register of the importance of locality. Its history—one of transformative redefinition and eventual disappearance—is a microcosm of the history of the rise of positive law, "the emergence of a world in which customary law gives way and the law of officials assumes exclusive standing as law, in which the territorial jurisdiction of a state replaces the principle of personality of law (that one lives and is judged according to one's own law), in which social science transforms the practices of a people into propositional knowledge of norms, and in which law becomes an instrument of social policy directed toward the management of a population."⁷⁶ It is a history of the decline of law as collective practice and its emergence instead as a device—a mechanism—the authority of which is derived from "sources external to it, whether in writings . . . or in an effectivity of force or will that histories of positive law figure as conquest."⁷⁷ The new unwritten law refers to a practice of exception from positive law and the development of an awareness of that practice. Constable asks descriptive questions: When did it begin? When and how did it end? Description offers an opportunity to shake up the categories, to estrange the routine. Like the mixed jury, the story of the new unwritten law "highlights the development of facets of law that many now take for granted: the legitimacy and authority of writings as sources of law and history; conventions of testifying to and documenting truth and reality; and the privileged ability of empirical and social sciences to access, observe

73. Marianne Constable, *Speaking Imperfectly: Law, Language, and History*, 5 U.C. IRVINE L. REV. 349, 354 (2015).

74. *Id.* at 354.

75. MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* (1994).

76. Constable, *supra* note 73, at 351.

77. *Id.* at 357.

and know law.”⁷⁷⁸ Law as language opens a history closed by social science to Motha’s “narratives, fictions, and images,” to “the imaginary.”⁷⁷⁹

Each of Constable’s vignettes can be appropriated for the category of minor jurisprudence. Each hence offers a case study in how “Law As . . .” can pursue a jurisprudential turn. The course each vignette follows seems most readily to conform to minor jurisprudence in Peter Goodrich’s sense—knowledge and practices “denied or ignored,” “discarded or failed,” “repressed or absorbed.”⁷⁸⁰ Yet Constable’s humanistic mode intends to treat law as open rather than closed, dynamic rather than static, uncertain rather than conclusive as a means to lay claims—“assert truth and demand recognition”⁷⁸¹—rather than simply to dominate. In that sense, her work also engages Minkinen’s conception of minor jurisprudence as a “statement about law” that can be “the foundation of a new law.”⁷⁸²

Bernadette Meyler’s *Law, Literature, and History: The Love Triangle* remains situated at the intersection of law and the humanities, where she offers a mode of inquiry distinct in appearance from Constable’s emphasis on law as language, but in fact quite compatible. Here too we can detect a means whereby humanistic inquiry can produce minor jurisprudence, in Meyler’s case expressed in the form of pedagogical practice.

Meyler finds “possibilities for new births of knowledge”⁷⁸³ in her love triangle, but currently an uneven relationship among its components. Both literature and history have strong links with law, but less so with each other. The weakness of this link is symptomatic of tensions over disciplinary authority and the acceptance of law’s normativity. Legal historians (as Constable also suggests) are decidedly ambivalent about law’s normativity, but despite this the legal academy deems their expertise essential to legal inquiry. Scholars of law and literature are completely open to normative inquiry and indeed chastise legal historians for their pretensions to “descriptive rigor that can be separated from normative claims.”⁷⁸⁴ Yet on the whole they enjoy much less authority than historians in the legal academy. Meyler notes the development in recent years of greater openness in legal history to what Steven Wilf has termed “thick normativity,”⁷⁸⁵ yet she does not pin her hopes to the emergence of a law-literature-history “interdiscipline.”⁷⁸⁶ To the contrary “[i]t may

78. *Id.* at 361.

79. Motha, *supra* note 57, at 337.

80. GOODRICH, *supra* note 12, at 3.

81. Constable, *supra* note 73, at 353.

82. Minkinen, *supra* note 14, at 358.

83. Bernadette Meyler, *Law, Literature, and History: The Love Triangle*, 5 U.C. IRVINE L. REV. 365, 366 (2015).

84. *Id.* at 375.

85. *Id.* at 377; see also Steven Wilf, *Law/Text/Past*, 1 U.C. IRVINE L. REV. 543, 562 (2011).

86. This was the term Penny Pether began using in the mid-1990s to describe the ideal relationship between law and literature. See, e.g., Penelope Pether, *Jangling the Keys to the Kingdom: Some Reflections on The Crucible, on an American Constitutional Paradox, and on Australian Judicial Review*, 8 CARDOZO STUD. L. & LITERATURE 317 (1996). Until her untimely death in September 2013, Penny Pether was one of the most productive of law and literature scholars actively engaged in historical

be th[e] very cognizance of disciplinarity that enables the passion for other disciplines to arise.”⁸⁷ Hence Meyler recommends “a pedagogy that temporarily situates students entirely within the technical aspects of the local discipline.”⁸⁸ By foregrounding “law” independent of explanatory “context,” students “became aware of law as a discipline while simultaneously witnessing the distinctions law draws to render itself independent of its environment.”⁸⁹ By “entering into the consciousness” of law presented to them deliberately as “a particular field,” Meyler reports that students developed for themselves in the search for understanding “a desire for another discipline that follows not a path of assimilation or escape but rather one of embrace.”⁹⁰ Students, in effect, take the path of minor jurisprudence themselves by “inhabiting [the] contingency” of legal materials firsthand.⁹¹

The final essay in this group is David Caudill’s *Law, Science, and the Economy: One Domain?* A case study of financial bias in scientific expertise, Caudill’s essay at first sight seems to offer quite a marked contrast to Meyler’s love triangle. In place of her endorsement of disciplinary difference, the “one domain” of his title announces dissolution of distinctions among the essay’s three components. Scientific expertise is a “coproduction” of the three enterprises of law, science, and the economy.⁹² Because each enterprise is as rhetorical, social, institutional, political, and historical as the next, no priority or privilege can distinguish amongst them. Instead they collapse into each other: “economy is already in science . . . science is already in law . . . law is already in [] economy.”⁹³ Where Meyler takes her cue from Niklas Luhmann’s autopoietic systems theory, which proposes that the subsystems of a social system are operatively closed to each other, Caudill’s language of coproduction invokes Bruno Latour’s suspicion of categories and divisions, his emphasis on hybridity.⁹⁴

As Caudill proceeds, however, the contrast becomes much less marked. Luhmann’s social subsystems are “cognitively open” to each other. Latourian coproduction does not imagine law, science, and economy as the same thing, one and indivisible; rather—as actor-network theory suggests—as differentiated but

research on law. She also conceived of her work as an active engagement in the production of minor jurisprudence, specifically in the form of epics of constitutionalism, in the definition of which she always referred to Peter Goodrich, yet advanced in such a way as to retain “the practicing lawyer’s visceral commitment to the faith that the practices of the rule of law . . . can matter in ways that challenge injustice tangibly.” See Penelope Pether, *The Prose and the Passion*, 66 MEANJIN 43 (2007); Penelope Pether, *Free at Last? Epilogues, Aftermaths, and Plotting the Nation*, 24 LAW & LITERATURE 102, at 107–08 (2012) (book review). Had her life not been interrupted, Penny Pether would have been a participant in “Law As . . .” III.

87. Meyler, *supra* note 83, at 383.

88. *Id.* at 378.

89. *Id.* at 383.

90. *Id.* at 378.

91. *Id.* at 382.

92. David S. Caudill, *Law, Science, and the Economy: One Domain?*, 5 U.C. IRVINE L. REV. 393, 395 (2015).

93. *Id.* at 394.

94. *Id.* at 396; Meyler, *supra* note 83, at 378.

densely interrelated and interpenetrating. The question in both cases is the form of interaction. To what extent do Luhmann's recursive subsystems and Latour's networked actors imply qualitatively different outcomes?

For our purposes, in understanding how to organize inquiry that can produce a minor jurisprudence, the key really lies in Caudill's conclusion: the goal should be that "of description *in advance* of critique, of groundwork, of trying to understand how given or conventional categories and distinctions" might obscure features of the object under contemplation.⁹⁵ One treats received categories with suspicion, but one does so "because they divide up a cloth that we want seamless in order to study it as *we* choose."⁹⁶ Caudill's study highlights the way critique based on an existing categorization of objects can be simply ineffective.⁹⁷ To reject received distinctions, or ways of doing things, is not to reject distinction or categorization as such. Rather, it is to create space for new approaches.

IV. "WHAT ROUGH BEAST . . . ?"⁹⁸

David Caudill's emphasis on description and groundwork, on careful examination of received categories, serves as a fitting segue to the three essays that conclude this issue, and that, in doing so, provide samples of what "Law As . . ." may in future look like as a minor jurisprudence in action, as conduct.

In *History, Law, and Justice: Empirical Method and Conceptual Confusion in the History of Law*, Constantin Fasolt engages in a form of intellectual *ridurre ai principii* that seeks to persuade historians of the impossibility of writing the history of law without writing the history of justice. The categories cannot be separated. "Law and justice are thoroughly intertwined."⁹⁹ In effect, Fasolt is engaged in the same critique launched by Stewart Motha (and echoed by Marianne Constable and Bernadette Meyler) of a historiography "incapable of providing a normative response," unable to imagine a position "apart from the contextual and contingent forces on the ground . . . a historiography with no place for justice."¹⁰⁰ His approach is singular. It is to demonstrate that, as a matter of language and logic, and of etymology, "the distinction between facts (of law) and opinions (about justice) hides the truth about the relationship between history, law, and justice . . . that without justice there is no history of law."¹⁰¹

The demonstration has two parts. First, Fasolt carefully describes Ludwig Wittgenstein's philosophical arguments for the position that, for human beings to communicate in language they must agree both in definitions and in judgments.

95. Caudill, *supra* note 92, at 410 (emphasis added).

96. *Id.* at 411 (emphasis added) (quoting BRUNO LATOUR, *SCIENCE IN ACTION* 223 (1987)).

97. *Id.* at 398.

98. William Butler Yeats, *The Second Coming* (1919).

99. Constantin Fasolt, *History, Law, and Justice: Empirical Method and Conceptual Confusion in the History of Law*, 5 U.C. IRVINE L. REV. 413, 417 (2015).

100. Motha, *supra* note 57, at 336–37.

101. Fasolt, *supra* note 99, at 419.

Adopting that position for himself on the grounds that the arguments he has described are sound, Fasolt applies it to the intertwinement of law and justice:

Their intertwinement consists of the very combination of agreement in definitions with agreement in judgments that is required for communication in any case, except that in this case the communication does not lie in the realm of theory but in the realm of practice, and that it does not result in statements of fact, but statements of what we ought to do (or ought not to do) because we know that it is right (or wrong).¹⁰²

Note that, like Caudill, Fasolt is not saying that law and justice are one and the same, or that the one can be derived from the other. Law and justice “differ as deeply from each other as having rules differs from following rules, meaning from understanding, and thinking from acting . . . Law embodies our agreement in definitions of what we ought to do, and justice embodies our agreement in judgments of what that *is*.”¹⁰³ But they are, in effect, codependent.

[W]ithout justice we cannot make the law stick to reality. There would be nothing for law to say. And without law, justice would be random. That is, there would be no justice at all. That constitutes their intertwinement. It gives us the language we need in order to refer to practical reality: the reality that we intend to turn into actual reality because we judge it to be good.¹⁰⁴

The second part of Fasolt’s account creates a sure philosophical foundation for the historicity of justice—a necessary condition for the possibility of a historical minor jurisprudence that would make justice an object of contemplation. Against the tendency of historicist critique to treat invocations of justice as ahistorical moves beyond history to timelessness,¹⁰⁵ Fasolt’s Wittgensteinian argument establishes that law and justice “do not exist in some Platonic heaven. They consist of agreements in judgments and definitions of what is right and wrong that are specific to specific communities of human beings at specific times and places.”¹⁰⁶ He elaborates:

As agreement in language must not be confused with the existence of a universal language, so agreement in ethics must not be confused with the existence of a universal moral code. Agreement in ethics rather means that there is no such thing as an agreement in judgments and definitions of what is right and wrong that none of us can join, and nothing someone can do that no one else can judge, no matter how deeply we may differ in our particular forms of morality, and no matter how alien a different culture may seem to us at first. All of us know the difference between right and wrong. In that regard we are agreed in ethics. But agreement in ethics does *not* mean that all of us make the same judgments and definitions of what *is*

102. *Id.* at 443.

103. *Id.*

104. *Id.*

105. See, e.g., Hunter, *supra* note 65, at 137–40.

106. Fasolt, *supra* note 99, at 449.

right and wrong. In that regard we differ from place to place and time to time.¹⁰⁷

But this does not commit Fasolt to a relativist history, or relativist jurisprudence, that desires simply to reconstruct the nature of past agreements, knowing that they will likely be different from those of the present. “Knowing what those agreements were means being able to figure out what those past people *thought* they were saying and doing. But it does not amount to writing history. In order to write history, we need to say what they *were* saying and doing.”¹⁰⁸ The difference is that between using the criteria that governed past agreements to tell what happened in the past, and using our own. To write history we must use our own criteria:

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.¹⁰⁹

Fasolt’s history judges. It takes sides, and takes responsibility for the side it takes. That makes it minor historical jurisprudence in action.

The second essay of this final group, Bonnie Honig’s *The Laws of the Sabbath (Poetry): Arendt, Heine, and the Politics of Debt*, offers a different example of minor jurisprudence in action. Taking as her point of departure the conference’s invocation of glossolalia, Honig’s interest (like other authors) is in what appears following the suspension of “normal rules or experience of signification.”¹¹⁰ Arguing from the example of Heinrich Heine’s poem “Princess Sabbath,” her answer is what she terms “the Sabbath-power.”¹¹¹ Heine writes of Sabbatarian metamorphosis “in which the lowest Jewish man becomes a king in his house once a week as he welcomes the Sabbath bride. ‘Of a prince by fate thus treated /Is my song. His name is Israel, /And a witch’s spell has changed him /To the likeness of a dog’”—or to be precise, Honig adds, “A ‘dog, with dog’s ideas’”—“But on every Friday evening, /On a sudden, in the twilight, /The enchantment weakens, ceases, /And the dog once more is human.”¹¹² Honig’s analysis of the poem, and of Hannah Arendt’s reaction to it (and to Heine himself) leads her to the important argument that Sabbath-power is not so much a transformation of the quotidian—the creation of a state of exception to the everyday that is an opening to the sacred—as it an *intensification* of the secular that is achieved by human agency with the assistance of ritual practices and objects that enable us to realize the suspension of

107. *Id.* at 449.

108. *Id.* at 458.

109. *Id.* (emphasis added).

110. Bonnie Honig, *The Laws of the Sabbath (Poetry): Arendt, Heine, and the Politics of Debt*, 5 U.C. IRVINE L. REV. 463, 463 (2015).

111. *Id.* at 468.

112. *Id.* at 469.

normality. “Thing and fantasy work together to produce the bundle of resilience and agency that I am here calling Sabbath-power.”¹¹³

Honig adds three crucial observations. First, Sabbath-power “is not just an arcane name for a dated idea.”¹¹⁴ She cites several examples, among them “Strike Debt,” the debt resistance movement that buys debt and abolishes it using the language of “Rolling Jubilee.”¹¹⁵ A more distant (because currently less achievable) example is the syndicalist General Strike—a radical intensification and acceleration of (normal) suspension of work into revolutionary mass action.¹¹⁶ The examples underscore Sabbath-power’s *generative* nature.

Second, Honig distinguishes her invocation of Sabbath-power from Giorgio Agamben’s claim of the Sabbath as template for his version of “destituent power,” the power of inoperativity, of cessation.¹¹⁷ Agamben’s destituent power is passive. It ignores “the collective and sensorial powers we exercise to *make* Sabbath . . . and, later, unmake it or bid it goodbye.”¹¹⁸

Finally, Honig notes Sabbath-power’s limitations. “Sabbath-power, rights claiming, and more are the destituent forms of action available to those lacking, for the moment, access to constituent power. They may even serve as preliminaries to it, or necessary conditions of it. But they are not its substitutes.”¹¹⁹

In both Fasolt’s case and Honig’s, the semblance of Minkinen’s variety of minor jurisprudence seems obvious, though not developed as such (this is, after all, my construal of their work, not theirs). Neither is, per se, a jurisprudence of critique. Each rather creates the foundation for a transition toward something new, a prospect for innovation, a new law. Drawing on the work of Stanley Cavell, Fasolt, for example, concludes that “Writing history means making claims to community with the past.”¹²⁰ If we take “claims making” here to mean, as Constable has it, the assertion of truth and demand for recognition, the activity of writing history that Fasolt describes is one that seeks in community with the past a foundation for one’s assertions of truth about the past and a demand for their recognition. The agential presence of the historian is clear: “It is not only a matter of evidence and chronology but also of judging where our agreements with the dead come to an end . . . [of] making a commitment to a particular political community by settling disagreements

113. *Id.* at 473. It is worth noting that Kafka’s *In der Strafkolonie* portrays the Condemned—“a ‘stupid-looking wide-mouthed creature with bewildered hair and face’”—as a submissive dog, eventually raised (intensified) by the agency of the machine to a condition of enlightenment—“the ‘radiance of justice.’” See Minkinen, *supra* note 14, at 358–59.

114. Honig, *supra* note 110, at 473.

115. *Id.* at 474; see also *You Are Not a Loan*, STRIKE DEBT!, <http://strikedebt.org/#initiatives> (last visited Dec. 17, 2014).

116. Honig, *supra* note 110, at 477.

117. *Id.* at 477; see also Giorgio Agamben, *What Is a Destituent Power?*, 32 ENV’T & PLAN. D: SOC’Y & SPACE 65 (2014).

118. Honig, *supra* note 110, at 479.

119. *Id.* at 482.

120. Fasolt, *supra* note 99, at 461 (referencing STANLEY CAVELL, *THE CLAIM OF REASON: WITTGENSTEIN, SKEPTICISM, MORALITY, AND TRAGEDY*, 20 (reprint ed. 1999)).

with the dead,”¹²¹ and, one might add, settling disagreements with the living on behalf of the dead. Honig’s jurisprudence, likewise, sees in Sabbath-power’s intensification of the everyday the foundational “bundle of resilience and agency” that facilitates transition to a new law—a law of jubilee, destituent power become constituent.

Though Minkinen’s brand of minor jurisprudence may be implicit rather than explicit in the essays by Fasolt and Honig, the same cannot be said of the last essay in this group, and the last in the collection, William MacNeil’s *From Rites to Realities (And Back Again): The Spectacle of Human Rights in The Hunger Games*. MacNeil explicitly embraces *The Hunger Games* “as *lex populi*, as a legal fiction, [that] may very well hold out, in the fashion of what Panu Minkinen would call a ‘minor jurisprudence,’ the prospect of a way forward” to a new law—in this case a new instantiation of human rights.¹²² Like Honig in dialog, in his case with Hilary Charlesworth and Suzanne Collins rather than Hannah Arendt and Heinrich Heine, MacNeil constructs from his interlocutors’ work a wondrous constellation—a dialectical image—that presents *The Hunger Games* as both allegory for the history of rights, and “theatricalisation of [the] nomological reality” that is the United Nations’ Universal Periodic Review (UPR) of its member-states compliance with human rights norms.¹²³ Chartered in Panem’s own basic law, the Hunger Games stage for mass consumption and education an artificial state of nature—a Hobbesian “war of all against all”—in which none must leave her blocks before the starting gun under the state’s penalty of death, in which all then exercise their originary rights “to kill and be killed.”¹²⁴ The Games stage the (Lockean) accumulation of property out of nature, resultant claims to rights of possession, and the conflicts provoked by the radical inequalities that accompany accumulation.¹²⁵ They stage the social contract—the shifting alliances formed to serve temporary mutual advantage, protect and mobilize accumulated resources, and establish (in the short term) security for those allied.¹²⁶ In their rapidly shifting environment and rules the Games even stage historicism’s complexity and contingency—“indeterminacy located in contradiction.”¹²⁷ But just as Kafka, in Minkinen’s telling, arrives at a “*Wesen* [essence] of law” that is expressed “by way of negation in relation to the narrative, in another law,”¹²⁸ so the *Hunger Games*’ parodic rule of law—which MacNeil likens to what the critical legal Charlesworth would once have recognized, instantly, as law’s reality¹²⁹—becomes the negative basis for a Honig-like *intensification* of its everyday spectacle of cruelty into another law, brought about by the (destituent)

121. *Id.* at 461–62.

122. MacNeil, *supra* note 23, at 485.

123. *Id.* at 487.

124. *Id.* at 492.

125. *Id.*

126. *Id.*

127. Gordon, *Critical Legal Histories*, *supra* note 22, at 114.

128. Minkinen, *supra* note 14, at 358.

129. MacNeil, *supra* note 23, at 498.

agency of Katniss and Peeta's suicide pact,¹³⁰ but manifested in the constitutive "pure love" of Katniss and Rue, the narrative pivot—carrying "the possibility and potential to mobilise its witnesses, energising them to action, functioning as a call to arms"—upon which Collins' entire trilogy turns.¹³¹

How, though, does the allegory fit the nomological reality of the UPR? It too is a theatricalisation—its rituals of sympathetic review mask a reality of ugly conflict¹³²—that MacNeil suggests could turn via intensification (more rather than less ritual) into a new law: "the right to be left alone to reinvent the world."¹³³ For "the underlying presumption of the UPR is . . . that *all* nations, as signatories, aspire to be rights-oriented and, at least, have the best of intentions to act in accordance with international norms."¹³⁴ Human rights might be better served, says MacNeil, by more ritual of review informed by that presumption rather than by mutual condemnation of each other's shortcomings.¹³⁵

CONCLUSION: "NOW SHOWN THEN TO HAVE BEEN FALSE"

By now, more than enough has been said here to recommend the minor jurisprudential potential of the essays gathered in this collection. I encourage the reader to engage with them and, in engaging, develop new understandings of them to add to (or detract from) those I have imposed.

What remains, very briefly, is to probe the nature of the "historical" in this minor jurisprudence.

There is enough here, I think, to underline a "historical" that is not historicist. As Stewart Motha puts it, if legal history "is not amenable to a redemptive account," neither is it "to a contextual account untroubled by contemporary ethical and political demands."¹³⁶ We find in Constantin Fasolt's exacting philosophical argumentation a strong basis for that turn to the use of our own criteria.¹³⁷

These are arguments for a particular kind of "historical," but do we have an example of a historical practice that fits our desire for this kind of historical jurisprudence? Walter Benjamin's distinctly metaphysical historical materialism articulates the past at the moment of its recognizability, which is the here-and-

130. *Id.* at 495.

131. *Id.* at 496. Arguably, however, MacNeil parts company from Honig over the rescue of constituent power from Agamben's critique, given his citation of Jacques Lacan's response to revolution. *See id.* at 497; Honig, *supra* note 110, at 477–79.

132. MacNeil, *supra* note 23, at 487–88.

133. *Id.* at 498.

134. *Id.* at 487.

135. One can also observe, with Minkinen, that although "Occidental anti-racist critique considers the universal recognition of human rights as a victory of the other race . . . [I]t is, of course, an Occidental triumph: the entire world has recognized the universality of Western values." The right to be left alone, hence, becomes the best means for the West to "rediscover the other, the alterity of the radically different." MINKINEN, *supra* note 10, at 149.

136. Motha, *supra* note 57, at 348.

137. Fasolt, *supra* note 99, at 456.

now.¹³⁸ Justice William Gummow's summation of the meaning of *Mabo*—"that the long understood refusal in Australia to accommodate within the common law concepts of native title rested upon past assumptions of historical fact, *now shown then to have been false*"—may be read as an involuntary acknowledgement of precisely this philosophy of history.¹³⁹ If we understand history to promise to enliven our understanding of an object (such as law) that we contemplate, we must recognize that the contemplated object is not enlivened by the relationalities within which it allegedly belongs, the relationalities of *its* time, but by the fold of time that creates it in constellation with the present, the moment of its recognition.¹⁴⁰ In the dialectical image created by that fold we make our claim to community with the past, and on its foundation we turn to settle our agreements and disagreements, both with the dead and the living.

138. Christopher Tomlins, *Toward a Materialist Jurisprudence*, in 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: LAW, IDEOLOGY, AND METHODS: ESSAYS IN HONOR OF MORTON J. HORWITZ 196, 211 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010).

139. Motha, *supra* note 57, at 332 (quoting *Wik Peoples v Queensland* (1996) 187 CLR 1, 180 (Austl.) (Gummow, J., concurring) (emphasis added)).

140. Tomlins, *supra* note 138, at 203; *see also* Christopher Tomlins, *Historicism and Materiality in Legal Theory*, in LEGAL THEORY AND LEGAL HISTORY: A NEGLECTED DIALOGUE (Maksymilian Del Mar & Michael Lobban eds., forthcoming 2015).

