Legal borderlines: Theorising rupture in the realm of interlegality

– The potential for radical legal change in the face of ecological collapse –

by

Katherine Llorca

MRes, European University Institute, Italy, 2004
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A Dissertation Submitted in Partial Fulfilment of the
Requirements for the Degree of

DOCTOR OF PHILOSOPHY

in the Faculty of Law and Society

We acknowledge and respect the Lək̓ʷəŋən̓ (Songhees and Esquimalt) Peoples on whose territory the university stands, and the Lək̓ʷəŋən and W̱SÁNEĆ Peoples whose historical relationships with the land continue to this day.

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Abstract

The IPCC has issued increasingly stark warnings that climate breakdown and ecological collapse are inevitable if radical action is not taken in the coming decade. To date, the legal academy seems dangerously impervious to this warning. And yet, any "radical action" will also demand radical legal change. Is it possible for law to do more than simply edge forward with piecemeal legal reform? Is radical legal change possible in a legal order that values stability above all else? And if it is, what might it look like?

I start by considering radical change in the form of ruptural events and the ways in which such events question the foundations on which our legal systems are built (Chapter 1). I then consider the origins of ruptural events. It seems that they emerge in the spaces of friction between legal orders, understood in the broadest, pluralist sense. But when the meaning of legal order is understood so broadly – as it is among legal pluralists – it is easy to lose one's footing: what distinguishes one legal order from another (Chapter 2)? what is specifically legal about each order (Chapter 3)? and, crucially, what does it mean for legal orders to overlap (Chapter 4)? These detours through legal theory are not accessory; we cannot begin to envisage radical legal change without clarifying law's potential. Together these chapters provide one possible understanding of the "distinctness", "legalness", and "intersectingness" of legal orders. With these theoretical tools in hand, I then consider how they help us grapple more constructively with the potential for change in the form of ruptural events (Chapter 5).

The result is an experiment in legal theorising: How might we think about law's role in times of ecological crisis? And what are the consequences of this thinking for our understanding of what the law can do? My conclusion is that ecological collapse changes the way we should be thinking about law. Indeed, it may not be the only modern development that will push us to reconsider the potential for change in the context of law…

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Acknowledgements

Here is the thesis I swore to myself I would have down in three years; seven years have flown by. I like to think that I purposefully dallied because I was enjoying myself so much. But I am certain that a number of unnamed persons will nevertheless be very grateful to see my dallying finally produce something!

In those seven years, many individuals have provided me with sustenance: intellectual, financial, and emotional. My long-suffering supervisor went above and beyond on all three counts. Rebecca provided enormous intellectual sustenance in my first year of the program (thank you LAW 501), ensured I always had the financial support I needed, and provided endless encouragement in the final stages. She did all this despite being roped into supervision of my thesis at a late date and despite my being on the other side of the world. I am eternally grateful for her bubbly insistence, her cheerful video dispatches, her ability to always find solutions, and her never-ending encouragement. She deserves a supervisory medal.

Thank you too to James and Brad. James stayed on board for the long haul, despite my dissertation evolving somewhat away from his interests. He was incredibly approachable, responsive, and thoughtful in his comments. Brad stepped in at the last minute, despite never having met me. I am not sure what swayed him, but I am grateful to have received his input during the final push. My external jury member, Prof. Hans Lindahl, engaged extensively with my dissertation and provided feedback that will no doubt inform my thought going forward; his presence and his report were both incredible gifts.

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The most important person by far over the last seven years has been my husband. Thank you for always being up for new adventures; thank you for understanding that one might want to write a thesis just for fun; thank you for picking up the slack while I wrote and I danced; thank you for your patience, your hugs, your encouragement, your unwavering belief in me; thank you for being you.

Dedication

For every static world that you or I impose
Upon the real one must crack at times and new
Patterns from new disorders open like a rose
And old assumptions yield to new sensation;
The Stranger in the wings is waiting for his cue,
The fuse is always laid to some annunciation.
— Louis MacNeice, 'Mutations'[1]

We ought to stop circumscribing the nomos; we ought to invite new worlds.
— Robert M. Cover, 'Nomos and Narrative'[2]

This thesis is dedicated to the next generations

and the world we will leave to them:

in the hope that they will work out how to "invite new worlds"

where we have failed

[1] Louis MacNeice, *Collected Poems* (Faber & Faber 2007) 216.
[2] Robert M Cover, 'The Supreme Court, 1982 Term, Foreword: *Nomos* and Narrative' (1983) 97 Harvard Law Review 4, 69 <http://www.jstor.org/stable/1340787> accessed 26 November 2018.

Introduction

> *The important thing in articulating the inquiry to be pursued is that the formulation must be stated in such a way as to render resolution possible. The point is obvious and nearly indisputable: law review writers never discuss that which they cannot fix. No one writes a law review article where the end line reads: "Well, in conclusion, it seems like we're all pretty much screwed." That simply doesn't happen. Which means—and this is important—that if ever we were screwed, you wouldn't hear about it in a law review article. Ever. In fact, the more thoroughly and intensely screwed we are, the less likely you would be to hear about it in a law review article.*
>
> — Pierre Schlag, 'The Law Review Article'[3]

Thank goodness then that this is not a law review article. Contrary to the typical law review article, this dissertation considers the law in a context in which we are screwed, in a context that we cannot fix.

We cannot escape Schlag's provocation simply by adding more words, however. The law review article is surely used here as a place marker for scholarly legal writing more generally, whether article-length or not. (Indeed, Schlag says as much by suggesting in the abstract that his sequel will be on "Dissertation Disease"![4]) The quote above seems to suggest that legal writing in general shies away from dealing with contexts in which we find ourselves "thoroughly and intensely screwed". This is not strictly true. If we cut through the hyperbole, I think that what Schlag meant is that legal writing has a tried and tested way of dealing with overwhelmingly complicated situations. Rather than refusing to engage with such topics altogether, legal scholars tend to chop off the complicated bits; narrow down the problem to something small, technical, and imminently manageable; and then proceed to set out a solution. The point of Schlag's article then is to highlight all the ways in which legal scholars render the object of inquiry manageable and, as a consequence, less complicated and less crisis-like. The problem with this approach, as Schlag clarified in a later article,[5] is that we portion off a subpart from the whole, all the while assuming: (i) that the subpart can be cut away from the whole

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[3] Pierre Schlag, 'The Law Review Article' (2017) 88 University of Colorado Law Review 1043, 1046 <https://heinonline.org/HOL/P?h=hein.journals/ucollr88&i=1079> accessed 8 February 2023.
[4] ibid 1044; and further confirmed by Pierre Schlag, 'The Knowledge Bubble: Something Amiss in Expertopia' in Justin Desautels-Stein and Christopher Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge University Press 2017) <https://www.cambridge.org/core/books/searching-for-contemporary-legal-thought/knowledge-bubble-something-amiss-in-expertopia/143AED9D8CE53226CE95470064CE4029> accessed 10 February 2023.
[5] Schlag (n 4).

intact (ie its links to other subparts are irrelevant); (ii) that the subpart is sufficiently insulated from the whole not to be influenced by forces active at the level of the whole (ie the subpart is independent of the whole – how then does it belong?); and (iii) that the subpart belongs only to one whole (when, in fact, it is far more likely subject to multiples wholes). Less cryptically, Schlag suggests that all this chopping and framing produces an object of inquiry that no longer conforms to the real-life object. Framing the knowledge production enterprise such that all these complications are excluded from view enables us to produce legal knowledge, but to what end? In Schlag's words: "relative to what we want to know, the [knowledge produced] is likely to reside in the neighborhood of the irrelevant".[6] The "solution" set out solves a problem that has been concocted by the framing, rather than a problem in real life.

This piecemeal and blinkered approach to crisis-like situations is worrying in a context that seems rife with multi-dimensional crises: democratic crises (Brexit and the 2020 Capitol riot for example); immigration crises (such as the Syrian refugee crisis and the legal debacle over the UK's plans to hand over migrant management to Rwanda[7]); war (in Ukraine and in Gaza for example); health crises (such as the Covid-19 pandemic); and of course ecological collapse.[8] These might be thought of as exemplars of us being "thoroughly and intensely screwed", at least at certain times and in certain places. All of the above crises are situations that cannot – or cannot simply – be fixed. Which leaves the legal scholar in an incredibly frustrating position.

Is legal scholarship capable of the "efforts at reconnaissance, experimentation, and creativity"[9] that would be required to escape Schlag's attack on legal scholarship as irrelevant? Can law

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[6] ibid 440.

[7] 'UK Court Rules Against Plan to Deport Migrants to Rwanda' [2023] Le Monde.fr <https://www.lemonde.fr/en/international/article/2023/11/15/uk-court-rules-against-plan-to-deport-migrants-to-rwanda_6257312_4.html> accessed 21 November 2023.

[8] I use the term "ecological collapse" to refer to a severe, widespread, and perhaps irreversible decline in the integrity and functionality of a particular ecosystem or the biosphere as a whole, characterised by a disruption of the system's ability to support life. Whether or not one considers ecological collapse inevitable, the mere threat of ecological collapse (ie a growing feeling that collapse is possible) increases the likelihood of coordination problems that may undermine the state's ability to secure the economic, political or social order, particularly through law (Yves Cochet, 'L'effondrement, Catabolique Ou Catastrophique?' (Institut Momentum 2011) 2 <https://institutmomentum.org/media/articles/L%E2%80%99effondrement-catabolique-ou-catastrophique.pdf>; Yves Cochet, *Devant l'effondrement: Essai de Collapsologie* (Les Liens Qui Libèrent 2019) 29–30; cited by Pablo Servigne and Raphael Stevens, *Comment Tout Peut s'effondrer: Petit Manuel de Collapsologie à l'usage Des Générations Présentes* (Seuil 2015) 15 <http://www.seuil.com/ouvrage/comment-tout-peut-s-effondrer-pablo-servigne/9782021223316> accessed 26 November 2018).

[9] Schlag (n 4) 451.

play a role in responding to such crises? Or, more specifically, what would it take to put law in a position to respond (with relevance) to such crises?

This dissertation emerged out of a double frustration. Frustration, first, at the poor track record of the small-frame legal "solutions" proffered in response to ecological collapse. These "solutions" push legal reform of the traditional variety, but rarely consider the broader context.[10] For example, environmental law has tended to ignore its embeddedness in an economic system which prioritises growth/progress/development[11] over the integrity of our ecosystems. In addition, progress on paper has suffered from a growing implementation gap. In 2019, the United Nations Environment Programme had this to say:

> While environmental laws have become commonplace across the globe, too often they exist mostly on paper because government implementation and enforcement is irregular, incomplete, and ineffective. In many instances, the laws that have been enacted are lacking in ways that impede effective implementation (for example, by lacking clear standards or the necessary mandates). According to the fifth Global Environmental Outlook, considerable progress has been made toward meeting only 4 of the 90 most important

[10] In efforts to protect economic activity, for example, we exclude certain fields from regulation (eg gas guzzlers were excluded from laws on car emissions in the US and became more popular as a consequence (Michael M'Gonigle and Louise Takeda, 'The Liberal Limits of Environmental Law: A Green Legal Critique' (2012) 30 Pace Environmental Law Review 1005, 1019 <https://heinonline.org/HOL/P?h=hein.journals/penv30&i=1028> accessed 21 January 2021)); we overlook the Jevons paradox (historically, the overall impact of efficiency improvements has been to increase environmental impact whether measured in material throughput or GHG emissions, see Tim Jackson, *Prosperity Without Growth: Foundations for the Economy of Tomorrow* (2nd edition, Routledge 2016) ch 5); we allow polluters to export their pollution elsewhere (displacing the problem) or lobbyists to determine how stringently they will be regulated (see Virginie Malingre, 'European Commission Faces Criticism for Glyphosate Reauthorization' [2023] Le Monde.fr <https://www.lemonde.fr/en/european-union/article/2023/11/17/european-commission-faces-criticism-for-glyphosate-reauthorization_6262461_156.html> accessed 23 November 2023); we allow international environmental law to be driven by "oxymoronic" sustainable development (see Louis J Kotzé and Sam Adelman, 'Environmental Law and the Unsustainability of Sustainable Development: A Tale of Disenchantment and of Hope' (2023) 34 Law and Critique 227 <https://doi.org/10.1007/s10978-022-09323-4> accessed 23 November 2023). At the heart of these failures is our legal habit (though it is perhaps not limited to law) of framing the problem such that the economic, political, cultural, etc context is beyond our purview.

[11] These terms tend to be rolled into one. The most recent and extensive analysis of the development of the growth logic as a "dominant social paradigm" is provided by Matthias Schmelzer, see Matthias Schmelzer, *The Hegemony of Growth: The OECD and the Making of the Economic Growth Paradigm* (Cambridge University Press 2016); see also Stephen James Purdey, *Economic Growth, the Environment and International Relations: The Growth Paradigm* (Routledge 2010); Gareth Dale, 'The Growth Paradigm: A Critique' [2012] International Socialism <http://isj.org.uk/the-growth-paradigm-a-critique/> accessed 23 November 2023.

> environmental goals and objectives, and critical ecological thresholds upon which human well-being depend may soon be surpassed.[12]

As a result, many environmental reforms have indeed proved irrelevant. Or worse, they have achieved the reverse of what was intended.[13]

My second frustration stems from the untethered nature of the more ambitious large-frame proposals coming from the field of ecological law.[14] The latter propose revolutionary visions of a new ecocentric law unshackled from anthropomorphism, human dominance over nature, and our unquestioning commitment to economic growth. This work has been incredibly important in highlighting the insufficiencies of environmental reformism and the impossibility of change without considering the broader legal and extra-legal context. I have been greatly inspired by colleagues in this field, but the literature came to feel like an academic dead end. The ecological lawyers I read provided no account of how we were to get from where we are

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[12] UNEP, 'Environmental Rule of Law: First Global Report' (United Nations Environment Programme 2019) 3.

[13] See, in particular, the numerous environmental contradictions highlighted by M'Gonigle and Takeda (n 10).

[14] I use ecological law as shorthand for all the work that has so far been done to go beyond environmental law. See, in particular, work on Green Legal Theory (eg Michael M'Gonigle, 'Green Legal Theory' (2008) 23 Ökologisches Wirtschaften 34 <https://oekologisches-wirtschaften.de/index.php/oew/article/view/594> accessed 21 February 2023; Michael M'Gonigle, 'Logics as Law: Re-Thinking Social Regulation in the Animacene' (2017) unpublished manuscript; Michael M'Gonigle, 'Green(ing) Legal Theory: Social Logics and Their Re-Formation' in Kirsten Anker and others (eds), *From Environmental to Ecological Law* (Routledge 2020) <https://www.routledge.com/From-Environmental-to-Ecological-Law/Anker-Burdon-Garver-Maloney-Sbert/p/book/9780367431082> accessed 5 April 2021; M'Gonigle and Takeda (n 10)); critical environmental law (eg Andreas Philippopoulos-Mihalopoulos (ed), *Law and Ecology: New Environmental Foundations* (Taylor & Francis 2011)); Earth jurisprudence and wild law (eg Cormac Cullinan, 'Earth Jurisprudence' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2021) <https://doi.org/10.1093/law/9780198849155.003.0014> accessed 9 July 2023; Jamie Murray, 'Earth Jurisprudence, Wild Law, Emergent Law: The Emerging Field of Ecology and Law, Part 1' (2014) 35 Liverpool Law Review 215 <http://search.proquest.com/openview/b5821fbbe0abb68e5e976bf9b02ef7b7/1?pq-origsite=gscholar&cbl=326283> accessed 5 April 2021; Jamie Murray, 'Earth Jurisprudence, Wild Law, Emergent Law: The Emerging Field of Ecology and Law, Part 2' (2015) 36 Liverpool Law Review 105 <https://doi.org/10.1007/s10991-015-9170-y> accessed 5 April 2021; Peter Burdon, *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2011); Peter D Burdon, 'Ecological Law in the Anthropocene' (2020) 11 Transnational Legal Theory 33 <https://doi.org/10.1080/20414005.2020.1748483> accessed 11 July 2023); ecological law (eg Kirsten Anker and others (eds), *From Environmental to Ecological Law* (Routledge 2020); Geoffrey Garver, 'The Rule of Ecological Law: The Legal Complement to Degrowth Economics' (2013) 5 Sustainability 316 <http://www.mdpi.com/2071-1050/5/1/316> accessed 21 January 2021; Carla Sbert, *The Lens of Ecological Law: A Look at Mining* (Edward Elgar Publishing 2020)); sustainability law (eg Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Taylor & Francis 2016)); and ecological integrity (eg Laura Westra, *Ecological Integrity and Global Governance: Science, Ethics and the Law* (Routledge 2016)).

now to the unshackled utopia. The radical legal change required was not addressed. Indeed, I found that those in the field who tried to *ground* ecocentric theory in real life often found themselves back in the "neighborhood of the irrelevant", battling against a context that couldn't be further from the high-flying theory.[15]

In this dissertation, I have taken up Schlag's challenge in a very literal sense. Convinced that law (or legal scholarship more specifically) must surely have a role to play in responding to ecological collapse, I have tried to engage in "reconnaissance, experimentation and creativity" to determine just what that role might be. In doing so, I have tried to navigate a fine line between irrelevance on the one side and untetheredness on the other.[16] Perhaps the particular role that law can play is not exhausted by the poles of irrelevance and untetheredness? If responding to ecological collapse will inevitably involve legal change, the aim of this dissertation is to consider both the *type* of legal change required when faced with situations in which we are "thoroughly and intensely screwed" (I call this type of change "ruptural change") and the *spaces* we might look to for such change (following Santos, I call these spaces of "interlegality", though the concept itself requires some unpacking).

Inevitably such questions require a large frame of reference. Environmental law itself is vast:

> It sprawls in its range of subject matters, methodologies, and legal structures. It has a base in common law and constitutional law, and extends far beyond public law regulation into the realm of theories of societal governance. […] Its concerns are international as well as domestic, and indeed its scope embraces the planetary and beyond. Its subjects include a menagerie of issues […]. In the environmental field, as the First Law of Ecology holds, everything is connected to everything else.

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[15] One of the few concrete attempts to apply ecocentric theory can be found in the work of proponents of rights for nature (see Christopher D Stone, 'Should Trees Have Legal Standing? Toward Legal Rights for Natural Objects' (1972) 45 Southern California Law Review 450; subsequently expanded into a book Christopher D Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (3rd edn, Oxford University Press 2010); and more recently David R Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press 2017)). On the ground, however, the results have – so far – rarely lived up to the theory (see, in particular, Julien Bétaille, 'Rights of Nature: Why It Might Not Save the Entire World' (2019) 16 Journal for European Environmental & Planning Law 35 <https://brill.com/view/journals/jeep/16/1/article-p35_35.xml> accessed 23 November 2023; Mauricio Guim and Michael A Livermore, 'Where Nature's Rights Go Wrong' (2021) 107 Virginia Law Review 1347 <https://www.jstor.org/stable/27135599> accessed 23 July 2023; Lorna Muñoz, 'Bolivia's Mother Earth Laws: Is the Ecocentric Legislation Misleading?' <https://revista.drclas.harvard.edu/bolivias-mother-earth-laws-is-the-ecocentric-legislation-misleading/> accessed 23 July 2023).

[16] As Bradley Bryan, one of my committee members, accurately noted in his comments, "ecological collapse confounds our every attempt at theorising in the service of practice".

And this dissertation suggests we branch out even further. After all, I am not primarily interested in the environmental laws and ecological philosophies that already exist, but in law's potential to respond more convincingly to ecological collapse. As a result, my dissertation is an experiment in legal theorising: How might we think about law's role as extending beyond the (current) irrelevance of environmental minutiae and the (current) untetheredness of ecocentric mythologies? If the argument made here comes across as highly theoretical, the point of the dissertation is nevertheless very concrete and practical. If radical legal change is necessary (and I assume it is),[17] what will it look like in practice? Where will it emerge from? Can it be encouraged? How can international institutions, states, local communities, and individuals prepare for it concretely? But one can only begin to grapple with concrete radical legal change by engaging in preliminary reconnaissance efforts. This is what my dissertation does. It asks: How is it possible to think about law in a way that remains expansive enough to acknowledge the variegated sources of radical legal change that are required by the ecological context? Does legal theory even have the vocabulary to consider the spaces change may emerge from and the forms such change is likely to take? Indeed, *can* legal theorising expand the frame of reference in the ways Schlag encourages without losing its footing entirely? Throughout the dissertation, I try to show that this radical legal thought experiment very much parallels the possibilities of practical legal change it hopes to reveal.

In what follows, I will briefly set out my reasons for assuming that radical legal change is necessary (or at the very least must be contended with) in the context of ecological collapse. The second section of the Introduction presents the methodology I have adopted throughout my experiment in legal theorising. Legal theorists rarely engage in such self-reflective practices, but since this dissertation is experimental in so many ways already, there is no harm perhaps in suggesting that even legal theorists deploy methodological props. The final section provides a roadmap for the dissertation as a whole.

[17] See further the following section.

What can the law do?

> Climate change is a threat to human well-being and planetary health (very high confidence). There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (very high confidence). […] The choices and actions implemented in this decade will have impacts now and for thousands of years (high confidence).[18]

In a series of increasingly gloom-ridden reports, the IPCC has warned that climate breakdown and ecological collapse are inevitable if radical action is not taken in the coming decade.[19] "All global modelled pathways that limit warming to 1.5°C (>50%) with no or limited overshoot, and those that limit warming to 2°C (>67%), involve rapid and deep and, in most cases, immediate greenhouse gas [GHG] emissions reductions in all sectors *this decade*."[20] By radical and deep, they mean a 50% reduction in GHG emissions by 2030 and net zero emissions by 2050, and an even steeper decline for countries in the Global North.[21] And that is just climate change. As Monbiot reminds us, "Only one of the many life support systems on which we depend – soils, aquifers, rainfall, ice, the pattern of winds and currents, pollinators, biological abundance and diversity – need fail for everything to slide."[22]

Relying on incremental legal reform via legislatures or the judiciary has so far proven inadequate for a variety of reasons. Despite a proliferation of legal codes, guidelines, frameworks and regulatory tools since the 1970s,[23] Sax reports in 1989:

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[18] IPCC, 'Climate Change 2023: Summary for Policymakers' (Intergovernmental Panel on Climate Change 2023) Synthesis {Report} AR6 24 <https://www.ipcc.ch/report/sixth-assessment-report-cycle/> accessed 23 July 2023.

[19] See IPCC, 'Climate Change 2014: Summary for Policymakers' (Intergovernmental Panel on Climate Change 2014) Synthesis {Report} AR5 <https://www.ipcc.ch/report/sixth-assessment-report-cycle/> accessed 23 July 2023; IPCC, 'Global Warming of 1.5°C: An IPCC Special Report' (2018) {IPCC} {Special} {Report} SR15 <https://www.ipcc.ch/sr15/>; IPCC (n 18). The most recent of these suggests that "For any given future warming level, many climate-related risks are higher than assessed in AR5 [the previous IPCC report]" (IPCC (n 18) 14). As a result, "worldwide climate resilient development action is more urgent than previously assessed in AR5" (IPCC (n 18) 24).

[20] IPCC (n 18) 20.

[21] IPCC, 'Special Report SR15' (n 19).

[22] George Monbiot, 'The Earth Is in a Death Spiral. It Will Take Radical Action to Save Us' [2018] The Guardian <https://www.theguardian.com/commentisfree/2018/nov/14/earth-death-spiral-radical-action-climate-breakdown> accessed 23 July 2023.

[23] In 1999, Plater noted that US environmental law was technically more voluminous than tax law. "The Internal Revenue Code and its regulations add up to something on the order of 6000 pages. The cumulative statute and regulatory pages for just three of the major federal regulatory statutes—the CWA, the CAA, and the RCRA—total more than 11,546 pages." (Zygmunt JB Plater, 'Environmental Law and Three Economies: Navigating a Sprawling Field of Study, Practice, and Societal Governance in Which Everything Is Connected to Everything Else Symposium: Environmental Law: Trends in Legal Education and Scholarship' (1999) 23 Harvard Environmental Law Review 359, n 7 <https://heinonline.org/HOL/P?h=hein.journals/helr23&i=365> accessed 23 November 2023). No doubt the pages are far more numerous today, and this is just US law.

> What discourages [environmental] law teachers is rather a sense of being drawn into a system in which enormous energy must be expended on something that is ultimately vacuous. As I read the letters, I imagined spending years learning the minutiae of an extraordinarily difficult language, only to find, at the end, that it wasn't a language of communication at all, but just empty babble. […] I sense that my colleagues would be more tolerant of the current laws if they were convinced that, for all the limitations of the regulatory genre, those statutes represented a best effort to cope with terribly difficult dilemmas—if they were persuaded that we were at least inching along in the right direction. But that is not the case."[24]

We noted at the outset that a major problem for environmental law was the implementation gap.[25] But failures in implementation are not the only obstacle. There are more deep-seated obstacles. One, in particular, continues to worry me: our obstinate commitment to economic growth. Indeed, this is the concern that set the dissertation ball rolling for me. If ecological collapse is intimately linked to collapse-of-economic-growth, how can the growth-imbued tools of current state and international legal systems[26] help us navigate the new terrain? I put forward the view that legal reform is not the only outlet for legal change. Indeed, viewing change as inevitably a story of legal reform (even of the judicial variety) seems a very limiting view of the legal toolbox. This is not to say that legal reform should be abandoned. Legal reform has an important role to play in mitigating the extent of collapse and will (and should) continue to be fought for by environmental lawyers and ecological associations alike. Instead,

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[24] Joseph L Sax, 'Environmental Law in the Law Schools: What We Teach and How We Feel about It' (1989) 19 Environmental Law Reporter News & Analysis 10251, 10251 <https://heinonline.org/HOL/P?h=hein.journals/elrna19&i=271> accessed 23 November 2023.

[25] UNEP, 'Environmental Rule of Law: First Global Report' (n 12).

[26] As an example, the common market has provided the EU with its internal cohesion, but economic growth has become its *raison d'être*. The term itself has appeared in all the EU treaties since 1992 as one (if not the central) objective of the European Union. From the "harmonious development of economic activities" in the Treaty of Rome (1957), "economic expansion, growth of employment and rising standards of living" in Article 2 of the Single European Act (1987) and "harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment" in Article 2 of the Treaty of Amsterdam (1992), such textual references have mutated into "Europe based on balanced economic growth and price stability" in Article 1(4) of the Treaty of Lisbon (2007). The EU's new 2020 strategy aims to achieve "smart, sustainable and inclusive growth". EU law has economic growth hard-wired into its DNA. While it is perhaps less common to find such explicit growth imperatives in national constitutions, this does not mean that they are unbound by the growth logic (see further Kenneth W Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Rowman & Littlefield 2007); David Doyle, 'Rule of Law: The Backbone of Economic Growth' (Small Countries Financial Management Programme, Oxford Union, Oxford, 17 July 2014) <https://www.courts.im/media/1432/ruleoflawoxfordlecture.pdf>).

I simply want to suggest that it is worth broadening our perspective with regard to "What can the law do?"

Some varieties of ecological law[27] have sought to do just this, describing the types of radical change that might be desirable. However, this scholarship generally has very little to say about *how* such changes will come about. Those in the field of ecological law who lobby for changes on the ground generally throw their weight behind rights of nature (whether embedded in a constitution, in legislation, or in court decisions) as a way of questioning human dominance over nature:

> the relationship between humans and Earth […] is not a relationship between equals but between the whole and a part. Accordingly, while the needs of the part must be respected, attempting to balance them against the rights of the whole is inappropriate. The rights of the whole cannot be compromised.[28]

The necessary changes are presented as a holistic ensemble. While there would no doubt be room for some local variation in execution, most of the literature in this more critical field is sweeping and global. Values for a new age are set out (Sbert details three principles of ecological law: ecocentrism, ecological primacy and ecological justice)[29] and tools for implementing them are discussed (human rights enlarged to encompass nonhuman beings, constitutional changes, global law). Often, these publications offer a "blueprint for rewriting the ground rules of civilisation".[30]

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[27] I use ecological law as shorthand for all the work that has so far been done to go beyond environmental law. See, in particular, work on Green Legal Theory (eg M'Gonigle, 'Green Legal Theory' (n 14); M'Gonigle, 'Logics as Law' (n 14); M'Gonigle, 'Green(ing) Legal Theory' (n 14); M'Gonigle and Takeda (n 10)); critical environmental law (eg Philippopoulos-Mihalopoulos (n 14)); Earth jurisprudence and wild law (eg Cullinan (n 14); Murray, 'Earth Jurisprudence, Wild Law, Emergent Law' (n 14); Murray, 'Earth Jurisprudence, Wild Law, Emergent Law' (n 14); Burdon, *Exploring Wild Law* (n 14); Burdon, 'Ecological Law in the Anthropocene' (n 14)); ecological law (eg Anker and others (n 14); Garver (n 14); Sbert (n 14)); sustainability law (eg Bosselmann (n 14)) and ecological integrity (eg Westra (n 14)).

[28] Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (Chelsea Green Publishing 2011) 100; see also ELGA, 'Oslo Manifesto for Ecological Law and Governance. From Environmental Law to Ecological Law: A Call for Re-Framing Law and Governance' <https://elgaworld.org/oslo-manifesto> accessed 12 July 2023. Other similar proposals include integrating ecological integrity as a grundnorm of the rule of law: Klaus Bosselmann, 'The Rule of Law Grounded in the Earth: Ecological Integrity as a Grundnorm' in Laura Westra and Mirian Vilela (eds), *The Earth Charter, Ecological Integrity and Social Movements* (Routledge 2014).

[29] Sbert (n 14) ch 9.

[30] Lynda Collins, *The Ecological Constitution: Reframing Environmental Law* (Routledge 2021) x.

One concern I have with this literature is that the totalising nature of the project seems to leave little room for discussion or for variation in the form of local narratives.[31] Much of the ecological law literature espouses a particular narrative but couches it in Nature (Nature's law) or, less frequently, Science (the laws of thermodynamics for example). Both of these approaches have a worrying tendency to suggest that the narrative is self-evident, unquestionable and automatically valid globally. Each of these characteristics raises its own questions: Is the narrative so self-evident? Who "perceives" and "interprets" Nature's law? Is it so obvious that Nature provides a unique answer to our human and nonhuman problems? Similarly, do scientific laws of thermodynamics or scientific data on the likelihood of certain future scenarios tell us what we should do in response? Is the narrative unquestionable? Or is it made so by the appeal to Nature and Science? After all, who dares set themselves above Nature? Or Science? Is the narrative really valid globally? There is a lack of acknowledgement of the ability of very different narratives to adapt to the changing local context in creative ways. It sometimes seems as if the suggestion is that indigenous relations with nature (which obviously have much to commend them) should be imposed top-down by a national or global authority.[32] Is there not a tension between the potentially less deleterious "groundedness" of indigenous or "Wild" narratives and the potential deleteriousness of a one-stop-shop solution imposed in a top-down fashion?

But my more primary concern with the ecological law scholarship is that it seems to require a paradigm-shifting revolution of sorts,[33] without describing the avenues for change. How is this paradigm-shifting revolution to come about?

With the implementation of environmental provisions constantly lagging, with environmental law ambitions that remained blinkered to their own internal contradictions (eg international

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[31] I think, in this context, of the owner of my local comic and manga bookshop who calls himself a "cement-lover" and has an active dislike of dirt, bugs, and nature's discomforts more generally. Is there a place for such people in ecological law? Or do the principles of ecological law require that they be delivered from themselves in some sense?

[32] Indeed, sometimes when they are (as for example in Bolivia's Mother Earth Law, which is often discussed in positive terms as being inspired by indigenous practices) the actual legislative process and the results it achieves are not as vivifying on the ground as might be expected. See further, Muñoz (n 15). For a broader discussion of the practical failures of rights of nature, see Guim and Livermore (n 15).

[33] See James R Karr, 'Protecting Ecological Integrity: An Urgent Societal Goal Symposium: Earth Rights and Responsibilities: Human Rights and Environmental Protection' (1993) 18 Yale Journal of International Law 297, 306 <https://heinonline.org/HOL/P?h=hein.journals/yjil18&i=305> accessed 26 July 2023: "Our long-term success depends on an enlightened environmental revolution, a set of scientific, political, and ethical transitions similar to those experienced during the agricultural and industrial revolutions."

sustainable development[34]), with paradigm-shifting philosophies untethered from the practicalities of concrete legal change, is it any surprise that we are left wondering how much has really changed since environmental teachers expressed their "bewilderment and frustration"[35] in 1989? Are environmental and ecological scholars any more convinced today that granting rights to nature[36] or instigating Green New Deals[37] or agreeing on Nationally Determined Contributions[38] will be sufficient to bring us back from the brink? Is this really all the law can do?

This dissertation takes up the provocative question: "What can the law do?"[39] Ecological collapse (and even just the mere threat of collapse, ie a growing feeling that collapse is possible) increases the likelihood of coordination problems that undermine the state's ability to secure the economic, political or social order, particularly through law. It also increases the likelihood that sub-state collectives will attempt to secure economic, political or social orders on subsidiary scales, either in direct challenge to state legality or in order to fill the gap left by a

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[34] Kotzé and Adelman (n 10).
[35] Sax (n 24) 10251.
[36] See Boyd (n 15)., but also critiques of rights of nature (eg Guim and Livermore (n 15); Muñoz (n 15)).
[37] See Ann Pettifor, *The Case for the Green New Deal* (Verso Books 2020); but also critiques of Green New Deals (eg Jasper Bernes, 'Between the Devil and the Green New Deal' [2019] Commune <https://communemag.com/between-the-devil-and-the-green-new-deal/> accessed 23 July 2023; Riccardo Mastini, Giorgos Kallis and Jason Hickel, 'A Green New Deal Without Growth?' (2021) 179 Ecological Economics 106832 <https://www.sciencedirect.com/science/article/pii/S0921800919319615> accessed 23 July 2023; Christos Zografos and Paul Robbins, 'Green Sacrifice Zones, or Why a Green New Deal Cannot Ignore the Cost Shifts of Just Transitions' (2020) 3 One Earth 543 <https://www.sciencedirect.com/science/article/pii/S259033222030542X> accessed 23 July 2023).
[38] Nationally Determined Contributions are the reductions in emissions agreed to by parties to the 2015 Paris Agreement (Paris Agreement to the United Nations Framework Convention on Climate Change, 12 Dec 2015, TIAS No 16-1104). Currently, these projected reductions are insufficient to limit warming to 1,5°C (IPCC, 'Special Report SR15' (n 19) 24; IPCC (n 18) 10) and many countries are failing to achieve their projected reductions: "Policies implemented by the end of 2020 are projected to result in higher global GHG emissions in 2030 than emissions implied by NDCs, indicating an 'implementation gap' (high confidence)." (IPCC (n 18) 11) Further, the conditional nature of many NDCs makes it likely that the implementation gap will continue if the financing to implement NDCs in the Global South is not forthcoming (WP Pauw and others, 'Conditional Nationally Determined Contributions in the Paris Agreement: Foothold for Equity or Achilles Heel?' (2020) 20 Climate Policy 468 <https://doi.org/10.1080/14693062.2019.1635874> accessed 23 July 2023).
[39] This approach to law is inspired by Spinoza's approach to the body: instead of asking the obvious question "What is a body?", he starts instead with the question "What can a body do?" The latter foregrounds questions of becoming. It conceives of essence not as a fixed identity, but as the temporary result of ongoing processes. In the legal realm, Douzinas has also suggested that this sort of shift might be necessary: "…once the question [about law] has been posed as a 'what is' one, the answer will necessarily give a series of predicates for the word 'law', a definition of its essence, which will then be sought out in all legal phenomena. As a result, a limited number of institutions, practices and actors will be included and considered relevant to jurisprudential inquiry and a large number of questions will go unanswered." (Costas Douzinas and Adam Gearey, 'From Restricted to General Jurisprudence', *Critical Jurisprudence: The Political Philosophy of Justice* (Hart 2005) 10) The reason for this shift will become clearer in the course of the dissertation.

flailing state legality.[40] Should the legal academy ignore the possibility – or the likelihood even – of such happenings? Or should we engage now with the "radical action" considered inevitable by the IPCC by considering law's potential role. This is the context.

The point of the dissertation is to show that ecological collapse changes the way we should be thinking about law and legal change. I suggest that the law may be capable of effecting much more change than we generally acknowledge when we are fixated on questions of institutionalised legal reform or untethered eco-philosophies. Often, we consider the only avenues for intentional change to be reform or revolution.[41] Reform and revolution both tend to be *intra*-order avenues for change (whether order refers to a state order, an international order, an indigenous order, etc). Instead, I suggest that there may be potential for legal change in *inter*-order relations and, more specifically, in the friction that sometimes occurs between two orders. Following Santos, I refer to the space of inter-order relations as ***interlegality***.[42] This is not the only name that has been used to refer to inter-order relations,[43] but it is the earliest reference to overlapping and intersecting orders and it is the one that will be adopted here. I will refer to the frictional events that occur in these spaces as ***ruptural events***. Discussed by three legal scholars – Vergès, Christodoulidos, and Bhandar – under the heading "legal rupture", these ruptural events represent a third avenue for change. Ruptural events are not incremental, but nor do they seek to overthrow an established order. As a third avenue for change, they tentatively make visible an alternative ordering and demand that the temporarily disturbed order formulate a response. There is potential for radical change, but the option of

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[40] For example, during the Covid-19 pandemic, French medical workers who were unvaccinated (even those who had been infected multiple times) lost their jobs, jobs which were normally guaranteed for life, under a French decree. Faced with this failure to respect medical autonomy, sub-state groups of medical professionals organised to provide false vaccination certificates. The material survival of their colleagues (and of the already severely-understaffed public health system) depended on it. One nurse told me that the statistics on vaccination would have to be read with a grain of salt in future given how many vaccines had been dispensed with in providing vaccination certificates to the unvaccinated.

[41] See the discussion in Ariane Goetz and others, 'Introduction to the Special Issue: Reform or Revolution? What Is at Stake in Democratic Sustainability Transformations' (2020) 16 Sustainability: Science, Practice and Policy 335 <https://doi.org/10.1080/15487733.2020.1838794> accessed 23 November 2023 and in the articles included in the special issue.

[42] Boaventura de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14 Journal of Law and Society 279, 297 <www.jstor.org/stable/1410186> accessed 21 November 2019.

[43] See Nico Krisch, 'Framing Entangled Legalities Beyond the State' in Nico Krisch (ed), *Entangled Legalities Beyond the State* (Cambridge University Press 2021) <https://www.cambridge.org/core/books/entangled-legalities-beyond-the-state/04306155350E1A8D300AFFABF4A3A58A> accessed 27 September 2022; Nico Krisch, 'Entangled Legalities in the Postnational Space' (2022) 20 International Journal of Constitutional Law 476 <https://doi.org/10.1093/icon/moac018> accessed 17 October 2022.

more limited engagement with the ruptural vision always remains. Radical transformation of the structure of the ruptured order becomes a possibility.

In order to appreciate the potential of ruptural events in spaces of interlegality, certain shifts in perspective are required. Without these shifts in perspective, interlegality remains a floating signifier[44] and ruptural events have nowhere to go but the courtroom. I argue for three shifts in perspective, each of which is essential to our understanding of "what law can do". First, I suggest that no inter-order relationship can exist without clearly delimiting individual orders. But how does one determine the "distinctness" of an order? Traditionally legal orders have been defined by reference to a body of law (perhaps determined by a grundnorm), but this definition of a legal order makes it impossible to take legal pluralism seriously.[45] The vast majority of substate orders, for example, simply don't have an identifiable body of law to which we might appeal. If we want to incorporate the full pluralist gamut of legal orders as potential participants in radical legal change, we need to review our preconceptions concerning the "distinctness" of orders. This then is the first shift in perspective required: it is suggested that orders might be defined not by a reference to a body of law, but by reference to two inseparable aspects of identity, namely, a map of sorts (that fixes the relations between members based on the "point" of the order's existence) and a collection of behaviours (driven by the map) whose existence serves to confirm and give shape to the map over time.

The second shift in perspective is compelled by Schlag's presentation of the "dedifferentiation problem", where he questions our ability to distinguish the strictly legal.[46] Having distinguished plural orders without reference to a body of law, we now find ourselves unable to point to what is specifically "legal" about the identified order. How is this order to be set apart from other normative orders? How is a legal order different from a cultural order, a moral order, an economic order, a religious order, etc? What provides the stamp of "legalness"?

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[44] Despite its arrival on the scene in 1983, the term "interlegality" remains surprisingly underdefined.

[45] Analytical jurisprudence has tended to disregard the pluralist nature of the law. The literature on legal pluralism, on the other hand, has insisted on this point for many decades now. The latter has floundered, though, when trying to find a workable definition of the law in a pluralist paradigm. As a consequence, some have given up looking and suggest we all do the same (eg Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001)), while others have concluded that legal pluralism and normative pluralism are indistinguishable (eg John Griffiths, 'The Idea of Sociology of Law and Its Relation to Law and to Sociology' in Michael Freeman (ed), *Law and Sociology* (Oxford University Press 2006) 63–64 <https://doi.org/10.1093/acprof:oso/9780199282548.003.0004> accessed 5 January 2023).

[46] Pierre Schlag, 'The Dedifferentiation Problem' (2009) 42 Continental Philosophy Review 35 <https://doi.org/10.1007/s11007-009-9095-z> accessed 21 November 2019.

Again, I argue for a shift in perspective: I suggest that "legalness" is always both contingent and a matter of degree. Legality is redefined on this basis, finally providing us with a grounding on which to discuss ruptural events as they emerge in spaces of interlegality.

The final shift in perspective goes to the heart of interlegality. While Santos' concept has been relatively understudied and underdefined, almost all uses of the concept of interlegality reference intersecting legal orders,[47] overlapping legal solutions to a question posed before the court,[48] or "entangled" legal norms.[49] But in each of these cases, we find ourselves cornered again by traditional conceptions of legal order tied to legal authorities and an attendant body of law. A more expansive definition of interlegality requires that we go beyond the order's simplest form of existence (its map) and pay attention instead to the way the order is mapped in practice. This final shift then invokes a phenomenological turn: radical legal change does not emerge at the site of intersecting norms but as a result of a legal subject's interlegal doings. More precisely, I suggest that perhaps radical legal change is provoked by an act of trespassing between legal orders.

An aside. While these suggested shifts are experimental, I do not claim to have happened upon them alone. Spurred on by Schlag's repeated provocations, I have also been deeply inspired by the work of Lindahl, Cover and Rancière. Their ideas run like a thread through my reconnaissance efforts and my appreciation for their intellectual contributions has only grown over time. With each rereading, I was compelled to ask new questions. Their work has given me the chance (and great privilege) to test my experimental theorising against their more solid intellectual endeavours.

Despite this intellectual baggage, I don't assume in this dissertation that my three suggested shifts in perspective are necessarily convincing. They are themselves ruptural offerings. My hope is not to transform legal thinking at large. But, more simply, to provoke a response. As outlined in this Introduction, my experimental theorising was intended as a means of engaging

[47] Santos (n 42) 289.
[48] Jan Klabbers and Gianluigi Palombella, 'Introduction: Situating Inter-Legality' in Jan Klabbers and Gianluigi Palombella (eds), *The Challenge of Inter-legality* (Cambridge University Press 2019).
[49] Krisch, 'Framing Entangled Legalities Beyond the State' (n 43) 1.

with the imminently practical question of "What can the law do?"[50] Perhaps the provocation will encourage others to press on further, whether in a theoretical or a practical sense.[51]

With the above shifts in perspective described, I come full circle, back to my initial discussion of ruptural events. In the first chapter of the dissertation, a rough (but phenomenologically charged) sketch of ruptural change is provided. It should now be clear why I have chosen this format. My hope is that the reader will get a sense of the shape of radical legal change, despite the lack of practical details. No attempt is made in this first chapter to ensure that the presentation of ruptural change is structurally sound. In the final chapter 5, I try and show how the experimental legal theorising[52] in the intermittent chapters may provide useful insights to fill in this initial sketch. This final chapter pulls the strands together in such a way as to show that the proposed shifts in perspective may be useful in thinking about radical legal change in the context of ecological collapse, and perhaps even beyond.

Methodology

I approach the topic of my dissertation from a "What can the law do?" direction. What difference does this make? If Valverde is right, it makes a difference to the way one does theory. She states at the outset to her book on chronotopes:

> This book is therefore meant as a reflection on the tools we use to study, describe, analyze, and theorize legal relations and legal processes, in the broadest sense of "legal". It is certainly not a theory of the world or a theory of 'spacetime' or a theory of any other objectified abstraction.[53]

Contrasting world-scale theories (such as Luhmann's and Althusser's) – which she considers necessarily static and monological – and pragmatically-oriented assemblages of ideas or assemblage-like conceptual architecture (such as Foucault's and Nietzsche's), she suggests that

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[50] It might be asked how a dissertation, situated squarely in the context of ecological collapse, can provide any practical answers to the question "What can the law do?" by embarking on a discussion of concepts and assumptions of interest only to legal theorists. This is a legitimate question. But one that I will put to one side until the legal theoretical musings are completed. I will give my reasons for taking this particular route in the Conclusion, in the hope that by then the reader will, unassisted, have found some part of the discussion pertinent to practical applications.

[51] See further the Conclusion.

[52] I use the term "legal theory", like Davies, in a very broad sense, to refer to "all forms of theory which touch upon law as a practice, concept, symbol, narrative or imagined entity. This includes feminist legal theory, socio-legal theory, analytical jurisprudence, […] critical legal theory, law and geography, law and humanities and legal philosophy" (cf Margaret Davies, 'Plural Pluralities of Law' in Nicole Roughan and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press 2017) n 28 <https://papers.ssrn.com/abstract=2808451> accessed 21 November 2019).

[53] Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale, and Governance* (Routledge 2015) 32.

theory's job lies more in questioning the questions[54] than in working towards objectified abstractions in the form of reified nouns. Valverde sees the "notions"[55] used by Foucault ("discipline" and "governmentality" for example) not as concepts with precise, static definitions, but as "tentative" and "dynamic abstractions"[56] that are site-specific and used tactically rather than either scientifically or philosophically. Valverde suggests that the tools Foucault provides should be used as an opportunity to "question the rules of the game we call theory".[57] I have kept Valverde's opening provisos with me throughout the dissertation and I hope that the concepts proposed within will be read with this in mind. They are "tentative" and "dynamic abstractions" that are inevitably site-specific and to be used tactically.

Nevertheless, there is always a risk in this kind of work that the production will be taken to have grander ambitions, such as producing a "theory of law" or a "theory of legal change" more specifically. Schauer takes this to be a failing of Tamanaha's otherwise very pertinent comments on the study of law and wishes Tamanaha might have limited himself to providing these "insights" rather than suggesting "a realistic theory of law".[58] I have tried to avoid this critique by not calling my dissertation "a realistic theory of legal change"! Further, I hope that the following brief exposition of the methodologies I have adopted in this dissertation will help ensure that the content that follows is read in the same playful manner in which it has been written.

Metaphor

The first and perhaps most important methodology adopted is an appeal to metaphor. Metaphor is rarely discussed as a methodological tool in the field of legal theory.[59] And yet, if it is useful

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[54] If Valverde's reading of Foucault is correct, we should be inspired by him to examine the "preconditions and foundations of our own present's intellectual habits" (Mariana Valverde, 'Specters of Foucault in Law and Society Scholarship' (2010) 6 Annual review of law and social science 45, 45 <https://www-annualreviews-org.ezproxy.library.uvic.ca/doi/10.1146/annurev-lawsocsci-102209-152951>).

[55] ibid 47. As Valverde says, "discipline and governmentality do not have firm definitions because they are not concepts" (ibid 52).

[56] ibid.

[57] ibid 54.

[58] Brian Z Tamanaha, *A Realistic Theory of Law* (Cambridge University Press 2017) <https://www.cambridge.org/core/books/realistic-theory-of-law/B02EE7FBCFB66D61A049B59BB474EB2D> accessed 25 July 2023.

[59] This is not to say that it is not used! See, for eg, Elizabeth A Povinelli, *Geontologies: A Requiem to Late Liberalism* (Duke University Press 2016) <http://read.dukeupress.edu/lookup/doi/10.1215/9780822373810> accessed 12 October 2020; Boaventura de Sousa Santos, 'Three Metaphors for a New Conception of Law: The Frontier, the Baroque, and the South' (1995) 29 Law & Society Review 569 <https://www.jstor.org/stable/3053910> accessed 19 February 2023.

in other domains, and particularly in philosophy,[60] there seems no reason why it would not be equally useful in legal theory:

> Without metaphor, there would be no philosophy. However, philosophy's debt is no greater, nor less, than that of any other significant human intellectual field or discipline. Philosophers must use the same conceptual resources possessed by any human being, and the potential for any philosophy to make sense of a person's life depends directly on the fact that all of us are metaphoric animals.[61]

I do not agree with Rorty, then, that metaphors are simply "linguistic flares":[62]

> Tossing a metaphor into a conversation is like suddenly breaking off the conversation long enough to make a face, or pulling a photograph out of your pocket and displaying it, or pointing at a feature of the surroundings, or slapping your interlocutor's face, or kissing him. Tossing a metaphor into a text is like using italics, or illustrations, or odd punctuation or formats. All these are ways of producing effects on your interlocutor or your reader but *not ways of conveying a message*.[63]

On the contrary, I have found throughout this dissertation that often metaphors seem to be the *only* way to convey a message. They allow one to create a tunnel for the senses between abstraction and concrete experience. Like art, they bring into stark view the most salient features of the notion being articulated. The metaphors I have relied upon and sought to develop include Santos' metaphor of the map, Kafka's metaphorical representation of the law in his parable 'Before the Law', Kundera's metaphors of heaviness and lightness, and the metaphor of the shadow in the conclusion.

There is a risk, of course, with any metaphor: the risk of breakdown, that the metaphor will be pushed too far and so lose its persuasiveness.[64] But this too is useful in theory. I have found

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[60] See Mark Johnson, 'Philosophy's Debt to Metaphor' in Raymond W Gibbs (ed), *The Cambridge Handbook of Metaphor and Thought* (Cambridge University Press 2008).
[61] ibid 39.
[62] This is how ibid 46 refers to Rorty's position.
[63] Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge University Press 1989) 18 (my emphasis).
[64] Frost warns of this risk: "What I am pointing out is that unless you are at home in the metaphor, unless you have had your proper poetical education in the metaphor, you are not safe anywhere. Because you are not at ease with figurative values: you don't know the metaphor in its strength and its weakness. You don't know how far you may expect to ride it and when it may break down with you. You are not safe with science; you are not safe in history." (Robert Frost, "Education by Poetry", reprinted in Robert A Greenberg and James G Hepburn (eds), *Robert Frost: An Introduction* (Holt, Rinehart; Winston 1961) 82–83).

that pushing the metaphor to see just how far it can go has sometimes allowed me to see the limits not just of the metaphor, but of the notion itself.

Experimentation

A second methodology appealed to in this dissertation is a playful type of experimentation.[65] I take inspiration in this from the work of my supervisor, Rebecca Johnson, in particular. It was during her course in my first year and through reading the required readings – along with some of her own publications[66] – that I discovered the power of weaving personalised narrative and depersonalised (legal) explanations, the power of story. It was something I had never dared do in my earlier attempts at academic writing. Having felt for myself the normative pull that such changes in perspective provoked, I was curious. This feeling was reinforced when I read Damasio's treatise on the neurological place of emotion in all human reasoning, prioritising or valuing, and *in fine* acting.[67] I was not sure I could carry it off though.

As it turned out, the ability-issue was sidestepped when I realised I didn't have much of a choice. When I began engaging with the concept of interlegality, it quickly became clear that I would not be defining something so much as exploring it. Exploration, as any child knows, begins with play: turning rocks over, trying things on for size, dressing up, etc. And for this, I needed as many props at my disposal as possible. The turn to literature, to film, to personal experience, to metaphor, to neurobiology on occasion, to narrative interludes, to maps happened as a consequence.

This experimental, exploratory approach means that I have tried to handle the object (the legal order) as playfully as a child might do: holding it up to the light; considering it from as many different angles as possible; trying it out for flotation purposes, smashable potential, tastiness;

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[65] In appealing to the experimental approach to legal theory, I have been inspired by Gilles Deleuze and Félix Guattari, *What Is Philosophy?* (Hugh Tomlinson and Graham Burchell trs, Columbia University Press 1996). There are many ways of engaging in experimental theory, however.

[66] Eg Rebecca Johnson, 'The Persuasive Cartographer: Sexual Assault and Legal Discourse in *R. V. Ewanchuk*' in Gayle M MacDonald (ed), *Social Context and Social Location in the Sociology of Law* (Broadview Press 2002) <https://www.jstor.org/stable/10.3138/j.ctt2ttpfw.15> accessed 20 February 2023; Rebecca Johnson, 'Blurred Boundaries: A Double-Voiced Dialogue on Regulatory Regimes and Embodies Space' (2005) 9 Law Text Culture 157 <https://search.informit.org/doi/abs/10.3316/IELAPA.100524287151154> accessed 4 June 2023; Rebecca Johnson, 'Justice and the Colonial Collision: Reflections on Stories of Intercultural Encounter in Law, Literature, Sculpture and Film' (2012) 9 No Foundations: An Interdisciplinary Journal of Law and Justice 68 <https://dspace.library.uvic.ca/handle/1828/5904> accessed 25 July 2023.

[67] See further Antonio Damasio, *The Strange Order of Things: Life, Feeling and the Making of Cultures* (Vintage Books 2018).

telling stories with it; etc. I do not claim to have found the right description of the object, but I hope that I have provided some productive sense of the ways in which it might be used.

"Shock therapy"

The third methodology used in this dissertation is a version of Connolly's "shock therapy".[68] Connolly describes his methodology as a "genealogy of reason" composed of two strategies: first, identifying "flashpoints" or key starting points in a particular theory/concept and, second, applying "shock therapy" in order to provoke alternative "dramatizations" of the same flashpoints. Often Connolly uses one theorist to impose shock therapy to the ideas of another, but alternative dramatizations may also be achieved by confronting radically different disciplinary visions or cultural settings.

The brief encounter with legal rupture in Chapter 1 serves to highlight the fact that this type of legal change takes place at the intersection between legal orders. This space of intersection has been referred to by Santos as interlegality. Despite the apparent utility of the concept for a discussion of legal rupture, it remains highly underspecified in the literature. In particular, it seems to camouflage three conceptual assumptions on which it relies heavily: the assumption that legal orders can be "distinguished"; the assumption that there is something "legal" about them; and the assumption that it is possible for them to "intersect". Without some sense of the "distinctness" of legal orders,[69] the "legalness" of legal orders,[70] and the "intersectingness" of legal orders,[71] it is very difficult to give body to the space of interlegality where legal rupture seems to take place. I take these to be useful flashpoints.

In applying "shock therapy" to these flashpoints, I use much the same approach as Connolly, appealing to a range of different theorists and a range of disciplinary settings. Three theorists in particular have borne me on their shoulders in proposing alternative dramatisations of the flashpoints: Lindahl, Cover and Rancière. The one characteristic that unites them all is the ability to immerse themselves in multiple disciplines and so make incredibly fecund links: Lindahl uses phenomenology to great effect in writing about legal theory in the realm of international law; Cover didn't shy away from appealing to his knowledge of Hebrew texts or baseball in discussing the law; Rancière uses a particular methodology/epistemology in fields

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[68] William E Connolly, *The Fragility of Things: Self-Organizing Processes, Neoliberal Fantasies, and Democratic Activism* (Duke University Press 2013) 99 <http://read.dukeupress.edu/lookup/doi/10.1215/9780822377160> accessed 22 November 2018.
[69] Discussed primarily in ch 2.
[70] Discussed primarily in ch 3.
[71] Discussed primarily in ch 4.

as varied as aesthetics, education and politics. Despite this similarity, I am reasonably sure that each of them was oblivious to the very similar work being done by the other two.

I do not claim to have added much to their already brilliant accounts. Nevertheless, I feel that the playful meeting of this trio (among others)[72] has produced its own surprising insights. In particular, I believe that through the encounter with these three flashpoints and a variety of other undisciplinary texts, I have teased out certain limitations in each of their accounts[73] and have suggested ways in which their application might be broader than initially imagined.[74] This was not the point of my dissertation, but it is a happy consequence.[75]

Roadmap

Before proceeding, it is worth briefly mapping out the contours of the dissertation. Chapters 2–4 set out the three shifts in perspective (concerning "distinctness", "legalness" and "intersectingness" respectively). The interlude provides some respite from the dense theoretical chapters and provides practical material to illustrate the "doings" discussed in Chapter 4. Chapters 1 and 5 act as bookends. These chapters introduce and then flesh out the concept of interlegal ruptural events, the proposed third avenue of legal change and the type of legal change perhaps most adapted to the context of ecological collapse. The Conclusion provides a

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[72] By focusing on these three theorists, I don't wish to downplay the impact of many other thinkers on my work. I have also relied heavily on the work of Kafka, Schlag, Romano, Ricoeur, Spinoza, Deleuze and Guattari, Valverde, etc. In addition, I fully acknowledge that "as one talks or writes, one is responding, knowingly but mostly not, to the indefinitely large number of texts and speakers that have already used the same words, entities, both real-life and ghostly, with whom one is necessarily in dialogue" (Valverde (n 53) 8).

[73] See in particular, for Lindahl, the section entitled "A tribute to Lindahl" in ch 2; for Cover, the section entitled "Sedimentation in the quadrants" in ch 5; for Rancière, the section entitled "Loose ends: Now what" in the Conclusion.

[74] In Lindahl's case, this means going beyond his authority-mediated version of legality. In Cover's case, this means extending his ideas beyond the state, and acknowledging the hegemonic and the apocryphal quadrants alongside the imperial and the paideic. In Rancière's case, this means considering the dissensual potential of the law. Given Rancière's penchant for using his dissensual approach in disparate fields, I do not think he would object to applying it to the legal field. Indeed, I would be willing to bet that he would not agree to the idea that law is *exclusively* part of the police order.

[75] An additional happy consequence would be to see their work more widely cited. I am still surprised by the lack of engagement with Schlag's playful (but deadly serious) attacks on the legal academy. Lindahl has been widely read and cited, but for the most part his reputation is limited to the fields of international law and constitutionalism. This is a shame since his insights could potentially be applied far more broadly. Cover's "Nomos and Narrative" article is widely cited, but rarely are the implications of his work considered beyond the state context. The idea of being limited to certain spheres or applications is perhaps less applicable to Rancière. His open shunning of disciplinary boundaries means that his work has often been taken up beyond its original field(s). Nevertheless, Rancière is less often appealed to in legal scholarship. I think this is in part because of the assumption that law is part of the police order (and thus part of the problem, rather than part of the "solution"). I deal with this issue in my Conclusion.

rapid recap, but focuses most of its attention on a discussion of the limits of this dissertation and the loose ends which might merit further research.

Chapter 1: Legal rupture

The aim of Chapter 1 is to look at why and how radical change in the law happens. The shift in focus suggested is from a position of blinkered enthusiasm for legal reform to a cautious investigation of legal rupture. Here I discuss the theoretical origins and practical features of legal rupture by considering, first, strategies of rupture and then, more generally, ruptural events. My aim is to show the power of ruptural events as provocative and potentially transformational moments for a legal collective.

This chapter answers the question: "What 'law' should we be focusing on in times of ecological collapse?" I suggest that our focus should be on the legal borderlines, where the two (or more) legal orders overlap, intersect, interact.

The first chapter is suggestive. The aim is to open up new perspectives in a very peremptory fashion. In the following chapters, I start to unravel the conceptual assumptions underlying our understanding of interlegality in an attempt to get at the "where" of legal rupture.

Chapter 2: Distinctness

Having considered what friction at the borderlines might look like, I turn more specifically to the ingredients involved in such frictional encounters. This means returning to spaces of interlegality.

In Chapter 2, the aim is to clarify what exactly we are looking for when we focus our attention on legal rupture in spaces of interlegality. The first chapter answered this question in a suggestive, tentative fashion. Here, I dig deeper into the notion of legal order and how one legal order may be distinguished from another, such that we might locate an intersection, "interlegality". Since Santos first introduced the term "interlegality", I use Santos' metaphor of law as maps as a starting point in this enquiry.[76] Kafka's parable "Before the Law"[77] helps me consider different "dramatizations" of the metaphor and so develop the metaphor further. Taking up Ricoeur's account of selfhood (as suggested by Lindahl) allows me to push the metaphor to its limits. In so doing, I argue that a first shift in focus is necessary among legal scholars who want to take ecological collapse seriously: away from our more traditional

[76] Santos (n 42).
[77] Franz Kafka, 'Before the Law' in Nahum N Glatzer and Joyce Carol Oates (eds), Edwin Muir and Willa Muir (trs), *Kafka: The Complete Stories and Parables* (Quality Book Club 1971).

definitions of law and towards a broader, fundamentally pluralist and dynamic vision of legality which encompasses two aspects: legal orders as maps (law-as-object) and legal ordering as the ways in which these maps are put to use (law-in-use).

Chapter 3: Legalness

But taking such a broad approach to legal orders may lead to law's undoing. I treat this question in Chapter 3, by engaging directly with Schlag's compelling presentation of the "dedifferentiation problem".[78] Schlag argues that "our more sophisticated theories of law lead us to a point where we are no longer able to distinguish law from culture, or society, or the market, or politics or anything of the sort".[79] I push this thinking to the limit, concluding that Schlag is correct in his diagnosis and that the "legalness" of law is always contingent and a matter of degree. This is where legality comes in. In this chapter, I propose an experimental mapping of legality in which legal orders are arranged across four quadrants. In exploring the "legalness" of legal orders as they occur across this map, I come to two conclusions. First, legality must embrace the idea that "legalness" cannot be purified: legality is never exclusively "legal" but is always more or less mixed up with other types of social ordering. Second, I propose that legality be considered a question of degree, by suggesting that where the normative import of the legal order is clearly intelligible to those that are bound by its narrative (and to concerned-others), there is a high degree of legality; where meaning is less obviously intelligible, there is a lesser degree of legality.

My argument in this chapter suggests that a second shift in focus is necessary, this time away from our attachment to purified law and hermetic disciplinary borders. Instead, I encourage an interpretation of legality that appeals to a fundamentally multi-sourced narrative in putting the map to use and I suggest that the existence of legality (or lack thereof) cannot be considered in black-or-white terms.

Interlude: A story

The interlude is a chance to tell a brief story. It also provides some well-merited relief from high-flying theory. Finally, it is a reminder of, and a return to, the central question of the dissertation: "What can the law do?" Here, I tell the story of the Belgian region Wallonia's refusal (in 2016) to sign off on the EU–Canada CETA Treaty, a treaty which was to further remove barriers to international trade between the two signatories. The Belgian region's

[78] Schlag (n 46).
[79] ibid 35.

confident "no" caused much indignation and a scampering among the signatories to patch up the hole caused by "little" Wallonia. Here then is a true tale of legal rupture. It is of particular interest to me because it shows the potential for legal rupture beyond the realm of the state and beyond the realm of the courts (the only spaces in which legal rupture has previously been discussed). This is the beating heart of my dissertation, contained in a story.

Chapter 4: Intersectingness

With the distinctness of legal orders mapped out (Chapter 2) and the legalness of legal orders relativised (Chapter 3), I am finally in a position in Chapter 4 to consider once again the ruptural event. In Chapter 1, I stated that this event took place in spaces of interlegality, on the borderlines of law. But it was unclear where exactly interlegality was to be found. Most theorists have talked about interlegality in terms of intersecting or overlapping maps, legal orders, or norms. In this chapter, I argue that "spaces" of interlegality is in fact an abuse of language: there is no physical space of interlegality. Interlegality cannot be found in a comparative study of maps or legal orders as de Santos' article might have led some to believe. Instead, there are only phenomenological experiences of interlegality. Interlegality is located at the site of the aesthetic experience of alternative mappings of legal order. That is, interlegality is experienced in bodies (or individuals)[80] that find themselves simultaneously navigating by two (or more) legal narratives; these individual doings straddle two worlds at once. I explore this phenomenological turn by comparing the space of interlegality to a trespassing of sorts.

My argument in this chapter suggests that a third shift in focus is necessary among legal theorists. Interlegality cannot be grasped through the metaphor of overlapping orders or norms. Intersectingness requires doings. I suggest then that legal scholars should pay more attention to individual legal subjects and their occasional trespassings as potential sites of radical legal change.

Chapter 5: Sedimentation

With interlegality reconsidered as embodied in individual doings, I consider the particular circumstances in which a trespassing of this kind may result in legal rupture. Which legal orders

[80] I use "individuals" in the Spinozist sense of the term to refer to "a collection of things […] which join together to have certain effects" (Michael Della Rocca, *Spinoza* (Routledge 2008) 107 <https://www.routledge.com/Spinoza/Rocca/p/book/9780415283304> accessed 26 January 2023). Individuals may therefore be human or nonhuman, singular or collective, as long as they are bodies capable of phenomenological "experiencing".

are most subject to rupture? And what part of the legal order comes into question during a ruptural event? I use Kundera's playful variation on heaviness and lightness in *The Unbearable Lightness of Being*[81] to tease out the characteristics of the point at which ruptural events occur. Sedimentation is suggested as a useful motif for discussing the layering of doings that stabilises the legal order over time. Excessive sedimentation however is pinpointed as exposing the fragility of the law. In cases of excessive sedimentation, our phenomenological commitment to the law is encouraged to become more and more unadventurous (and non-improvisational). Interactional-practice is channelled into fixed drills/furrows. In some sense then sedimentation reduces the vitality of the legal order: the more it assumes effective control, the more it forgets the constitutive existence of the outlandish Outside and so reduces its ability to respond to rupture. I apply these musings to the mapping of legal orders introduced in Chapter 3 in order to reflect on the types of legal orders that may be most subject to "unbearable" sedimentation and thus perhaps most susceptible to legal rupture.

My argument in this chapter comes full circle, employing the insights proposed in chapters 2, 3, and 4 to reconsider and specify to some extent the "how" of ruptural events. There is much that remains to be done, but this chapter sets out a final tool (sedimentation) to support further exploration of the potential of legal rupture.

Conclusion

"What can the law do then?" I conclude by considering the theoretical and practical potential of interlegality and legal rupture. Theoretically, I argue that this dissertation has the potential to open up new fields of research in legal theory. It provides a framework that could usefully be reapplied in a variety of interlegal spaces. More practically, I argue that the theoretical exploration in this dissertation may help those actively defending "inherent jurisdictions"[82] on the ground to reflect on the salient pressure points and the means available to them to expose alternative narratives. The more sedimented legal orders have well-oiled toolboxes to deal with irruptive events so as to preserve their own non-arbitrariness. The examples of true responsiveness to such events are few and far between. Nevertheless, I conclude by suggesting that the rumble of legal rupture may become louder in coming years as such events inevitably

[81] Milan Kundera, *The Unbearable Lightness of Being* (Michael Henry Heim tr, Kindle, Harper & Row 1984).
[82] Shiri Pasternak, *Grounded Authority: The Algonquins of Barriere Lake Against the State* (1st edn, University of Minnesota Press 2017) 3.

multiply. If only for this reason, the more sedimented legal orders will need to prepare themselves as best they can for repeated stagings of incompossibility.

Chapter 1 — Legal rupture: The spaces of interlegality

> *Failure is a kind of edge. And I wanted talk [sic] to you about edges, what's over them, just on the other side. And what happens if you jump, or sail, or sink, or simply walk from what feels familiar into your own unknown, across borders of any kind.*
>
> *Edges are boundaries, places where two genres or faces or bodies meet, drawing individuals and collectives together in certain conversations or collaborations. Though an edge can feel like the point of slip-off into a gulf or abyss, a lot like failure, they signal transitions and can be called beginnings or endings.*
>
> — Hayley Singer, 'Never Heard of That: Writing at the Edge of What's Publishable'[83]

In the Introduction, I explained how the law seems to suffer either from irrelevance or from untetheredness in the face of ecological collapse. I noted the urgent need to recognise the extent of legal change that lies ahead and the potential for that change in spaces of interlegality, those very spaces that legal scholars tend not to attend to. According to Santos, spaces of interlegality[84] are to be found at the intersection of two (or more) legal orders. For simplicity's sake, I refer to these intersecting legal orders as "sister orders". Most often, sister orders coexist peacefully, each order adapting its jurisdictional reach to the contours of its sister(s): the siblings politely leave each other space. Like siblings, however, sister orders may occasionally disagree, causing friction in these spaces of interlegality. The way one order draws the contours of legal spaces, legal times, legal subjects or legal behaviour may contradict the legal understandings adopted by a sister order. As Santos states, "the different legal orders […] translate the same social objects into different legal objects".[85]

To take a simple example, if I share an apartment with a fellow student, we may have incompatible understandings of what constitutes acceptable "noise" (clarinette practice at 10pm? the breakfast news on at 5am?); of what constitutes acceptable use of the fridge (storing my kid's science experiment? rancid milk?); of what constitutes acceptable levels of "cleanliness" (washing piled up in the sink? chopping boards used for meat and veg?), etc.

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[83] Hayley Singer, 'Never Heard of That: Writing at the Edge of What's Publishable' [2022] Sydney Review of Books <https://sydneyreviewofbooks.com/essay/singer-never-heard-of-that/> accessed 8 August 2022.

[84] The term "interlegality" is taken from Santos (n 42). Santos defines the term as the "intersection of different legal orders" (ibid 298) which operate "simultaneously on different scales and from different interpretive standpoints" (ibid 288). He claims that interlegality is the "phenomenological counterpart of legal pluralism" (ibid 297) and a key pillar in his "postmodern conception of law" (ibid 296).

[85] ibid 288.

When this happens, expectations about how to use our common living space are compromised, and this may result in friction between us. This is low-level friction however: a form of inter-order friction no doubt, but hardly the form that interests us here. We might remove such friction by sitting down and discussing our personal limits. Perhaps this will result in some shared house rules. This is low-level inter-order friction, an everyday occurrence.

Another example of cohabitation takes this a step further. In the occupied ZAD Notre Dame des Landes in France, a wide range of activists took up residence in an attempt to block the construction of a new airport. Some of these activists became involved in managing the local forest (within a collective named *Abracadabois*). They organised and carried out tree-felling when necessary to support local construction projects. These activists came into conflict with another section of activists who lived in the same forest but believed that man's footprint on the natural world should be as light as possible: in particular, they refused the use of human-made machines to fell trees or animals to till the soil. They relied on wild foraging and the produce of seeds scattered randomly on the forest floor; their dogs roamed freely about the encampment (sometimes causing havoc with resident flocks). The forest cuts carried out by *Abracadabois* were unacceptable within the light-touch activists' frame of reference. Similarly, occasional attacks by the latter's dogs disturbed local flocks and were unacceptable to farmer-activists living nearby. Here is an example of inter-order friction that goes a step further than that seen in the cohabitation case exposed above: translatability between orders becomes more difficult as things considered irrelevant by one order are brought to the fore by the other. Nevertheless, as co-activists – fighting the same *"grand projet inutile"* ("useless development project") – some common ground needed to be found. The potentially ruptural incomprehension was resolved by creating a "non-motorised zone" within which *Abracadabois* would not intervene.

Transposing this problem to the legal context, similar (though far more serious) instances of interlegal friction can be found at the intersection between the settler state legal order and indigenous legal orders. Consider the Douglas Treaties, the oral agreements between James Douglas and several indigenous communities on Vancouver Island, for example. The Treaty was only translated into W̱SÁNEĆ language in 2017. At the time, Elder STOLC̓EŁ John Elliot recounted that he had struggled to translate the handover of title to land: there were no words in his language to describe this. The W̱SÁNEĆ language, their particular conception of "the land" and their deep, almost spiritual, respect for the material context in which they are embedded are all intricately entangled with W̱SÁNEĆ law. The W̱SÁNEĆ Nation sees land as

a gift from the Creator, from which duties flow.[86] Whilst this gift can be lent out to be used, there is no sense in which ownership can be transferred. In W̱SÁNEĆ language, transferring land would be equivalent to transferring one's own limbs.[87] How to square this with the logic of the settler-English text with its understanding of land as a resource, to be portioned up, privately owned and transferred at will? The intense friction in this case arises, again, because two overlapping legal orders apply contradictory understandings of the concept of "land" at one and the same site, namely, the agreement contained in the Douglas Treaties.[88]

Again, friction of this type occurs in spaces of interlegality, at the intersection of two or more legal orders. That we are living today in a time of "porous legality", in "multiple networks of legal orders",[89] is no longer dismissed as a whim of legal anthropologists. Interlegality, the term coined by Santos in 1987,[90] is a reality. Yet this shifting acceptance that legal orders are decidedly intertwined has had surprisingly little impact on the field of legal theory. That is, the widespread acceptance of the pervasiveness of "overlappingness" as a feature of legal orders has not prompted a shift in the focus of legal theorists or in the way we do legal theory. The mainstay of the literature in legal theory remains fixated on the existence and persistence of legal orders as self-sufficient and autonomous entities.[91] While Santos' article noted that

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[86] As Elder STOLQEŁ John Elliot noted, "Language is part of our identity". XEMŦOLTW̱ Dr. Nick Claxton continued, "Our language is the voice of the land. We relate to it through our stories, song and prayer. The laws, the land and the beliefs of the W̱SÁNEĆ are intertwined and inseparable." (Panel discussion, "First Nations, Land and James Douglas" conference, Songhees Wellness Centre (Victoria), 25/02/2017).

[87] I am grateful to Alan Hanna for these insights.

[88] Abram describes the power of language to enfold one perceptually: "every human language secretes a kind of perceptual boundary that hovers, like a translucent veil, between those who speak that language and the sensuous terrain that they inhabit. As we grow into a particular culture or language, we implicitly begin to structure our sensory contact with the earth around us in a particular manner, paying attention to certain phenomena while ignoring others, differentiating textures, tastes, and tones in accordance with the verbal contrasts contained in the language. We simply cannot take our place within any community of human speakers without ordering our sensations in a common manner, and without thereby limiting our spontaneous access to the wild world that surrounds us. Any particular language or way of speaking thus holds us within a particular community of human speakers only by invoking an ephemeral border, or boundary, between our sensing bodies and the sensuous earth." (David Abram, *The Spell of the Sensuous: Perception and Language in a More-Than-Human World* (1st edn, Pantheon Books 1996) 255–256)

[89] Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (3rd edn, Cambridge University Press 2020) 519 <https://www.cambridge.org/core/books/toward-a-new-legal-common-sense/D720B788FE51917D2402CEA0811A0D6A> accessed 4 January 2021.

[90] Santos (n 42).

[91] Eg Austin restricted his project of general jurisprudence to "the ampler and maturer [legal] systems of refined societies" (John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law. 5th Ed. (1885) 2 Vols.* (Robert Campbell ed, Reprint of 5th 1885 Edition, The Lawbook Exchange, Ltd 2004), lect XI); Raz explicitly acknowledges the primacy of "contemporary municipal legal systems" in informing his concept of law (Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edition, Oxford

interlegality was a dynamic *process* rather than a fixed state of affairs – thus suggesting certain avenues for further research – his article[92] and later book[93] didn't discuss in any detail what the dynamic process of overlapping or intersecting legal orders might look like and whether the process was essentially harmonious or conflictual. Instead, the concept of interlegality was left underdefined. In the following chapters, I take up the challenge to give a fuller account of the processes involved in interlegality. My aim here is to show that an ecologically informed critical legal theory would be vastly improved if it paid more attention to these sites of intersection and, in particular, the friction that occurs therein. Spaces of interlegality have the potential to provide us with insights into the imperial missteps we have made to date and are, I would argue, the only possible site of legal change of the order now required by our ecological predicament.

My dissertation is dedicated then to a study of interlegality, focusing more particularly on experiences of friction between sister orders in spaces of interlegality. It is central to my argument that an ecologically informed critical legal theory must pay more attention to these spaces. But this renewed attention requires a number of shifts in focus. I argue that three particular shifts in focus would be useful in the field of critical legal theory if we wish to ensure that law remains relevant in the face of ecological collapse. The question at the heart of these chapters is: "What can the law do?"

The noted absence of scholarship in legal theory on the forces that cause radical shifts in the law is surprising, especially in a period where radical legal change might have an important role to play in how we respond to global threats such as climate breakdown (and pandemics). This opening chapter, then, focuses on a specific type of legal change – one I will refer to as "legal rupture".[94] Legal rupture is a dramatic opening in the law. It does not involve replacing one law with a more ecological version of itself, but instead describes a paradoxical event which leaves legality ruptured and leaky, demanding attention. This type of legal change need not take place in Parliament or in the courthouse; indeed, more often legal rupture involves the disruption of everyday legal spaces, those where the law is least visible (because the law is, for

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University Press, USA 2009) 50). A lonely exception would be Santi Romano, *The Legal Order* (Mariano Croce tr, Routledge 2017).

[92] Santos (n 42).

[93] Santos (n 89).

[94] Emilios Christodoulidis, 'Strategies of Rupture' (2009) 1 Law and Critique 3 <https://www.infona.pl//resource/bwmeta1.element.springer-e1462e85-6736-3956-9bf2-3c0bd4104bb2> accessed 27 March 2021.

the most part, respected) and most powerfully driving social interaction (precisely because it is less visible). This is not to say that other forms of legal change are unimportant, but I argue that legal rupture is likely to be central to law's capacity to maintain relevance in a context of climate breakdown.

In the following, I consider the legal context in which rupture was first mobilised and the legal theorists that have discussed strategies of rupture. I then go on to sketch and discuss two practical and readily accessible examples of what a ruptural event might look like. The final section returns to the idea of legal rupture and tries, on the basis of the literature and bolstered by the practical examples, to define the most interesting characteristics of legal rupture for a critical theorist. I conclude by returning to the idea of interlegality, showing why a shift in focus from legal reform to legal rupture requires that we pay more attention to spaces of interlegality.

Strategies of rupture in the literature

I have chosen the term "rupture" on purpose to insist on the dramatic and unexpected nature of legal change that we are dealing with. Rupture refers to a sudden bursting open of, for example, a pipe, a container, or a membrane. This is not a gentle transitional type of legal change; it is a dramatic and unexpected event that effects a break or a breach at a particular point in the existing legal order. The consequences of the rupture may be felt well beyond the breaking point, however, for a rupture leaves a leak in its wake. And the leaky membrane must be replaced, repaired or routed around. As a rule then, rupture requires a response, even if the immediate response is to ignore the leak… until it can no longer be ignored.

The term "rupture" has a legal genealogy. In 1966, a famous French advocate named Jacques Vergès penned a book entitled *De la stratégie judiciaire*[95] in which he defends a particular strategy of legal defence in criminal cases. He calls this strategy – which was made famous by French and Algerian lawyers defending members of the Algerian National Liberation Front (FLN) in the 1950s and 60s – *"la défense de rupture"* ("rupture defence"). A rupture defence – or, as it was later known, a strategy of rupture – involves accusing the prosecution of the same offences as the defendant in order to reframe the context of the defendant's actions. In the French criminal proceedings against the suspected anti-French Algerian guerrilla fighter Djamilla Bouhired, Vergès accused the prosecuting French state of crimes against humanity.

[95] Vergès (n 94).

These crimes included unwanted colonial rule. He claimed that Algerian guerrilla fighters were not terrorists but in fact freedom fighters, struggling against the unlawful foreign rule of the French. Bouhired was condemned to death in the French proceedings, but Vergès' provocative arguments, legal showmanship, political radicalism and grand pronouncements lead to a public outcry demanding her pardon, which the French state then granted.

The rupture defence operates, then, by questioning the authority of the prosecutor or legal order itself. In this case, Vergès questioned the French state's authority to condemn Algerian freedom fighters for "terrorism" when the French state itself was responsible for creating rebellious subjects through its imposed colonial rule and subsequent war to ensure control over Algeria. Further, while the court condemned Bouhired for her violent action, Vergès reversed the accusation and condemned France for its own violent tactics, including widespread use of torture. The case became a theatre in which one type of violence (terrorist / freedom-fighter) was pitted against another (state torture / colonial rule). By casting doubt on the ability of the sovereign to prosecute the crimes of a defendant, the defence effectively turned the tables on the prosecution, shifting the inquiry away from the alleged criminal activity in a procedural move that put the spotlight on the hypocrisy of the legal order itself and thereby undermined the court's jurisdiction altogether. In so doing, Vergès used "the law to dislodge the law".[96]

That said, Jacques Vergès should not be mistaken for a beacon of justice. He defended a large number of perpetrators of crimes against humanity, included members of the Pol Pot regime and the SS collaborator Klaus Barbie, also known as the Butcher of Lyon, who was arrested in Bolivia in 1983 and extradited to France, for killing members of the French Resistance and ordering the deportation of some 300 Jews when he was the head of the Gestapo in Lyon. Vergès took the case, confounding people who had admired him for fighting the Nazi occupation of France. Even those who agreed that Barbie deserved a lawyer, and a good one, never forgave Vergès for the violence of his tactics. As a consequence, his immorality has occasionally been likened to that of his clients. Indeed, Vergès himself often flamboyantly played along with such characterisations: "Of course he would have defended Hitler, he […] told reporters many, many times. He'd even defend George W Bush, he always add[ed] – so long as Bush pled guilty."[97]

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[96] Christodoulidis (n 94) 8.
[97] Stéphanie Giry, 'Against the Law' <https://pulitzercenter.org/stories/against-law> accessed 16 April 2021.

Despite the murky waters the rupture defence has been dragged through, the theme of rupture is an important, though underexploited, site for further research in critical legal theory.[98] Expanding on Jacques Vergès' early ideas, Christodoulidis took up the idea of rupture as a mode of immanent critique (in the Marxist tradition): "Immanent critique is tied to the logic of contradiction where contradiction, as 'practical' rather than logical, informs a crisis that is experienced by social agents in the materiality of their life."[99] The contradictions generated within a legal order by strategies of rupture are said to be "*inevitable* (they can neither be displaced nor ignored), *compelling* (they necessitate action) and *transformative* in that (unlike internal critique) the overcoming of the contradiction does not restore, but transcends, the 'disturbed' framework within which it arose."[100] As with Vergès, Christodoulidis makes an explicitly normative argument in favour of critical legal interventions that adopt this "political-strategic"[101] form. But his argument is that of a legal theorist rather than a lawyer in court. In his view, legal theory should encourage strategic interventions in the law in an attempt to move beyond the strictures of capitalism. He suggests this is possible without becoming a defence lawyer, thus taking Vergès' argument a step further by claiming that these interventions should not be limited to the courthouse. That is, he wants to ask the same question – "*what registers as resistant, neither reducible to nor co-optable by the order it seeks to resist*?"[102] – but about strategies of rupture that might generate contradiction not just within the colonialist order of the state, but more generally within the capitalist order.

Another legal theorist has also taken up the theme of rupture and ventured beyond the context of the courthouse and the strictly criminal defence.[103] Brenna Bhandar considers the meaning of legal strategies of rupture, and the possibilities that such strategies hold for anticolonial and anticapitalist political resistance. Shifting from the strategies of defence lawyers to the question of judgment, the author analyses a recent judgment of the Indian Supreme Court and explores how judges' decisions can themselves be ruptural when they redefine legal concepts with the

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[98] As Hans Lindahl, Emilios Christodoulidis and Brenna Bhandar have all pointed out in recent works (cf Brenna Bhandar, 'Strategies of Legal Rupture: The Politics of Judgement' (2012) 30 Windsor Yearbook of Access to Justice 59 <https://heinonline.org/HOL/P?h=hein.journals/windyrbaj30&i=365> accessed 26 March 2021; Christodoulidis (n 94); Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford University Press 2013); Hans Lindahl, 'Possibility, Actuality, Rupture: Constituent Power and the Ontology of Change' (2015) 22 Constellations 163 <http://onlinelibrary.wiley.com/doi/abs/10.1111/1467-8675.12154> accessed 22 November 2019).
[99] Christodoulidis (n 94) 6.
[100] ibid (emphasis in original).
[101] ibid 3.
[102] ibid 9 (emphasis in original).
[103] Bhandar (n 98).

interests of marginalised communities in mind. While Bhandar's article on legal rupture may seem at first sight to embody a return to the courthouse context, I would argue that she goes a step further than Christodoulidis. Bringing together both the colonial context in which the rupture defence was first put to use and the capitalist order that Christodoulidis[104] has in his sights, Bhandar suggests that strategies of rupture may also be adopted by judges. This seems inimical to the ruptural project. After all, judges are part of the institutional legal structure that a rupture defence seeks to undo. It is their legitimacy – both the legitimacy of their jurisdiction and of their authority to judge – that Vergès worked so hard to undermine in showing the hypocritical foundations of the legal order that the courtroom judge embodied. The suggestion that a judge's decision may be ruptural seems to "contaminate the radical nature of this form of immanent critique" as Bhandar herself recognises.[105] Nevertheless, Bhandar argues – successfully I believe – that the point of rupture within a legal order cannot be pre-ordained. If the pressure is too great, rupture becomes a possibility at any of the multiple sites of applied pressure. She discusses a case[106] in which Indian Supreme Court judges sided with marginalised Adivasi youths, their decision exposing a contradiction at the heart of the capitalist *and* postcolonial order in India: the state was condoning armed violence by Adivasi youths in order to contain Maoist/Naxalite revolutionary violence, itself a by-product of state policies of privatisation.

> In critiquing the violence of capitalist development imperatives pursued by the state, and the inhumane violence utilised by the state to counter its natural consequences (armed unrest), the Court re-invests concepts of liberty, life, and equality with political meaning that goes beyond their usual liberal interpellations.[107]

Questioning the very meaning given to legal concepts within a particular legal order is clearly ruptural in character.

I do have one qualm, however, with Bhandar's argument. It seems to me that the judges, rather than adopting a strategy of rupture, are in fact *responding* to an existing legal rupture. As I mentioned earlier, a rupture implies a breach or break in the membrane of a legal order. The leakiness that ensues requires a response, whether that response be framed in terms of replacement, repair, or rerouting. Whilst the judges' decision in this case clearly subverts state

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[104] cf Christodoulidis (n 94) 27.
[105] Bhandar (n 98) 70.
[106] *Nandini Sundar and Others v State of Chattisgarh*, 5 July 2011, Supreme Court of India.
[107] Bhandar (n 98) 76.

violence – disrupting the colonial and capitalist strictures of the existing legal order – and in this sense is *inevitable* (impossible to ignore), it is not *compelling* (necessitating action) or *transformative* (requiring transcendence of the "disturbed" legal framework). There is no leakiness here; the legal order is not left hanging. In this case, nothing further is required to overcome the contradiction exposed. On the contrary, the action demanded to contain the leak has already occurred. Briefly, the court ordered the State of Chattisgarh to stop arming SPOs[108] immediately; to desist from funding the recruitment of other vigilante groups; to recall all firearms issued to SPOs; to make arrangements to provide protection for previously appointed SPOs; to commit to filing 'First Information Reports'; and to ensure diligent prosecution for the crimes of SPOs.[109] Thus, the legal order again finds closure, just not perhaps the type of closure the state might have expected.

Make no mistake though, the judges were clearly well aware of the existence of ruptural leaks that needed tending to, at least partly thanks to the petition brought by the three petitioners. This was after all a petition for judicial review and not, as in the Vergès cases, a criminal prosecution. The court alludes in its judgment to a "virulent auto-immune reaction"[110] waiting to happen amongst Adivasi youths and envisions the possibility of these youths becoming "roving groups of armed men endangering the society, and the people in those areas as a third front".[111] It would seem then that the *transformation* demanded by a strategy of rupture or a ruptural event is no longer awaited… the "disturbed" framework has here been transcended (or at least patched for some time). While this may seem a detail of little import, making explicit the distinction between legal rupture itself and the response to legal rupture does help clarify three characteristics of legal rupture that I have not seen discussed elsewhere and which I consider helpful to set out in order to better understand the shift in focus that is encouraged here. I will discuss these characteristics at length in Defining legal rupture below. First though, I would like to give two examples of ruptural events that will serve as reference points when defining legal rupture in the discussion that follows.

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[108] SPOs or "Special Police Officers" was the name used in Chattisgarh (and incidentally under colonial rule too) to refer to tribal youths appointed and armed to carry out counter-insurgency activities, with full "police" powers but very limited training or oversight.
[109] *Nandini Sundar and Others v State of Chattisgarh*, 5 July 2011, Supreme Court of India, para 72.
[110] Bhandar (n 98) 76.
[111] *Nandini Sundar and Others v State of Chattisgarh*, 5 July 2011, Supreme Court of India, para 58.

Strategies of rupture in practice

This section presents two examples of ruptural events which will help to draw out the features of legal rupture beyond the courthouse. The first of these has very little to do with law at all. Instead, the purpose of this example is to help the reader get a feeling for the ruptural. Consider it a prop. It is designed to guide the reader through the feelings of the abject that are so common to the realm of the ruptural.

> *"Love is in the Bin"*
>
> *In 2018, Banksy pulled off an audacious art-stunt. One of his most famous works was due to be sold at Sotheby's. In his usual fashion, Banksy had framed the piece (Girl with Balloon) with an ornate gilded frame. The auction proceeded as normal with the artwork fetching the highest price yet for a Banksy piece – just over one million dollars. All seemed in order until the auctioneer's gavel came down. His enthusiastic "going… going… gone" was followed by a shrill alarm as the artwork self-shredded through the bottom of its frame. The shredder was part and parcel of the displayed art. Banksy immediately claimed ownership of the prank on his Instagram account, posting a photo of the moment which showed shocked telephone buyers next to the canvas under the title "going… going… gone".*
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> *In a video posted later on, a hooded individual was shown preparing the frame to house a shredder with the caption "in case it was ever put up for auction". The video showed a test run in which the piece shredded entirely, producing a pile of shredded strips on the floor beneath the frame. By a twist of fate, the shredder did not function exactly as it was supposed to and the artwork was only half-shredded: its top half remained framed and untouched, while the bottom half hang in limp tatters from the bottom of the frame.*
>
> *The staff at Sotheby's admitted to having been "Banksy'd". The buyer, too, was initially shocked, but chose a few days later to go ahead with the purchase and take home her tattered but unexpectedly "new" artwork. The Girl with Balloon is now entitled Love is in the Bin and is estimated to have doubled in value since the fateful day it was half-shredded.*

Banksy provides us here with a near-perfect non-legal example of what the ruptural strategy looks like in an everyday context. Through his stunt, the artist underlined the contradictions of a capitalist and bourgeois art-world, embodied by Sotheby's clients, who cherished his free-for-all street art but only insofar as they might own it. How would the Sotheby's world of art-owners react to the ruptural event? After all, the new owner had potentially just paid over a million dollars for an old frame with (almost) nothing in it. Had she bought a (new) work of art or had her work of art been destroyed on reception? What did it mean to hand over money (especially when she had just paid more than anyone had ever paid for a Banksy piece) for an object that had transformed during the transaction itself? A clash of meanings occurred between the capitalist "going, going, gone" of the auction hammer and the artistic "going, going, gone" of the painting itself as captured on Banksy's Instagram account. How to resolve

the paradox of an intimate world of Sotheby auctions where the wealthy compete for property and ownership, while out-of-sight/out-of-mind artists themselves have little say in this process and rarely benefit much (if at all) from such sales? This paradox is only heightened in Banksy's case where his public-oriented artwork which adorns the streets worldwide has become a prized private possession in a gilded frame. There is a sense in which he exposed the panic that ran through the Sotheby's cocktail party to his more usual public – using Instagram and his website this time rather than walls – bringing his art back to a place where it feels more at home.

The act of destruction was a way of expressing something previously deemed inexpressible: the aghast looks and the amazed smiles are concrete examples of the panic and exhilaration that are so often present in ruptural moments. There are no programmed responses in these situations, all those implicated are obliged to do their own soul-seeking to determine the appropriate reaction. People were left hanging, without answers: the buyer, the auctioneer, Sotheby's and the art-world more generally. After a week of negotiations, Sotheby's put out a statement declaring "Banksy has not destroyed a work of art, but has created one." The fact that the artwork could still be put on display surely contributed to this outcome. The end result might have been slightly less evident if the full canvas had been shredded… Would the buyer have been so willing to hang a pile of tangled shreds on her wall? Would she have accepted to pay over a million dollars for a piece that no longer hung together at all?

I appeal to Banksy's temerity in this instance simply to make the idea of a ruptural event more concrete to a readership not necessarily versed in criminal defence strategy. The Banksy anecdote shows the reach and the power of the ruptural model as a strategic move, but it also provides us with a number of keys to better decipher how ruptural events may play out in the everyday space of law, beyond the courthouse.

Ruptural events are not confined to the art world. What about rupture in a legal order? How might we imagine ruptural events in law? Christodoulidis provides an example of rupture beyond the most obvious legal context (ie the courthouse) when he describes the multi-sector strikes that took place across Chile, events that shook the Chilean legal order through their questioning of the boundaries of illegality. But we can take this idea much further if we consider, in addition, everyday legal spaces.

In a 2010 documentary called "Qu'ils reposent en révolte", Sylvain George produced an account of living conditions among immigrants (mostly men from North Africa and the Middle East) in France over a period of three years (2007–2010). The film is in black and white and

consists in a collection of video fragments that illustrate the everyday in the "Calais jungle" as it is known in France. Calais is a city and major ferry port on the north coast of France. The "Calais jungle" designates an area around the entrance to the Channel tunnel, officially known as the *Camp de la Lande*, where migrants congregated from the early 2000s while attempting to reach the UK. The numbers grew significantly during the European migrant crisis in 2015. Although estimates of the number of migrants differed, a Help Refugees census gave a figure of 8,143 people just before the refugees were evicted and the camp demolished by the French government in October 2016.

"Qu'ils reposent en révolte"

Image i: Shaved fingertips (screenshot from film Qu'ils reposent en révolte)

One of the most moving extracts from this film depicts the immigrants using a razor to disfigure their fingertips (see Image i above) and others using screws heated up in the fire to burn the ends of their fingers (see Image ii below). There is no commentary in the film. The evidence is just presented to the viewer accompanied by the immigrants' everyday chit-chat. The film depicts these acts, no doubt as they really happen, as everyday acts, carried out around the campfire with friends. The mutilated hands are displayed like artwork, with black and white close-ups depicting regularly patterned fingertips resembling mehndi hand paintings.

Image ii: Patterned fingertips (screenshot from film Qu'ils reposent en révolte)

The film presents us with a contradiction, an everyday legal contradiction this time. The immigrants, seemingly in good spirits, self-inflict a form of torture in order to ensure their most basic freedoms, the freedom of movement, a touchstone of the European Union project. The documentary emplaces us in a European democracy, in the 21st century, in which groups of individuals are choosing to self-harm to avoid being numbered and tracked like industrially farmed animals or slaves from another era.

How is this "event" ruptural? The immigrants "resist" the European legal regime of migrant management with which they are obliged to comply, but they choose a form of resistance that is neither reducible to, nor (easily) co-optable by, the existing legal order. The illegal immigrants use their bodies as resistance, not by opposing force, but by offering up illegible fingers to the EU's managerial plan to scan and catalogue all migrants transiting through their system. By self-mutilating, they render their existence illegible (and so untraceable) to the legal order. In the face of Eurodac (the EU immigration management system), the immigrants suggest through their actions an alternative order, one in which they are recognised as individuals who may freely travel where they desire, rather than illegal and depersonalised beings to be tracked and managed.

This ruptural event expresses the inexpressible without proposing a resolution. It is impossible to wrap one's head round the idea that sitting outside one's own door, there are illegal immigrants who have travelled thousands of kilometres to escape persecution and/or sustain their families, and who, on arrival, must continue that arduous journey on the streets of French cities, fleeing police checks, scavenging, self-mutilating, while they wait for their chance to cross the Channel. What does it mean to exist in the condition, testified to by one of the film's

plaintive voices, of "neither living, nor dying; not animal, not human". The viewer is left "hanging". Can a barbarous act simultaneously be an act of resistance? Can self-mutilation also be considered the ultimate gesture towards life?

The viewer is not the only one left hanging; the law, too, is "strung up" by this act of resistance. Eurodac establishes an EU asylum fingerprint database enabling Member States to compare the fingerprints of asylum applicants in order to see whether they have previously applied for asylum or entered the EU irregularly via another Member State. This makes it easier for EU countries to determine responsibility for examining an asylum application and to apply the rules on return of non-EU nationals. On the ground however another reality of law is developing: the law of the fingerprint-less. Those whose place in the legal system is to have no place have nonetheless refused to be corralled by EU directives. The "uncounted", as Rancière calls them, speak up as if they had a voice and as if that voice counted.

The documentary embodies two paradoxes then. The initial paradox is the idea of equating self-mutilation with freedom/self-determination, but this leads inevitably to a larger paradox. Insofar as the EU legal regime is incapable of "reading" self-mutilation as freedom, the legal regime itself is (temporarily) derailed by the migrants' action. This is the ruptural event. If EU immigration "management" is based on a mapping of legal obligations that require the traceability of fingertips, undoing this traceability serves to undo the legal regime's ability to "manage" migrants. This is what I meant by the idea of putting two incompatible legal orders in the same space (temporarily): they cannot both exist and both be legally effective at the same time, one is inevitably undone by the other. Accepting the rupture means accepting the end of EU immigration "management". Alternatively, the EU regime must "reconcile" the paradox by recoding immigration management such that fingertips are no longer the obligatory tracking tool (instead reverting to iris recognition for example).

Every legal order has its own strange or "monstrous" outside.[112] This is one of the central arguments of Lindahl's seminal work.[113] Against the widely endorsed assumption that we are now moving towards law without boundaries, Lindahl argues that boundaries[114] individuate

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[112] An outline of Lindahl's definition of the strange "outside" is provided in section 3 of this chapter.
[113] Lindahl, *Fault Lines of Globalization* (n 98).
[114] Lindahl's terminology can sometimes be confusing. He uses three terms (boundaries, limits and fault lines) to discuss how legal orders are partitioned. Importantly, the three terms are layered, rather than referring to three different things. *Boundaries* might be likened to Rancière's "partage du sensible" insofar as they divvy up the relevant "oughts" (behavioural oughts, spatial oughts, temporal oughts and role oughts) while also mapping a shared and relevant ordered inside (as opposed to the unordered and unorderable outside). Together these boundaried oughts are referred to as "ought-spaces". Boundaries

and thereby constitute any imaginable legal order. These boundaries order the "inside". They categorise behaviour, etc as legal/illegal and so determine the practical possibilities of the legal order. But boundaries are also points at which the "outside" may irrupt into a legal order, thereby revealing unrecognised practical possibilities. These irruptions are termed "a-legality" in Lindahl's work and are defined by the author as "strange behaviour and situations that, evoking another realm of practical possibilities, question the boundaries of (il)legality".[115] If we accept, as I do, Lindahl's description of this outside, we must acknowledge that this "outside" is not just an *inevitable* feature of any given legal order, it is also a *constitutive* feature of each legal order. Again, I insist on the fact that this monstrous outside need not be physically outside in any sense. I am not referring here to a foreign legal order – just another statist legal regime which more or less closely resembles our own – but the realm of the legally unordered and potentially unorderable at least insofar as the domestic legal order is concerned. This realm contains everything that remains illegible to a particular legal order: an understanding of land as a relation rather than as something that is owned for example. Burned-up fingertips are illegible to the legal regimes of EU member states; they belong to the realm of the out-of-sight/out-of-mind, the unimaginable. And yet the acts of these illegal immigrants render legible for a fleeting moment the impossible juxtaposition of the EU immigration directives and the immigrants' everyday conditions in the Calais jungle. The legal system teeters at times like these. It is this teetering that I refer to with the term "legal rupture": a point of rupture that has the potential to produce a gushing flow, but that may also, as is often the case, be quickly reconciled to the existing regime by a statist or capitalist intervention.

Ruptural events make visible the invisible hairline fractures that separate off the unrecognised or unordered (and, at times, unrecognisable or unorderable) practical possibilities from the point of view of one's own legal order. These hairline fractures that separate off "our" inside from the strange and unknown "outside" are for the most part unattended to.

In this section, I have tried to place the reader *in* two different ruptural contexts, thus providing a phenomenological account of what a ruptural event might feel like. Since the ruptural is inevitably an embodied experience, I felt it was important to take this detour through the experiential version of the ruptural event. This is insufficient though as an argument for a shift

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appear as *limits* when they expose the limiting nature of the ought-spaced inside. This generally happens when the as-yet-unordered outside appears, however furtively. Importantly, any boundary may become a limit. Limits appear as *fault lines* when the unorderable outside makes an appearance thereby revealing unrecognised and unrecognisable practical possibilities. This is what Lindahl calls a-legality.

[115] Lindahl, *Fault Lines of Globalization* (n 98) 3.

in perspective among critical legal theorists. I suggest we return to the theoretical genealogy of rupture presented in the first section and use the everyday examples of ruptural events outlined in this section to better clarify the contours of legal rupture.

Defining legal rupture

I suggested at the end of the first section that legal rupture proper should be distinguished from the legal-institutional *response* to legal rupture. As Christodoulidis made clear in his discussion of strategies of rupture, each ruptural event *requires* action in response. Just as the rupture of an aneurysm requires medical intervention, the rupture of a legal order at a particular pressure point requires a legal-institutional response. Distinguishing the ruptural event from the institutional reaction is helpful because it allows us to further specify the characteristics of legal rupture itself. In what follows, I will make four arguments that are intended to clarify and detail the concept of legal rupture. First, I propose three additional defining characteristics to complement those put forward by Christodoulidis (and set out above in Section 1). Second, I question the attachment in the literature to the term "*strategies* of rupture", arguing that, unlike strategy, ruptural events may not always be intentional. Third, I insist again on the potentiality of ruptural events, a potential that is at the end of the day determined not by the rupture itself, but by the response to that rupture. Thus the power of a ruptural event always lies beyond the event itself. And finally, I suggest that the power of the ruptural is not limited to this potentiality, but also to a little-studied latent characteristic: the capacity for contagion. It is not the event itself that undoes a legal order; it is the doors the ruptural event opens, the possibilities it renders visible, even if only temporarily.

To begin then, I would like to return to the three defining characteristics that Christodoulidis associates with immanent critique and therefore with strategies of rupture:

a) the contradiction or paradox embodied in the ruptural event cannot be ignored or displaced: it is *inevitable*;
b) the contradiction or paradox requires a response: it is *compelling*;
c) the overcoming of the contradiction or paradox "does not restore, but transcends, the 'disturbed' framework within which it arose": it is *transformative*.

We can now develop these characteristics further. The above characteristics do not speak to the fact that a ruptural event is by nature a *forceful* irruption. It *empowers* (temporarily) those who occupy a space beyond the legal order. In giving these outsiders a temporary voice, the ruptural event actualises practical possibilities that have no place in the legal order and

constrains (and thereby depletes, in some sense, the power of) the legal collective as a whole, which finds itself compelled to respond, whether the issue raised is a priority for the legal order or not.[116] Thus we can add:

d) the ruptural event is a *forceful* irruption of contradiction into the legal order which temporarily upsets the balance of power

This force is applied at a particular point in the legal order. An "outside" does not irrupt into the legal order as a monolithic "whole" – as a pre-formed sister order, for example, with its own collective goals and distribution of ought-spaces. No, an "outside" always appears at a specific pressure point or a particular hairline fracture. This is not to say that there can be no sister order behind ruptural events, but ruptural events are monomaniac, focused to the point of fault on a single issue, whether that takes the form of the actualisation of a (previously impossible) practical possibility or normative claim to actualise practical possibilities that are structurally impossible. We might say then that:

e) the force of a ruptural event is *focused* along a single line of fracture[117] that embodies the inside/outside dialectic by questioning the practical possibilities opened up (or shut down) by the legal order.

A further feature that bears mentioning is the unexpected nature of a rupture: the pressure applied to the membrane at a particular point becomes too great and results in a breach. This breach is not planned, nor is it perfectly foreseeable. After all, the legal order at hand cannot know pre-emptively what it has abandoned to the realm of the unordered outside. Thus it comes as a surprise to the legal order when ruptural events reveal as relevant and important practical possibilities that the legal order has previously ignored as irrelevant and unimportant. We can add this to the list:

f) the contradiction or paradox embodied in the ruptural event comes as a surprise: it is *unexpected*

Finally, I would like to come back to the idea that legal rupture is *transformative* (characteristic (c) above). Christodoulidis is quick to suggest that strategies of rupture inevitably produce transformation in the form of transcendence of the "disturbed" legal order. The Indian Supreme Court case presented by Bhandar and the outcome of Banksy's stunt show, I think, that a far

[116] This point is raised and discussed by ibid 16.
[117] Called "fault lines" by Lindahl, *Fault Lines of Globalization* (n 98).

more common outcome of legal rupture is transformation with a small 't'. Some change is inevitable at the point of rupture. But surprisingly often, the legal order that suffers a rupture intervenes quickly either to patch or to contain (and reroute around) the resulting leaks. There is nothing transcendental about this. The response seeks instead to render anew the disturbance, making it legible to the existing legal order. This may occur in the form of judicial orders, new laws or constitutional rearrangements, technical or jurisdictional adjustments, or simply by better ensuring the disturbance's removal from view. What is interesting about legal rupture is not the fact that it *ensures* dramatic transformation, but that it makes the *possibility* of such transformation visible, however briefly.

I would add here that the likelihood of judges producing transformation of the type Christodoulidis speaks of – that is, where the "overcoming of the contradiction does not restore, but transcends, the 'disturbed' framework within which it arose"[118] – is low. After all, the work of judges is to co-opt social problems such that they are legible within a given legal framework. It is hard to imagine (though not impossible) that a judge whose authority depends on a given legal order would actively choose to throw out the existing framework and propose a new one in its place. This would certainly be a ruptural event… but again, the ensuing transformation cannot be predetermined. (Although I would submit that the most likely "transformation" in such a case would be dismissal of the judge and a retrial.)

To recap then, a ruptural event embodies a contradiction or paradox which:

a) is *inevitable* (it cannot be ignored or displaced);
b) is *compelling* (it requires a response);
c) makes the *possibility* of dramatic legal transformation visible (at least temporarily);
d) *forcefully irrupts* into the legal order, temporarily upsetting the balance of power;
e) is *focused* along a single line of fracture (one that embodies the inside/outside dialectic by questioning the practical possibilities opened up or shut down by the legal order); and
f) is *unexpected* (it comes as a surprise).

The second point to be made in this discussion of the definition of legal rupture turns on the notion of "strategy". Christodoulidis is keen to advocate a voluntarist political-strategic approach to critical legal interventions. Given the "crushing force of homology" and the

[118] Christodoulidis (n 94) 6.

"mechanisms of deadlock"[119] which characterise the law, he argues that critical legal theory is wasting time on the potential of ethical interventions and of (what he terms) a "mystical" Derridean "excess"[120] to provide the impetus for serious transformation. As with Vergès before him, he argues that a ruptural approach has more strategic potential. He suggests that strategies of rupture can be played out "at level" (namely in the courthouse à la Vergès) or as "meta-level struggle".[121] He does not discuss in any detail what meta-level struggles "*against* the law"[122] might look like other than a quick mention of illegal multi-industry strikes in Chile. More revealing is a reference to Tully (whose term it is) and Tully's discussion of imperial situations where "hegemonic languages and corresponding practices of governance […] provide the horizons of the mode of disclosure of the present".[123] This injustice can only be redressed, says Tully, by taking politics to the meta-level.

I summarise these ideas only to point out that far from being strategic in an exclusively intentional sense (as was the case with the rupture defence put forward by Vergès), "strategies" of rupture may in fact be perfectly contingent—a spark set off by a fortuitous (or unlucky) encounter between a ray of sun and a piece of broken glass. Rupture is not reserved to the intentionally strategic interventions of lawyers or legal institutions.

The example of multi-industry strikes in Chile is a case in point. The incident began with a simple strike by miners working in Escondida, the world's largest copper mine, and spread like a contagious virus. The initial strike provoked further (illegal) sympathy strikes among forestry workers, urban workers and students, all protesting privatisation.

As was the case in Chile, rupture may result when the legal order is unable to render legible (or represent in terms comprehensible to the legal order) the public/private violence of Adivasi youths; when Sotheby's and its clients are unable to represent in terms comprehensible to the Sotheby's art market the "sale" of a shredded painting; when the EU is unable to represent in terms comprehensible to the EU immigration management system the mutilated fingertips of

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[119] ibid 20.
[120] ibid 19. As he says, "how long can the law limp along in this modality of lack while still holding the promise of responsiveness?" (ibid).
[121] ibid 25.
[122] ibid 24 (emphasis in original).
[123] James Tully, 'On Law, Democracy and Imperialism' in Emilios Christodoulidis and Stephen Tierney (eds), *Public Law and Politics: The Scope and Limits of Constitutionalism* (1st edn, Routledge 2008) <http://www.taylorfrancis.com/https://www-taylorfrancis-com.ezproxy.library.uvic.ca/chapters/edit/10.4324/9781315245669-13/law-democracy-imperialism-james-tully> accessed 27 March 2021; referred to in Christodoulidis (n 94) n 19.

migrants… It is for this reason that I prefer to talk of legal rupture in terms of ruptural events. These events may be intentionally staged, as was the case in Vergès theatrical appearances in court or Banksy's shredding of Girl with Balloon, but they may also result from a chain of events without being specifically planned as "strategic" legal interventions. What is common to these events, then, is not so much their strategically planned occurrence, but the fact that they result from friction between the law of one legal order and its legal "outside".

I use the term "outside" here in the very specific sense set out by Hans Lindahl in his 2013 book, *Fault Lines of Globalization*.[124] The Lindahlian legal "outside" is the part of a legal order that remains opaque to itself. Here the inside/outside distinction – so often used in legal theory to distinguish one legal order from its foreign neighbours – is productively "bastardised". The outside no longer simply refers to foreign legal orders. Instead, it refers specifically to the realm of the legally *unordered*, that is, the realm of practical possibilities that are internally unaccounted for and thus have not yet been legally mapped onto the legal order's own legal/illegal binary. Further, the outside may expose practical possibilities that are not just *unordered* within the existing legal order, but that are normatively *unorderable* by this specific legal order. In such cases, acknowledging what exists on the outside (ie responding to the ruptural event) is equivalent to stepping into another legal order, one that is not just foreign, but is fundamentally outlandish. This is the case of the meta-level struggles briefly referred to by Christodoulidis. In a meta-level ruptural event – which may take place in the courtroom or beyond – a normative claim is made that demands "the actualization of practical possibilities that are incompossible with the range of possibilities available to a collective as its own possibilities".[125]

How does this unordered (and potentially unorderable) outside come into play in the ruptural event? The inside is temporarily "occupied" by the outside during a ruptural event. With this occupation, the limit between the inside of the legal order and its opaque outside is punctured and the unordered spectre comes gushing into the legal order. This explains why such events

[124] Lindahl, *Fault Lines of Globalization* (n 98).
[125] ibid 161. A good example of this type of meta-level structural event is the well-known *Quebec Secession Reference* case heard by the Canadian Supreme Court: *Reference re. Secession of Quebec* [1998] 2 S.C.R. 217–297. The central question the Court was called on to consider in this reference was "whether Quebec has a right to unilateral secession" (§149). The Court rejected such a right, effectively suggesting that a putative "right to unilateral secession" was an oxymoron and that the province's claim embodied a performative contradiction.

are always tinged with a sense of urgency. The leakiness cannot be ignored too long lest further occupations of the unordered realm ensue.

A final point should be made here about the importance of the "response" to legal rupture. Since legal rupture directly questions the current drawing of limits between a legal order and its unordered outside and as such presents practical possibilities that may hover between the strictly illegal (on the legal inside) and the explicitly unrecognised in legal terms (on the legal outside), there are times when the response itself will undo the ruptural nature of the event. This could happen when, for example, a supposed ruptural event is immediately classified as illegal and, thus, re-embedded in the existing legal order as legally legible. If Vergès' clients had not been simply condemned to execution by the court (as they all were), but had actually been executed – that is, if public outcry had not swayed the government of the time – there would not have been a book to write on strategies of rupture years later. More often than not, as Vergès himself accepts, his clients were saved not by his arguments but by the play of circumstances that surrounded the case. As other lawyers have noted too, the type of defence engaged often depended not on legal strategy but on very practical issues (whether the client was a woman or a man, whether he or she was obviously guilty, how recently a rupture defence had been used, etc).[126] The power of a ruptural event is not to be found in the rupture itself… but in the leaks that ensue and the response to those leaks.

Conclusion: Why look to spaces of interlegality?

My aim in this chapter was to consider why a shift in focus from legal reform to legal rupture inevitably requires of us that we, as critical legal theorists, pay more attention to spaces of interlegality. (Once again, spaces of interlegality are where sister orders intersect.) I did not at the outset define or specify the contours of sister orders. This is a discussion for later chapters. Nevertheless, I believe that I have pointed to an intersection, one that is potentially productive for thinking about radical legal transformation. That intersection is between a legal order and its own strange "outside". So far, I have not referred to this unordered outside as a sister order, and for good reason. This is not because, as an unordered domain, it cannot be itself a legal order. To recall, the "outside" is unordered only in terms of the pertinent legal order. The unordered nature of the space for one legal regime has no incidence on whether the space

[126] Sylvie Thénault, 'Defending Algerian Nationalists in the Fight for Independence: The Issue of the "Rupture Strategy"' (2012) 240 Le Mouvement Social 121, 129 <https://www.cairn-int.info/article-E_LMS_240_0121--defending-algerian-nationalists-in-the.htm> accessed 13 April 2021.

contains practical possibilities that have been foreclosed by another sister order. Thus, insofar as the outside contains all the non-actualised practical possibilities (and thus also incompatible practical possibilities) for organising the mapping of social objects as legal objects, the outside can only be understood as a *multitude* of existing and potential sister orders.

We know now that the intersection referred to here is not of the overlapping sort—the type one encounters on the underground, with layers of underground lines lying above and below one another and commuters confined to one line at a time, with occasional crossings occurring only at hub-station intersections. Sister orders are fundamentally enmeshed in, and around, and with, other sister orders. They are entangled.[127] I do not cross between them at rare hubs, exiting one legal order to enter another. Instead, I navigate their interfaces all day, manoeuvring between the different legal orders I am a part of (eg the Sicilian mafia and the Italian state; my religious community and the secular state; my home traditions and my adoptive state; EU requirements and the local order; international indigenous protections and provincial orders, etc), but also trying out new orders and new unordered spaces. Occasionally, one of these interfaces shows up on the radar in the form of a ruptural event.

Returning to my initial question – What can law do? – it should now be clear that I argue for a shift in focus towards the borderlines. My claim is that the "law" which should retain our attention in the context we currently face is the law of legal borderlines. This argument may seem questionable at a time when state borders are increasingly irrelevant and when faced with ecological problems that are undeniably global in reach. Nevertheless, I do insist in this dissertation that, despite the growing irrelevance of state borders, the boundaries drawn up by disparate legal orders have never been so important. These boundaries are *internal* to a legal order: they shape the ought-spaces in which we navigate. Thus, the appeal to pay attention to legal borderlines is not an appeal to focus on the law of state borders; it is an appeal to look to the legal boundaries we are drawing with increasing fervour in and among our legal orders and which are collapsing with more and more desperate consequences each time a ruptural event disturbs their contours.

A ruptural event inevitably involves a legal order and its "outside" as I have tried to make clear in this chapter. The "outside" is composed of everything that is illegible to the pertinent legal

[127] This is the term preferred by Krisch over "interlegality" as it gets to the heart of the enmeshedness of different legal orders, see Krisch, 'Framing Entangled Legalities Beyond the State' (n 43); Krisch, 'Entangled Legalities in the Postnational Space' (n 43).

order. As a consequence, it includes all the parts of sister orders that do not map perfectly onto one's own legal order and all the sister orders that could potentially exist at some future time. Rupture then is always an *interlegal* event. The event concentrates friction between two legal orders (whether fully formed or fledgling orders) at a particular pressure point (ie the site of rupture happens where incompatible understandings of a particular concept or issue meet).

I noted at the outset the absence of scholarship in legal theory on the forces that cause radical shifts in the law. I found this gap surprising insofar as radical legal change is likely to have an important role to play in how we respond to global threats such as climate breakdown (and pandemics). This chapter has argued that ruptural events are likely to be central to law's capacity to maintain relevance in a context of climate breakdown. As a consequence, I suggest that legal theorists should be paying more attention to the spaces in which these events occur, namely the spaces of interlegality.

Chapter 2 — Distinctness: A map of sorts

> *A picture held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably.*
>
> — Ludwig Wittgenstein, Philosophical Investigations[128]

In the previous chapter, I began to formulate a response to the question "What can the law do?" by suggesting that we should focus on legal borderlines, where the boundaries of ought-spaces are at risk of collapse due to the forceful and unexpected irruption of contradiction that characterises a ruptural event. Having considered what friction at the borderlines might look like, I would now like to turn more specifically to the ingredients involved in such frictional encounters. This means returning to spaces of interlegality.

At the beginning of Chapter 1, I briefly noted that spaces of interlegality were to be found at the intersection of two (or more) legal orders. These are the terms employed by Santos himself. Since the focus in the first chapter was on the type of legal change that might be required in circumstances of ecological collapse, I passed rather quickly over what Santos meant precisely by interlegality. Yet it is not possible to conceptualise ruptural events without a better understanding of the ingredients of rupture. In this chapter then, we will return to the term interlegality, spelling out its assumptions and redefining where necessary the concepts Sousa relies on to buttress his "postmodern conception of law".[129]

Adoption of the term "inter*legality*" rather than "inter*law*" specifically suggests a shift away from law pure of the kind theorised by most analytical jurisprudence. But this shift is hardly made explicit in the literature. Indeed, among the authors who have engaged with the concept of interlegality, a recurrent criticism is that the notion of legality is underdeveloped or even ignored.[130] If we are to discuss legal borderlines, this gap needs to be faced head-on. The aim is to clarify what exactly we are looking for when we focus our attention on legal rupture in

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[128] Ludwig Wittgenstein, *Philosophical Investigations* (PMS Hacker and Joachim Schulte eds, GEM Anscombe, PMS Hacker and Joachim Schulte trs, 4th edn, John Wiley & Sons 2010) s 115.
[129] Santos (n 42) 296.
[130] Both Klabbers and Taekema in their responses to Krisch's 2022 article on "entangled legalities" (the term he employs to discuss interlegality) criticise his lack of engagement with the conception of law which underlies his theory: see Krisch, 'Entangled Legalities in the Postnational Space' (n 43); Jan Klabbers, 'Dystopian Legalities: A Reply to Nico Krisch' (2022) 20 International Journal of Constitutional Law 507 <https://doi.org/10.1093/icon/moac015> accessed 17 October 2022; Sanne Taekema, 'Navigating Law's Complexities: Concepts for Postnational Law—A Reply to Nico Krisch' (2022) 20 International Journal of Constitutional Law 514 <https://doi.org/10.1093/icon/moac016> accessed 17 October 2022.

spaces of interlegality. The first chapter answered this question in a suggestive, tentative fashion. In the following three chapters, I want to be more precise.

I suggest we start by acknowledging the assumptions that lie behind the adoption of the term "interlegality". To my mind there are three such assumptions that must be rendered explicit: first, the concept of "interlegality" assumes that there are a plurality of units, of existing "legal orders" that may (in some sense at least) be *distinguished*; second, the concept of "interlegality" assumes that these "legal orders" may be identified as *legal* in some sense and as such may be set apart from other normative orders (ie it actually aids our understanding of multiple normative orders to apply the term "legal" to a subset of them); third, the concept of interlegality assumes that it is possible, concretely, for two "legal orders" to *intersect*. Let us call these conceptual assumptions the problems of the "**distinctness**", "**legalness**" and "**intersectingness**" of legal orders.[131] A convincing theoretical account of legal rupture in spaces of interlegality needs to grapple with these questions.

In this chapter, I will be concentrating on the first of these assumptions: the "distinctness" of legal orders. More specifically: How does one distinguish one order from another? Where are the boundaries of legality? Where does the map of a legal order begin and end? The aim of the chapter will be to articulate the conceptual problem of "distinctness" and provide some suggestions as to how we might go about distinguishing legal orders from one another. It is hoped that this will later help us deal with the problem of the "intersectingness" of legal orders and so locate an intersection, "interlegality". I use Santos' metaphor of law as maps[132] as a starting point in this enquiry. But it is Kafka's parable "Before the Law"[133] that allows me to draw out the many possible "dramatisations" of the metaphor and so develop Santos' metaphor further. The discussion I engage in is likely to take us beyond the familiar territory of doctrinal law and jurisprudential accounts that focus on explaining the existence of doctrinal law. In this sense, part of the point of the chapter is to provoke a second shift in focus among legal theorists who want to take ecological collapse seriously. This second shift is away from our more traditional definitions of law and towards a broader, fundamentally pluralist and dynamic

[131] I should note here that while these assumptions remain in question, the term "legal order" itself references a unity that is definitionally suspect. In this sense, "legal order" should probably retain the quotation marks to insist on the fact that I am referring to a definitional black hole. I have chosen to drop the quotation marks to increase readability. Nonetheless, each time I refer to a legal order, I should be read as referring to a "legal order that yearns for some definitional clarity but as yet has none".
[132] Santos (n 42).
[133] Kafka (n 77) 3–4.

vision of legal orders as maps and legal ordering as maps-in-use. I close with a tribute to Hans Lindahl whose seminal book on legal "fault lines"[134] inspired so much of my thinking on this issue.

Santos' map as a starting point

In discussing maps as a "literal" metaphor for law,[135] Santos provides us with some clues as to his preference for the term (inter)legality. Two axes for discussion are developed in his article. First, he insists that law's relation to social reality parallels a map's relation to spatial reality: both distort the underlying reality in order to ensure that the tool (the law or the map) is "convenient to use".[136] By "convenient to use", he means that the map is able to serve its purpose, whether that be to identify one's position in space or to orient one's movement in space. Second, to ensure convenience, Santos suggests that maps play with scale, projection and symbolisation. Maps choose a particular scale and thus determine the boundaries of the space represented and the detail that can be included. Maps choose to centre a particular part of spatial reality and decentralise other spaces, creating a centre and a periphery. Maps use codes or a legend to facilitate readability. These codes order the spatial reality that is being represented. They highlight certain features of the represented spatial reality and concurrently invisibilise other features so that the map remains readable.

Law does all of these things too. Law represents (or distorts) social reality at different scales: local legalities are, according to Santos, detailed legalities: the scale adopted is large. State legalities on the contrary must, by necessity, pull back from the detail: the scale used is much smaller. Law represents social reality with different centres, prioritising different aspects of social reality and paying less attention to others. And finally, the law codifies social reality into an ordered and legible whole. Certain behaviour is coded as (il)legal.[137] These codes have the

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[134] Lindahl, *Fault Lines of Globalization* (n 98).
[135] Santos (n 42) 282.
[136] ibid 283.
[137] This coding as legal or illegal ("diverse communicative processes that observe social action under the binary code of legal/illegal") is precisely the aspect emphasised by Teubner in his autopoietic theory of law (see further, Gunther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism Closed Systems and Open Justice: The Legal Sociology of Niklas Luhmann' (1991) 13 Cardozo Law Review 1443 <https://heinonline.org/HOL/P?h=hein.journals/cdozo13&i=1465> accessed 3 November 2022). Though Lindahl does not rely on communicative processes to code the legal and the illegal, a similar type of coding is adopted in his "fault-lines" theory. He refers to legal "boundaries" which sketch out a distribution of ought-spaces, distinguishing the legal from the illegal. These boundaries are spatial, temporal, subject- and content-specific and thus come much closer both to Valverde's "chronotopes" and to Rancière's "distribution of the sensible", though neither are mentioned by Lindahl (see further, Lindahl, *Fault Lines of Globalization* (n 98); Paul Bowman and Richard Stamp, 'Introduction: A Critical

potential to apply to realms beyond the social reality they currently represent. But they also have their limits. In coding a social reality, some features are inevitably left out as irrelevant, whether because no one has thought yet to codify them using the current coding or because they are so "strange" as to be uncodifiable using the coding of the current map. These social realities represent the "outside" of any given legal map.

Santos' map metaphor is an extremely productive starting point. Though not, I would argue, for the reasons Santos appealed to. Santos is no doubt right to suggest that, similar to maps, law uses scale, projection and symbolisation to represent a particular social reality. Where I feel his account becomes more questionable is in tying particular scales, particular projections and particular symbolisations to particular types of law (namely infra-state law, state law, and supra-state law), as if each of these legalities could be defined by the type of map or representational strategies adopted. In an attempt to broaden the scope of law, his categorising (small vs. large scales; economic vs socio-political projections; Homeric vs biblical symbolisation) shuts down practical possibilities in each of the legalities he describes. In particular, it seems clear now that the small (undetailed) vs. large (detailed) scale do not map clearly onto national vs. "local legalities" as he suggested, since national legalities may, in certain areas, legislate down to the minutest details while "local legalities" may have a more general narrative that must be adapted to the concrete circumstances of a case. Further, the reductionist view of legalities as either infra-state, national, or supra-state overlooks a large number of legalities that proliferate today. The term "local legalities", for example, seems to exclude from view *networks* of local legalities which may become global in reach[138] and very issue-specific legalities at the global level (for example, transnational *lex sportiva*)[139] which despite their global reach can have very localised application. It is perhaps more productive to consider representational choices as available to each legality and the particular map as resulting from the distribution of representational strategies adopted.

Dissensus' in Paul Bowman and Richard Stamp (eds), *Reading Rancière: Critical Dissensus* (Continuum 2011); Valverde (n 53)).

[138] See, in particular, Saskia Sassen's discussion of "networks of places" in Saskia Sassen, *A Sociology of Globalization* (WW Norton 2007) 13.

[139] Antoine Duval, 'Seamstress of Transnational Law: How the Court of Arbitration for Sport Weaves the *Lex Sportiva*' in Nico Krisch (ed), *Entangled Legalities Beyond the State* (Cambridge University Press 2021) <https://www.cambridge.org/core/books/entangled-legalities-beyond-the-state/04306155350E1A8D300AFFABF4A3A58A> accessed 17 October 2022.

Before the map

This is not to say that the map-as-law analogy is unhelpful. But to see how it may help us understand the concept of legality, we may need to go further than references to geographical mapping techniques. In order to press the analogy a little, I would like to take a detour via Kafka's parable "Before the Law". Though Kafka nowhere mentions maps, he does provide us with a map of sorts to navigate the various theories of law that are currently available to us. And I believe that by using Kafka's vision of the law, we may be able to tease out the real potential of the map analogy to help us understand legality. The parable is short and worth setting out in full.

> BEFORE THE LAW stands a doorkeeper on guard. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. "It is possible," says the doorkeeper, "but not at the moment." Since the gate stands open, as usual, and the doorkeeper steps to one side, the man stoops to peer through the gateway into the interior. Observing that, the doorkeeper laughs and says: "If you are so drawn to it, just try to go in despite my veto. But take note: I am powerful. And I am only the least of the doorkeepers. From hall to hall there is one doorkeeper after another, each more powerful than the last. The third doorkeeper is already so terrible that even I cannot bear to look at him." These are difficulties the man from the country has not expected; the Law, he thinks, should surely be accessible at all times and to everyone, but as he now takes a closer look at the doorkeeper in his fur coat, with his big sharp nose and long, thin, black Tartar beard, he decides that it is better to wait until he gets permission to enter. The doorkeeper gives him a stool and lets him sit down at one side of the door. There he sits for days and years. He makes many attempts to be admitted, and wearies the doorkeeper by his importunity. The doorkeeper frequently has little interviews with him, asking him questions about his home and many other things, but the questions are put indifferently, as great lords put them, and always finish with the statement that he cannot be let in yet. The man, who has furnished himself with many things for his journey, sacrifices all he has, however valuable, to bribe the doorkeeper. The doorkeeper accepts everything, but always with the remark: "I am only taking it to keep you from thinking you have omitted anything." During these many years the man fixes his attention almost continuously on the doorkeeper. He forgets the other doorkeepers, and this first one seems to him the sole obstacle preventing access to the Law. He curses his bad luck, in his early years boldly and loudly; later, as he grows old, he only grumbles to himself. He becomes childish, and since in his yearlong contemplation of the doorkeeper he has come to know

> even the fleas in his fur collar, he begs the fleas as well to help him and to change the doorkeeper's mind. At length his eyesight begins to fail, and he does not know whether the world is really darker or whether his eyes are only deceiving him. Yet in his darkness, he is now aware of a radiance that streams inextinguishably from the gateway of the Law. Now he has not very long to live. Before he dies, all his experiences in these long years gather themselves in his head to one point, a question he has not yet asked the doorkeeper. He waves him nearer, since he can no longer raise his stiffening body. The doorkeeper has to bend low towards him, for the difference in height between them has altered much to the man's disadvantage. "What do you want to know now?" asks the doorkeeper; "you are insatiable." "Everyone strives to reach the Law," says the man, "so how does it happen that for all these many years no one but myself has ever begged for admittance?" The doorkeeper recognizes that the man has reached his end, and to let his failing senses catch the words, roars in his ear: "No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it."[140]

Let us start with the title, "Before the Law". As with the entire parable, even the title presents us with an intractable enigma. "Before the Law" might mean to come before the authoritative institutions of the law, to stand before the law and be judged. But, more cryptically perhaps, "Before the Law" might also refer to the origins of the law, to the time before law existed, to the space where there is no map, no law to speak of. Kafka's parable performs its "story" of the law into existence. Just like the man from the country, we find ourselves "Before" this text, waiting for authoritative judgment, waiting to gain access to the meaning the text should contain… And finding ourselves instead in a no-man's-land of absent meaning, "Before" (as in prior to) the emergence of a text and of meaning. There is no map in Kafka's story. Literally. As Derrida says, the story is "ultimately ungraspable, incomprehensible […] essentially unreadab[le]".[141] The man from the country comes looking for a sort of map, a way to access the law, to position and orient himself. And he finds none. We, too, come looking for a sort of map, a way to access the meaning of the text. And we find none. Or perhaps, more truthfully, we find so many potential meanings in competition that the author's point seems beyond us.

I would like to suggest that Kafka's parable nevertheless provides us with a map of sorts. His map renders palpable some aspects of theorising about the law that are particularly important. These characteristics become visible by adopting different positions in the text.

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[140] Kafka (n 77).
[141] Jacques Derrida, 'Before the Law' in Derek Attridge (ed), *Acts of Literature* (Routledge 1992) 211.

Let us start with the position of the man from the country who comes seeking access to the law. In one sense, he could be likened to a legal theorist seeking access (in the form of understanding) to the meaning of the law. As the parable progresses, the man from the country becomes older and more and more decrepit. His decrepitude is expressed in physical terms: first he loses movement (he spends "days and years" on his stool), then he loses speech (once incessant "requests" become self-directed mumblings), his sight, and finally his hearing. In a sense, our legal theorist is gradually disembodied. This physical denouement mirrors an intellectual denouement. While the man from the country deteriorates into old age, he does not become any wiser, regressing instead to the status of a "child". He comes with some very clear ideas about what he expects to find in terms of "law" (accessibility at a minimum). He holds on to these expectations for some time before begrudgingly accepting that access to the law is not quite what he expected: the obstacles seem increasingly insurmountable. In the end, he effectively lets go of any and all expectations – other than the expectation that others must surely be searching like him – and regresses to the intellectually childlike state of innocence and superstition ("he curses his luck" and "begs the fleas as well to help him"). Darkness descends in the parable, cloaking his mind as well as his vision. The only remaining light (a "radiance that streams inextinguishably from the gateway of the Law") is blinding rather than illuminating.

It does not seem that far-fetched to interpret this disembodiment and intellectual regression as a metaphor for legal positivism, or perhaps for legal positivism's undoing. Kafka places the man from the country before law as command (the legal positivist's position *par excellence*). The man seems, at first, to be relatively unimpressed by the law's edifice. He stoops to look through the gateway and what he sees (or cannot see) has no noticeable impact on his attitude. He is forthright and persistent in his requests to enter. The "gatekeeper", presumably a legal official, says that entry is "possible" but that he cannot grant him entry, at least for the time being. The gateway is open, the gatekeeper does not physically block the passage, yet the country man awaits permission. Time passes.

The man from the country appears to be under the thrall of the gatekeeper's authority (which grows as the country man shrinks) despite the fact that this authority seems tenuous at best. The source of the actual prohibition is hidden from view, invisible, impalpable, an abstract concept. It is represented by a series of open doors and successive halls, all guarded by increasingly "powerful" and fear-provoking gatekeepers. As far as we know, these may all just be figments of the imagination. In any case, these gatekeepers are perfectly unnecessary; the

man from the country never gets past observation of the first of them. The law then is presented as a mirage, a potentially monumental and awe-inspiring edifice which remains abstract and impalpable.

The man from the country, or the legal subject, is made inert by this unfathomable abstraction that is authority. Indeed he is progressively erased from the picture. The gatekeeper and his abstract authority come to fill the frame entirely, both physically through his size, visually through the "great radiance" of the light streaming from the doorway, and sonorously through the gatekeeper's final "roar". The command and the legal officials who execute these commands live on indefinitely, while the legal subject disappears. I will refer to this positivist image of law as **law-by-design**. This is one plausible version of a top-down[142] normativist[143] theory of law: law is embodied in norms, that emanate from an abstract central edifice (eg the rule of recognition) and are applied to a distinctly absent or erased set of legal subjects. Only the legal officials, or gatekeepers, who exist to enforce the law have an embodied role to play

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[142] Top-down images of law tend to "presuppose a formalized, institutional, definitional criterion for law that is located in State action (centralism)[;] […] conceive of law in terms of systems of normative ordering that have impermeable territorial and intellectual boundaries (positivism)[; and] […] posit a singular distinction between law and society as if one were measuring the relationship of two (and only two) separate commensurables (monism)" (Martha-Marie Kleinhans and Roderick A Macdonald, 'What Is a Critical Legal Pluralism?' (1997) 12 Canadian Journal of Law and Society 25, 29 <https://www.cambridge.org/core/journals/canadian-journal-of-law-and-society-la-revue-canadienne-droit-et-societe/article/abs/what-is-a-critical-legal-pluralism/A950AEEF6DC5EB17B2E48CB67593E947#> accessed 18 February 2023).

[143] I use the term "normativist" theory following Tschorne (Samuel I Tschorne, 'What Is in a Word? The Legal Order and the Turn from "Norms" to "Institutions" in Legal Thought' (2020) 11 Jurisprudence 114, 115 <https://doi.org/10.1080/20403313.2019.1699321> accessed 7 November 2022) to refer to images of law that describe law *primarily* as a product of norms. These theories of law have also been described as "chirographic" (see Roderick A Macdonald, 'Custom Made—For a Non-Chirographic Critical Legal Pluralism' (2011) 26 Canadian Journal of Law and Society 301, n 1: <https://www.cambridge.org/core/journals/canadian-journal-of-law-and-society-la-revue-canadienne-droit-et-societe/article/custom-madefor-a-nonchirographic-critical-legal-pluralism/15171EE3D3AFAEEE712DC9D24B877E6C> accessed 18 February 2023 "any approach to legal theory that holds that law is primarily (if not exclusively) about norms (policies, principles, rules, concepts) that can be, and usually are, fully expressible in written words arranged discursively") and the term is perhaps more appropriate, since undoubtedly norms emanate from all sorts of social fields and are not limited to those produced by an "abstract central edifice". These theories are contrasted with institutional theories that take the institution to be of primary importance even in the absence of what we might describe as norms and enforcement of those norms. This should not be read as implying that there is no institutional element to normativist theories (as MacCormick's normativist theory of "institutional normative order" makes clear). Normativist theories simply take up a position in which norms come first and institutions are secondary, existing only to enforce the original norms. Examples of true institutional theories can be found in the work of Hariou, Romano and the later work of Schmitt (who was inspired by both Hariou and Romano) (see further Éric Millard, 'Hauriou Et La Théorie de l'institution' (1995) 30 Droit et Société 381 <https://www.persee.fr/doc/dreso_0769-3362_1995_num_30_1_1343> accessed 5 January 2023; Romano (n 91); Carl Schmitt, *On the Three Types of Juristic Thought* (Praeger Publishers 2004)).

in this version of the law. This image highlights the power of the positivist paradigm and at the same time is suggestive of its undoing.

One of the reasons for its undoing in the modern context is suggested by Kafka's tale itself. In its representation of law as a transcendental, abstract edifice to be accessed, we cannot help but liken this image to religious visions of God as the final authority and accessing heaven as the ultimate goal. But the upshot of this representation is striking. As a result of the pedestalisation of law, the law that actually happens on the ground (Before the pedestal) is emptied of content, it becomes absurd. So the act of putting one aspect of the law – in this instance, its state-like qualities – on a pedestal is also questioned.

The positivist image of law-by-design might be compared to an outdated map that has become disconnected from the underlying physical reality. While all maps distort the physical reality they wish to represent, there comes a point where the distortion is so incongruous that the map no longer serves its purpose. In this particular case, the incongruity of the map is a consequence of the central position given to state law and state institutions or gatekeepers. The abstract central edifice is beset by the "ideology of legal centralism",[144] as Griffiths calls it, according to which "law is and should be the law of the state".[145] In theories espousing legal centralism, all other forms of normative ordering are considered subordinate to state law and are only "made" law through formal recognition by the state. Indeed even when alternative orderings are labelled as law, they tend to derive their legal validity from their state-like qualities,[146] with state-law remaining the principal and paradigmatic form of law. In a time of globalisation, regionalisation and localisation of law, it is hard to square this image of law with the many laws of *lex mercatoria*, *lex sportiva*, the European Union, religious communities, indigenous nations, and globalised metropolises.

This image of law-by-design is further undone by its reliance on an inert populace. It suggests that the edifice transcends legal subjects, that what is important is the rule and enforcement of the rule, both handed down by centralised institutions. This approach fails to acknowledge that,

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[144] John Griffiths, 'What Is Legal Pluralism?' (1986) 18 The Journal of Legal Pluralism and Unofficial Law 1, 1 <https://doi.org/10.1080/07329113.1986.10756387> accessed 30 October 2022.
[145] ibid 3.
[146] As is the case, for example, in MacCormick's "institutional normative order" theory of law. While he suggests in his work that his theory achieves a detachment from the state context (Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford University Press 1999) v), in his later definitive account, he admits "I make no apology for giving priority to expounding a theory about law in its state and state-like contexts" (Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press 2008) 2).

in many situations, the legal subject is both the initiator of law – the source of "jurisgenesis" whether through private agreements, lobbying, activism, or self-rule – and the purveyor of law, seeing to law's application through his or her everyday activities and in so doing regularly "pruning" the law to suit his or her needs. Indeed sometimes, particularly in the global setting, there are no centralised rules or institutions at all, but just a diffuse network of legal subjects (not necessarily states) working things out as they go along.

Perhaps we have not yet exhausted the possibilities of Kafka's parable? While the law is given abstract form in the metaphor of successive doors, successive halls and successive gatekeepers, reaching back to the original (but legally inexplicable) rule of recognition, Kafka chooses to foreground something else. The man from the country "stoops to peer" through the first door, a quick glance in the direction of an invisible abstraction, but from this point on his observations are focused entirely on the other human being in the story, a living man whose non-abstractness is brought home by the fleas living in the collar of his fur coat! By foregrounding the relationship between these two men, Kafka brings us back to the "living law".[147] The narrator describes how the man from the country "forgets the other doorkeepers". He contemplates only the first of them and considers this man to be "the sole obstacle preventing access to the Law". Their interaction forces us to focus on the frame of reference that they co-construct and which enables them to read each other's behaviour and adapt their own behaviour accordingly. Indeed they adapt their own statures accordingly! The man from the country who once had to stoop to peer into the little doorway is now towered over by the gatekeeper.

Their social interactions are limited, cordial and mundane, but they are also central to the tale. The gatekeeper provides a stool and frequently questions the man from the country about his homeland. He keeps a hope of sorts alive for the man from the country by leaving doors open: the "not yet"-ness of his injunction postpones indefinitely the moment of access to legal meaning. The man from the country tries polite but persistent requests (he "wearies the

[147] I use Ehrlich's term "living law" as a place marker to refer to the theory of law often genealogically linked to the work of Malinowski (Bronislaw Malinowski and Russell Smith, *Crime and Custom in Savage Society* (Routledge 2017)) and Ehrlich (Eugen Ehrlich, 'The Sociology of Law' (1922) 36 Harvard Law Review 130 <http://www.jstor.org/stable/1329737> accessed 15 November 2022; Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Walter L Moll tr, Taylor & Francis 2002)), but that in fact had many sources (eg Gierke and Tonnies among others; see further Brian Z Tamanaha, 'A Vision of Social-Legal Change: Rescuing Ehrlich from "Living Law"' (2011) 36 Law & Social Inquiry 297 <http://onlinelibrary.wiley.com/doi/abs/10.1111/j.1747-4469.2010.01232.x> accessed 19 August 2022) and which lives on today among a number of legal pluralists (see, in particular, Griffiths (n 144)).

doorkeeper with his importunity"), then bribery (giving over his life's possessions in order to try and influence the gatekeeper's behaviour in his favour), then superstition. He decides to respect the gatekeeper's prohibition based on physical markers ("his fur coat, […] his big sharp nose and long, thin, black Tartar beard") that seem to embody power and authority for him. Their interactions produce (or confirm) a common language (composed of questions and open-ended answers, bribes and reassurances, small talk, physical signals, and domination). The two men share a phenomenological "world".

It is also worth noting that the long wait is absurd from the reader's point of view, much like that of Vladimir and Estragon in Beckett's *Waiting for Godot.*[148] The outcome too is the same: the man from the country never gains access and Godot never turns up. Waiting proves futile. But time passes nevertheless and the entire narrative is spent concentrated on this drawn-out-time, a lifetime in fact, the time without access, the time "Before the Law". Can Kafka be read then as suggesting the absurdity of an exclusive preoccupation with the access question? That one does not perhaps "access" law (in the sense of accessing knowledge or understanding), so much as live and breathe and relate through the law for the span of a lifetime? That the law is *alive* as Ehrlich would say.[149] Is this foregrounded relationship not a second metaphor for law in action? A suggestion that the law outside (or Before?) the official edifice requires our attention, that "the great mass of law arises immediately in society itself in the form of a spontaneous ordering of social relations".[150] Institutionalised norm enforcement then, as represented by the gated edifice, is secondary; indeed it is perhaps (as in this parable) unnecessary.[151]

Whether secondary or entirely unnecessary, the enforcement of the law by powerful officials is only the tip of the iceberg where law is concerned. Mostly, we are just average country or flea-infested city folk, going about our daily lives in interaction with others, and largely respecting the line (drawn at that open door) that separates legality or normality (in the form of our daily activities) from illegality or deviance. Nobody actively prevents us from crossing

[148] Samuel Beckett, *Waiting for Godot* (Grove Press / Atlantic Monthly Press 2011).
[149] See Tamanaha (n 147).
[150] Ehrlich, 'The Sociology of Law' (n 147) 136.
[151] Both Ehrlich and Malinowski were adamant that institutionalised norm enforcement was *not* essential to law. That the social ordering itself was sufficient. This left them both open to the objection that their conceptions were unable to distinguish law from non-law.

that line. But most of the time we choose not to, we choose to leave the crossing for some other time. As a consequence, law rarely becomes "obtrusive".[152] As Lindahl states:

> Legal ordering is already at work in the myriad legal acts whereby individuals are practically involved with things and with others. […] In fact, those mundane forms of practical involvement with others and things make up the bulk of legal ordering, even though the ordering that takes place therein usually remains largely implicit and veiled to the participants.[153]

This is "the ordinary course of a legal practice" when "what agents do and what they ought to do run over into each other; only when the point of the act becomes problematic do 'ought' and 'is' fall apart".[154]

Here then, 'ought' and 'is' coincide; there is no falling apart. The country man refrains from crossing that line, but so too does the gatekeeper. They both sit to one side of the doorway, as if the "gatekeeping" has been taken up not just by the gatekeeper, but also by the newcomer. They join forces in a sense: both respect the line, both await a possibility of non-deviant deviance that never materialises. If we consider Kafka's parable from this point of view, with our focus on the foregrounded protagonists, we come to see law, as Fuller defined it, as a "language of interaction" that leads to the "stabilization of interactional expectancies", often without these being consciously processed.[155] Like language, the law remains implicit and veiled to those participating in the legal order, unless and until strange vocabulary is introduced or a strange grammatical construction is produced. I will refer to this pluralist image of law as **law-as-interactional-practice**.

There is much to commend such a conception of law. First, it accepts at face value the fact that law is part of our mundane everyday lives and is not just an abstract construct applied by legal officials that make up an official edifice. Much of the "law" that provides structure to our daily

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[152] As Lindahl notes, law only becomes "obtrusive" when behaviour *breaches* legal norms, when the distribution of ought-spaces that makes up a legal order is ignored or transgressed. "Succinctly, the interruption wrought by illegal behaviour has the effect of making legal order manifest *as* legal order." (see Lindahl, *Fault Lines of Globalization* (n 98) 28 (Lindahl's emphasis)).
[153] ibid 128.
[154] ibid.
[155] Lon L Fuller, 'Human Interaction and the Law' (1969) 14 The American Journal of Jurisprudence 1, 2, 9 <https://doi.org/10.1093/ajj/14.1.1> accessed 17 October 2022. "Our conduct toward others, and our interpretations of their behavior toward us, are, in other words, constantly shaped by standards that do not enter consciously into our thought processes." (ibid 9).

lives in our interactions with others is built in this way, through daily interactional practices, from the ground up. As Fuller says:

> To interact meaningfully men require a social setting in which the moves of the participating players will fall generally within some predictable pattern. To engage in effective social behavior men need the support of intermeshing anticipations that will let them know what their opposite numbers will do, or that will at least enable them to gauge the general scope of the repertory from which responses to their actions will be drawn.[156]

Second, this type of approach has far fewer difficulties coming to grips with private forms of law (such as *lex mercatoria*) and customary law, both of which were adamantly refused the label "law" for a long time before finally gaining acceptance as "law" in the legal literature.[157] It accepts, too, that the sovereign vision of "juridical law" described by Foucault and embodied in positivist legal theories was perhaps a pure product of its time (exemplified by the so-called Westphalian system).[158] It may then be less apt to describe periods before this type of law (when state sovereignty was less endemic) and also periods after this type of law (during which state sovereignty has been compromised from above and below).[159] Insofar as this conception of law recognises diverse sources of law – whether they be indigenous, religious, private, supranational, or networked – we have here a version of legal pluralism at its most fulsome.

Finally, this type of approach escapes the legal centralism critique. State law is not taken as the standard for defining all other types of law, nor is it taken as the ultimate legitimator of "inferior" types of law. This kind of definition suggests that non-state law can and does emerge without the need to be conceptually or functionally equivalent to state law. Further, it may empirically exist as law without the need to be validated or recognised as such by state law.

Here though, we run into problems of a different order. First, those who wish to access the law-as-interactional-practice cannot distinguish legal orders from normative orders more generally. The folly of legal centralism is replaced by the "folly of […] legal pluralism", as Tamanaha

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[156] ibid 2.
[157] See the discussion of the literature on *lex mercatoria* in Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in Gunther Teubner (ed), *Global law without a state* (Dartmouth 1997).
[158] Although it is worth noting that the Westphalian system, as it is called, is not as ruptural or distinct as some would like to make out, either with regard to a patchwork "feudal" past or a networked "cosmopolitan" present/future (see eg Michael Hardt and Antonio Negri, *Empire* (Harvard University Press 2001); see further Bob Jessop, *The State: Past, Present, Future* (Polity 2016) 32).
[159] Jessop(n 158).

calls it:[160] a slippery slope for law and one that has been raised time and again. In the 5th century, Augustine wondered how the law of a kingdom might be distinguished from that of a band of thieves.[161] More recently, Cotterrell has insisted that law must be distinguishable from the rules of a game of sport. Once we have accepted as "legal" these "looser assemblages of norms and normative practices",[162] the defining features of law itself, its "legalness", seem to slip away from us. As Teubner has observed, it "has proved hopeless to search for a criterion delineating social norms from legal norms".[163] Klabbers refers to this slippage in which the legalness of an ordering seems to fade from view as a "dystopian" vision of law, suggesting that in the slip towards looser forms of legality, we are engaging in a slip away from the rule of law.[164] Symptomatic of this slippage is the fact that Griffiths himself – a forthright proponent of law-as-institutional-practice – retracted on his initial position and now prefers to refer to normative pluralism rather than legal pluralism.[165]

Second, defining the "assemblage" or the newly conceptualised "legal order" – determining whether and, if so, how one legal order can be sectioned off from another – becomes an increasingly arduous task. If law is primarily a bottom-up phenomenon, developing through the gradual reification of concrete practices, how does one determine where one legal order ends and another begins? And further, in defining law more broadly, are we not simultaneously running the risk of turning everything into apples and so flattening the scope of analysis? How can we continue to engage with questions of power imbalances and unequal legal resources when everyone is supposedly participating in jurisgenesis?

Is there anything more in Kafka's parable that might help us deal with the two problems raised here? A final meta-metaphor is discernible in the parable; one that is, in a sense, pointed out

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[160] As Tamanaha says, "Why 'legal' pluralism rather than 'normative' pluralism or 'rule system' pluralism?" (Brian Z Tamanaha, 'The Folly of the 'Social Scientific' Concept of Legal Pluralism' (1993) 20 Journal of Law and Society 192, 199 <http://www.jstor.org/stable/1410167> accessed 5 January 2023).
[161] "The robber-band too is a body of men ruled by the command of a leader, bound by a compact of alliance, its booty allotted according to agreed law." (PG Walsh (ed), *Augustine: De Civitate Dei (The City of God): Books III and IV* (Liverpool University Press 2007) 115 <http://www.jstor.org/stable/j.ctv1198tcj> accessed 28 November 2022).
[162] Krisch, 'Entangled Legalities in the Postnational Space' (n 43) n 1.
[163] Teubner (n 157) 13.
[164] "[N]o one is in control, and where no one is in control, no one can be held to account" (Klabbers (n 130) 512).
[165] As he states in a more recent publication, "In the intervening years, further reflection on the concept of law has led me to the conclusion that the word 'law' could be better abandoned altogether for the purposes of theory formation in sociology of law […] It also follows from the above considerations that the expression 'legal pluralism' can and should be reconceptualized as 'normative pluralism' or 'pluralism in social control'" (Griffiths (n 45) 63–64).

by Derrida. The text takes us on a journey to discover its meaning, the same journey that the man from the country embarks on in order to discover the law. What we find, as noted above, are multiple meanings, multiple metaphors, that do not provide closure but leave us hanging. There is no one dominant or conclusive meaning to be garnered from the story. And nor is there one dominant or conclusive understanding of law that comes to the forefront. Instead we are left with a kaleidoscopic collage: our interpretations of what law might mean vary depending on the standpoint we adopt and one of these standpoints is that of the narrator, who goes out of his way in this parable to ensure that we do not reach firm ground.

But this too corresponds to a definitional posture towards law. Here, the definition of law presented comes close Tamanaha's position,[166] that is, the idea that there is no essentialist definition of law that does justice to the multiple legal forms that exist. Tamanaha suggests that law is a "thoroughly cultural concept".[167] As a result, he settles for an understanding of law as whatever people refer to as law. It depends then on the perspective adopted. This conventionalist image of law might be described as **law-as-the-narrator's-prerogative**. It embodies absolute perspectivism. It also leaves the narrator (or legal theorist) in a position of significant power. The narrator is in a position to write a perspective into a text or leave it out entirely; the legal theorist, likewise, is in a position to "see" law where others might not or to "not see" law where others might see it, based entirely on the legal officials or users he/she interacts with.

This is certainly a handy way of exiting the unitary definitional conundrum. How helpful is it though in practice? The image of law as the narrator's prerogative might hold up for analyses of law that limit themselves to the study of one body of law (assuming of course that the relevant legal subjects are agreed that such a body of law exists). But how are we to adopt a conventionalist approach when discussing interlegality? Who is to determine what counts as law in such cases? Who are we to ask? Who determines which persons are part of the group of "legal" subjects? What if the different "legal" subjects involved are not in agreement about what counts as law? Who is to determine which "legal" subjects are right about the definitional categories they apply? This question is itself raised by Kafka's parable: what happens when

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[166] Other legal theorists could also be appealed to here. Twining, Davies, and Manderson, for example, all have similar positions in that they refuse to be limited by essentialist definitions of law. However, while Tamanaha espouses a conventionalist definition in place of essentialism, the other theorists avoid appealing to any form of definitional closure. In fine, however, they could all be referred to as proponents of law as the narrator's prerogative.

[167] Tamanaha (n 45) 313.

the narrator introduces multiple non-concordant perspectives on law? Can the reader simply decide which of the perspectives is preferred? How are we to square these differing opinions? Whose story is *the* legal story?

Turning back to the map

Something about the map makes it extraordinarily flexible as a metaphor. For if we look back to the various images of the law suggested by Kafka's parable, we find that they align well with the possibilities of the map. The top-down law-by-design image of law speaks to the authority of official maps and the power of the mapmaker. The mapmaker shapes the physical reality that is mapped, distorting it in particular ways, all the while appealing to secondary rules of mapmaking (eg rules on scale, colours, legends, etc) to ensure the map's legibility. Certain specificities of the mapped terrain may be emphasised or routes through the territory privileged. These representations can impress themselves on the terrain itself: they suggest a certain way to use the map and these usages can mark the physical reality itself. Alternative routes suggested by GoogleMaps to avoid traffic jams may, for example, end up creating new traffic jams in different places.

The bottom-up law-as-interactional-practice image of law speaks to the ability of map-users to make their own maps or force maps to adapt to evolving usages. Map users may, through their ongoing interaction with physical reality, create new hiking trails for example through repeated use. These new uses may be handed down from one user to another (as a mental map of sorts) or may require the updating of official hiking maps to keep up to date with the new trails.

Finally, the conventionalist law-as-the-narrator's-prerogative image of law speaks to the multiplicity of potential distortions of physical reality. For any one section of physical reality, a number of maps may exist and be in use, for different purposes and by different users. The appropriate map then depends on the users one is interacting with and the purposes one wishes to achieve… that is, one must ask the "map-users" if a map exists.

But doesn't this beg the question? After all, who are the "users" if a map does not exist? Can there be users without a map? Doesn't the existence of users pre-suppose in some sense a map, a desire to use the physical reality in a particular way and manifest this usage in a map? This same question arises in Kafka: the user (legal subject) of the law is "Before the law"; the reader seeking the meaning of the law is "Before the text". In both cases, the user presupposes the existence of the object: existence of the legal user presupposes the Law and the existence of the reader presupposes a text.

How can we get at this pre-supposed object – the text or the Law? The text has a beginning and an end and definite boundaries defining its existence: it is a concrete order imposed on words, with both limits to the deployment of the text itself and a particular organisation of the words within the deployed text. The Law too is presented by Kafka as having these same boundaries: a beginning (arrival of the legal subject and an open door), an end (death of the legal subject and a closed door), and definite material contours (the scene set is materially limited, though the abstract potential is unlimited as suggested by the succession of doors). Within the materially limited scene, the subjects and props are organised in a particular manner (stature, other physical characteristics, interaction with each other and the props, dialogue, etc).

Legal order vs legal ordering

Perhaps, in appealing to particular aspects of the map as a metaphor, Santos led us astray a little. Concerned as he was with the mapping techniques used to represent or distort the physical terrain, the focus was very much on the mapmaker's techniques, the authority and the content of the map. This way of approaching the metaphor suggested a very intentional relationship between the mapmaker and the map itself (and consequently between the lawgiver and the law itself). But this intentional ordering (or normative work) does not, alone, get to the essence of a legal order. Disappointingly, Santos' own definition of law does not get us any further:

> I conceive law as a body of regularized procedures and normative standards that is considered justiciable—ie, susceptible of being enforced by a judicial authority—in a given group and contributes to the creation and prevention of disputes, as well as their settlement through an argumentative discourse coupled with the threat of force.[168]

He insists on justiciable norms and argumentative legal procedures, coupled with sanctions. One sets apart a "body" of law by the fact that it is applied and used by "a given group" in their interactions. Presumably the unity of such groups may be contested, since otherwise much of the force of his argument would be lost, but no mention is made of how such groups are to be found or distinguished. Despite being an ardent legal pluralist, Santos' definition provides very little guidance as to how we are to study the interlegal processes going on between these ill-defined groups. As with the positivist and normativist law-by-design approaches that focus on legal officials (the mapmaker) and legal norms (the legend), Santos' definition blinkers us to

[168] Santos (n 89) 106–107.

the further potential of his map metaphor. I suggest that it is worth giving a little more thought to Santos' map metaphor, using Kafka to help spell out its potential.

A brief detour to flesh out identity

Talking about law with the one word – Law – oversimplifies something that the above discussion shows has been anything but simple for generations of legal theorists. On the one hand, the law is a discrete, concrete and durable unity – a ***body* of law** or a **legal order** – to be distinguished from other orders, whether legal, scientific, economic, cultural, etc. We frequently appeal to the state template (a move decried as "legal centralism") to describe such orders. States give us the simplicity of bounded territoriality (at least at first glance) to talk about a particular group of persons as belonging to a particular legal order. On the other hand, law is never finished, it is an ongoing process. It is an ordering of human interaction that creates expectations as to the correct or normal behaviour to adopt in a variety of contexts (hence our tendency to speak in normativist terms about law). We sometimes use the term **legal (or normative) ordering** to refer to this ongoing process. Legal order and legal ordering are two inseparable aspects of law.[169] We cannot talk about the ongoing ordering of a legal order without wondering at some point where the order starts and stops. Likewise we cannot talk about the "stable, integrated, discrete unit"[170] that is a legal order without questioning at some point how the boundedness of this unity initially became significant for its legal subjects and continues to respond to their needs.

Lindahl effects a helpful detour through the work of Ricoeur to discuss these two aspects of legal identity when developing his own theory. The detour is worth rehashing here in order to clarify the differences between legal order and legal ordering.

Ricoeur discusses individual identity along two axes: sameness or ***idem*-identity** and selfhood or ***ipse*-identity.** *Idem*-identity speaks to the material oneness of a self over time: quantitatively and qualitatively the one self may be reidentified as the same self over time. There is permanence and continuity of the self's quantitative oneness and its qualitative character. As an individual, my skin encloses an ordered existence (of epithelial, muscle, nerve and connective tissues made up of water, lipids, proteins, carbohydrates and nucleic acids along with a whole host of microbes). While the elements of my internal makeup may change

[169] Lindahl insists on this point by dividing his book (Lindahl, *Fault Lines of Globalization* (n 98)) into two parts entitled "Legal Order" and "Legal Ordering".
[170] William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009) 121.

somewhat over time, as long as an ordered existence between them continues, I persist in being. This "enskinnedness" and the particular character of my enskinned being make it possible for me and for others to count myself as a material being and to reidentify myself over time.

Ipse-identity, on the other hand, speaks to reflexive selfhood. It involves *doing*, rather than simply *being*. Under this aspect of identity, there is a personal recognition of and owning of the character of earlier selves. In the present moment, the self sticks to its word (given at some moment in the past), or its earlier values or commitments. As Ricoeur says, "I will hold firm".[171] Haraway seems to be discussing this same aspect of identity when she riffs on individuality: "What counts as a 'unit', a one, is highly problematic, not a permanent given. Individuality is a strategic defence problem."[172] This second aspect of identity then, *ipse*-identity, involves some level of self-engagement. And to be engaged, one must be emplaced in time and in space, and have some kind of hold on the world. As Taylor says, there is an "essential link between identity and a kind of orientation" to the world, and to break this link is to shatter identity.[173] Taylor holds that the question, "Who am I?" cannot be answered without locating oneself within a framework of value. "[A]other basic condition of making sense of ourselves [is] that we grasp our lives in a narrative. […] In order to have a sense of who we are, we have to have a notion of how we have become, and of where we are going."[174] There is an instinct to protect and preserve this narrative.

How does this parsing of identity apply to collective selves? Indeed can *idem*-identity and *ipse*-identity be applied to a collective? It might seem strange to talk in terms of selves when we are concerned with legal orders and orderings. But it is possible that the identity of legal orders and orderings follows the same principles. Spinoza seemed to think that parallels could be drawn between the identity of individuals (as we use the term today) and of composite (collective) individuals (in his words),[175] and I am inclined to agree. If this is the case, the

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[171] Paul Ricoeur, *Oneself as Another* (Kathleen Blamey tr, University of Chicago Press 1992) 124 <https://press.uchicago.edu/ucp/books/book/chicago/O/bo3647498.html> accessed 9 January 2023.
[172] Donna Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (Routledge 1991) 212.
[173] Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Harvard University Press 1992) 28.
[174] ibid 47.
[175] For Spinoza, a collection of things constitutes a singular individual insofar as the members join together to have certain effects (Baruch Spinoza, *Spinoza: Complete Works* (Michael L Morgan ed, Samuel Shirley tr, First Edition, Hackett Publishing Company, Inc 2002) 244 (*Ethics*, part II, definition 7)). These members are related to each other in a certain way and they strive to preserve the relations that hold among them. Spinoza's conception of the composite individual also applies to human selves since we too are simply collections of parts that work together to achieve certain effects based on certain fixed relations between our parts (that we strive to maintain!). Spinoza's concept of the (composite) individual insists on

collective self is recognisable because of the particular relations that obtain between its subparts. The existence of such productive relations (relations that enable the ensemble to produce effects, however limited those effects might be) together present a quantitative oneness. The pattern of relations between the subparts also determines the character of the collective whole. When a particular pattern of relations endures in time, we might say we recognise a qualitative oneness. Both of these criteria would obtain for a trade union, for example, or a family unit. *Ipse*-identity adds another layer. *Ipse*-identity represents the requirement that the self (and the subparts of the self where the self is collective) reaffirm its earlier iterations, that it hold firm to its own particular narrative. Holding firm to a collective's narrative might involve reaffirming the collective's direction (its productive striving in Spinozist terms). This would require that a majority of the subparts adhere to the narrative and support its ongoing relevance. In Haraway's strategic defence terms, the collective self doesn't just take up an orientation with respect to the world, it must also own the orientation adopted by its previous collective selves, standing up for who it was. In other words, the collective self must protect its own substantive nature over time from irreparable damage from the inside (subparts that refuse to comply) or the outside (threats to its cohesiveness).

Back to Santos' map

The term "legal order" is a useful place marker for the law's *idem*-identity. It is a quantitively discrete and qualitatively ordered existence. This is the map itself. The map – as the legal order – is a material and bounded entity that serves a particular purpose for some subset of map-users by re-presenting the physical reality in a way that makes it legible for that subset. What is most interesting in the map analogy from my point of view is the fact that it points to the map as a tool to help the user read the surrounding terrain and orient their behaviour (or find their way). Similarly, the legal order is a prism through which we interpret the social terrain (ie our position in relation to other legal subjects) and orient our social behaviour (towards other legal subjects). We can develop Santos' analogy by insisting on the map's limits, the map's legend and the map's purpose.

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the arbitrariness of "enskinning" insofar as the existence of a "whole" depends entirely on our ability to explain the relations between the parts and their striving to achieve certain effects in the world. For example, one might ask (and given the debates over abortion for eg, people clearly have asked) when a pregnant woman becomes two individuals rather than one. Spinoza's unique understanding of composite individuals suggests that it is not so absurd to compare individual selves and legal orders.

First, any given map is limited: it is tied to a limited physical reality and there is always a remaining unmapped "outside". At some point, one comes to the edge of the map (though these edges are internal as much as external); and, beyond this point, the traveller enters unmapped territory. The map therefore enskins a certain portion of the physical terrain.[176] A legal order too is constituted by its limits. I am not referring here to territorial limits,[177] but to the limits of its own mapped distribution of ought-spaces. The distribution of these ought-spaces informs as to *who* may do *what*, *where* and *when*. They define an unmapped outside: that is, certain aspects of social life that have not been re-presented or coded as legal or illegal,[178] as ought or ought-not, as normal or deviant, as acceptable or unacceptable, as reverent or irreverent. Certain behaviours are not re-presented (as either one of the binaries) in the interactional language adopted by the legal order: these behaviours are "outside" the mapped legal order. The inside is the space in which behaviour is normatively legible, it complies with (or at least can be interpreted in terms of) the distribution of ought-spaces. The outside is that space in which behaviour becomes normatively illegible, "strange", or "unworldly".[179]

Second, a map must impose some internal order on that limited physical reality: the terrain is presented in a certain way. Within the map, the chosen terrain is divvied up and certain details are magnified while others disappear from view. Just as a map maps a particular spatial reality by presenting a particular distribution of physical obstacles or resources, a legal order maps a particular social reality by presenting a particular distribution of ought-spaces. It is a distribution insofar as a map represents each physical entity as occupying a particular place and gives that thing a position relative to the other things that are mapped. This distribution

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[176] The notion of enskinning used here might be likened to Schmitt's "taking" or appropriation by dispossessing (*nehmen*), which is the initial move giving rise to a *nomos* or collective in Schmitt's work. The moves that follow are the distribution of entitlements (*teilen*) and their exploitation (*weiden*) (see further, Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Telos Press 2006)).

[177] Territorial borders have been shown to be largely contingent as a marker of modern legal orders: "A wide range of contemporary legal and political theories, as well as sociologies of globalization, equate the inside/outside distinction to the distinction between domestic and foreign territories, arguing that this distinction cannot be constitutive for the concept of legal order. Ulrich Beck formulates what for many has become a platitude when asserting that '[t]he association of place with community or society is breaking down'.^36 No doubt these theories are correct in asserting that the inside/outside distinction, when construed as the distinction between domestic and foreign territories, is historically contingent; it is certainly possible to conceive of legal orders that do not require fixed territorial borders like those of the state." (Lindahl, *Fault Lines of Globalization* (n 98) 42).

[178] I should note here that not all legal orders use the terms legal/illegal as their coding device. This is one reason why I have not relied heavily in this dissertation on Teubner's autopoietic systems theory.

[179] "Strange" is the term preferred by Lindahl, but given his phenomenological inspirations (namely Husserl), it seems that "unworldly" would be similarly appropriate.

brings together the represented entities in one map while also distinguishing them by giving each a separate existence on the map. In a legal order, too, the what, when, where and how of legally acceptable behaviour is mapped and ways of traversing these ought-spaces are opened up or shut down accordingly. This mapping brings together certain persons, places, times and behaviours while excluding others. I take this to be what Lindahl means when he refers to boundaries as fulfilling "joining and separating functions".[180]

It should be noted here that the "ordered existence" proposed by the map has no imposed form. Santos distinguishes formal, "cartographic maps" from informal, "mental maps". Both of these maps have parallels in "law" insofar as the map remains "convenient to use" and is in fact *used* to navigate the represented spatial reality. Thus, Santos makes it clear that "law" ranges from the formal "enacted law" where ought-spaces are mapped out in legal documents and generally upheld by legal institutions to the informal "customary law" (as Fuller refers to it) embodied in social norms and generally upheld by a shared history of compliant conduct.

Finally, this divvying up achieved by the map is not random. A map provides a representation of the obstacles, resources or the relevant boundaries (usefully represented using scale, projection and symbolisation) which will orient one's behaviour or travel through the space that is mapped. To map such obstacles, one inevitably needs an idea of the purpose for which the map will be used. After all, the map must render the terrain legible to its users. The map has a "point" then: the map represents the physical terrain by distorting it in particular ways that make it "convenient to use" for the map-users who have particular needs. So too a legal order maps ought-spaces based on the legal subjects' needs, the "normative point"[181] of their collaboration. This might be thought of as the qualitative sameness of the map, its character. It tells the story of the map as currently impressed in the map.

In focusing on the map itself, we see that the map's coverage may be extended or reduced and still remain the same map; the internal ordering may gradually evolve over time while still remaining the same map; and finally, new users may join the group of map-users as long as the one map is "convenient to use" or legible for them too.

This aspect of the map analogy – the map itself as legal order – is useful in order to highlight the way law structures and, even more importantly, limits our reading of the social reality in which we exist, shaping our interactions with co-subjects who are part of that same social

[180] Lindahl, *Fault Lines of Globalization* (n 98) 28.
[181] This is the term used by Lindahl: ibid 8.

reality. What it fails to get at though is the embodied nature of the law, the phenomenological counterpart to the map itself. But here too the map analogy may guide us. Outside of Santos' focus on the map-as-object (whether physical or mental) is the elided question of the map-in-use (whether physically or mentally). This is a strange omission given his starting suggestion that a map must, first and foremost, be "convenient to use".[182] A map that is of no use to anyone is hardly much of a map. Likewise, a law that is consistently ignored is not much of a law.

A map then is first and foremost made to be used. It is drawn up with some intention in mind. If I want to draw a map to indicate to a friend how to get to my house, I will intentionally exclude certain details and include others. The "point" of the map is simply to provide her with the most direct and recognisable route between her house and mine. If the map is useful, it will serve its purpose or "point". If the map is confusing, my friend may suggest I revise it in certain ways to make it more legible. If I send this improved map to further friends, it may even end up being adopted more widely. The "point" of a map will often be quite simple. Nonetheless, it helps us to see that a map that fails to achieve its point (ie that fails to get the user from A to B or which provokes confusion) has failed as a map.

Map-usage can take two forms: an ideational form and a concrete form. Ideationally, a map designed with a certain "point" in mind creates "**interactional expectations**" among its users. The map user expects that the map will guide interaction with the spatial reality represented therein. In concrete form, these expectations translate into **citational use** of the map. Map-users go out each day and use the map to determine where and how they will interact with the physically mapped terrain. They embody their commitment to the map by actually acting on the basis of its content.

Both the expectations and the behaviour these expectations produce in the form of citational use of the map reinforce the map's usefulness and durability. The more users rely on the map and actually follow the map, the more it becomes useful to have the map and to orient oneself using the map. In addition, the most useful or used distortions with regard to the particular purpose of the map become "sedimented" through such usage. Previously unmapped pathways created through regular usage may themselves eventually get mapped. Thus usage is its own form of mapping, driven by the map and feeding the map at the same time. Repeated use of the map increase the chances of the map's continued use in the future.

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[182] Santos (n 42) 283.

Similarly, the legal order espouses a collective "point" which is embodied in its own limited distribution of ought-spaces. Legal subjects expect that the law will guide interaction with the social reality contained therein, facilitating collective achievement of the "point" of the legal order. The legal order therefore creates interactional expectations in the same way the map does. In adapting one's behaviour to comply with such expectations, individuals manifest their ongoing allegiance to the legal order and thereby ensure the continued existence of the legal order. The interactional expectations created by the legal order and the everyday citations that sustain the legal order are what make up a legal ordering.

Thus we come full circle. The term "legal ordering" is a useful place marker for the law's active self-identification that goes on under the head of *ipse*-identity. This is the phenomenological counterpart to the map. It refers to the collective agent's active commitment to its own legal order over time: this is achieved by a certain orientation to the world (a frame of interactional expectations based on a "narrative", or the "point" of a legal collective) and a series of concrete citations (whether by individuals or groups) that feed the narrative over time.[183] These citations serve as a restatement of one's identity, but they also aim to ensure its persistence. The legal order must have meaning for the agent and the agent must commit to (or defend) its continued existence through its ongoing participation in legal ordering. As Ricoeur observed, the "point" or the narrative is part of both *idem*- and *ipse*-identity, the legal order and the legal ordering. It is impressed in the map, but also results from citational use – ie mapping – over time.

A tribute to Lindahl

It is interesting to note that many legal theorists have adopted this division of labour between legal order (as map) and legal ordering (as map-in-use) in discussing Law without necessarily appealing to these precise terms. I'm thinking in particular of Cover[184] (whose "nomos" and "commitments" map spectacularly well onto my presentation of legal order and legal ordering) and Fuller[185] (whose discussion of a "language of interaction" that creates "interactional expectancies" can similarly be parsed into aspects of the legal order and legal ordering). Rancière should also be mentioned here, for his "police order" – defined as a distribution of

[183] In Butler's terms, this would be called a "reiterative and citational practice" (Judith Butler, *Bodies That Matter: On the Discursive Limits of "Sex"* (Routledge 1993) xii).
[184] See, in particular, Cover (n 2); also discussed to some extent in Robert M Cover, 'Violence and the Word' (1986) 95 Yale Law Journal 1601 <https://heinonline.org/HOL/P?h=hein.journals/ylr95&i=1624> accessed 29 November 2019.
[185] Lon L Fuller, 'Positivism and Fidelity to Law–A Reply to Professor Hart' (1957) 71 Harvard Law Review 630 <https://heinonline.org/HOL/P?h=hein.journals/hlr71&i=662> accessed 2 February 2023.

the sensible – is the perfect description of a map (or legal order). He insists on the double-edged notion of partaking or distribution, which points both to a unity which we partake in and a partitioning of that unity among the partakers. As far as I am aware, however, Rancière does not discuss the police order's phenomenological double that is legal ordering.[186] Despite these multiple and highly-regarded references, Lindahl is the most obvious theorist to turn to here since his seminal book, *Fault Lines*,[187] is itself divided into two parts: "Legal Order" and "Legal Ordering". In addition, it was his use of Ricoeur that inspired me to use Ricoeur for my own purposes. Since it was Lindahl who most influenced my account here, I would like to close the chapter by detailing how his theory has inspired my own and where we part ways.

Lindahl's phenomenologically inspired theory describes "legal order" in a parallel fashion to Husserl-style phenomenological "worlds". A world, as described by Husserl/Lindahl, is a nexus of *meaning-relations* (that are co-given and pre-given by the actions/events that take place in that world). The nexus is experienced as *subject-relative* (these meaning-relations appear *to someone*) and makes up a *limited unity* (though it is not experienced as such unless and until it is interrupted).[188] Lindahl takes this definition of a phenomenological world and applies it adeptly to unpack the concept of a legal order. For Lindahl then, a legal order is a limited nexus of meaning-relations (more specifically, ought-spaces, ought-times, ought-subjects and ought-behaviour) that specify who can do what, where and when. These ought-relations map the domain of the legal/illegal. The legal order's "limits" are constitutive of the order. These limits are not, though, the physical boundaries of national frontiers. Instead, the legal order's "limits" are to be found in the partitioning of places/times/subjects/behaviour into oughts (legal) and ought-nots (illegal). This partitioning both separates (imposing a boundary between the ought and the ought-not: legal vs illegal) and unites insofar as the manifold of boundaries brings together a particular subject pursuing collective joint action – a *we* – that prefers this order – *our* distribution of ought-spaces – over *un*order,[189] that is, spaces/times/subjects/behaviour that we have not deemed relevant to qualify as legal/illegal.

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[186] This is not strictly true if we consider his discussion of dissensus (which we will do later on). However, insofar as we are concerned solely here with legal order and not with rupture of that order, I do not think it unfair to say that Rancière does not discuss at any length the police-order-in-use.
[187] Lindahl, *Fault Lines of Globalization* (n 98).
[188] ibid 263.
[189] The "un" used in Lindahl's work is highly reminiscent of Rancière's discussion of dissensus. Indeed Rancière gave a whole speech on the "un" in Australia (see Jacques Rancière, 'What Does It Mean to Be Un?' (2007) 21 Continuum 559 <https://doi.org/10.1080/10304310701629961> accessed 17 December 2020; see also Jacques Rancière, 'Un-What?' (2016) 49 Philosophy & Rhetoric 589 <http://www.jstor.org/stable/10.5325/philrhet.49.4.0589> accessed 17 December 2020).

This inevitable "we" is referred to by Lindahl as the "legal collective" and explains why Lindahl describes his theory as providing a "first-person plural concept of legal order".[190]

It is worth noting here that while Lindahl clearly adopts the terminology of "legal order" and "legal ordering", he might not condone the use of the map/mapping analogy. His theory of legal order and legal ordering relies instead on the concepts of representation and the representation process. Perhaps the only interesting part of the map/mapping analogy then is that it points to this representation / representation process? I would like to suggest that the map metaphor goes some way further than the idea of representation and may therefore be a more productive starting point. First, a representation suggests a one-to-one correspondence: something is represented *as* something else. Maps, on the other hand, represent not just things, but relationships between things. They offer another layer of complexity. This complexity also allows for the possibility that a single map may generate slightly different interpretations of the map's meaning (ie narrative versions), while still providing a helpful guide to situate and orient oneself in a social space. The map seems to me a more concrete illustration of the way any representation of a space involves selecting certain features and excluding others, while also acknowledging that although a map is shared different people may "read" the map in different ways. Second, maps seem to usefully embody both the ideas of representation *and* recognition contained in Lindahl's theory: maps embody someone's intention, which is then taken up by others. An individual (or a composite individual) makes an initial suggestion (ie *representation*) as to what will be emphasised, what retains a place on the map, the detail, the disposition, etc. This initial suggestion is then shared with others. It is through the map's practical adoption that a map gains wider *recognition* and is considered "successful" or not. The map analogy therefore helps concretise both the suggestive initial representation embodied in the map and its subsequent uptake by a particular collective. Third, maps that have been recognised in this sense carry the insignia of authority in a way that representations do not. When you encounter incomprehensible terrain while out using a map (especially in unknown territory), you are more likely to think you are lost or you have lost your place on the map, rather than expecting an error in the map (think for example of your experience using GoogleMaps in the car!). One expects the map to be authoritative in the territory one is traversing. A representation, even a recognised representation, does not necessarily inspire this kind of authority. Finally, the existence of different types of maps (official maps, mental maps,

[190] Lindahl, *Fault Lines of Globalization* (n 98) 11.

contestatory maps, algorithmic maps, even more-than-human migratory maps, etc) points to the potential of the map analogy to encompass collectives beyond the human… something that phenomenological representation has so far failed to do.

Back to Lindahl's account, then. The first part of his book, entitled "Legal Order", considers the order's boundaries to be already set, pre-given. But a phenomenon, in Husserl's account, does not just appear, it always appears *to someone*. A phenomenon is always *lived and experienced*. In this sense, it is subject-relative. It is in the second part of Lindahl's work that he engages with the question of how these legal boundaries get started, how the mapping begins, and the ongoing process of the map-in-use. The "we" subject, the legal collective, is inevitably more active in this second part. Here, it becomes clear that legal acts performed by this legal collective both disclose the legal order as an ongoing enterprise, but also assume, somewhat unconsciously, the closure (the "horizon" of meaning-relations in Husserl's terms) of a pre-given legal order. Legal acts are defined by Lindahl as "the disclosure of something as something* from the perspective of a 'we' in joint action".[191] Every individual legal act engages the legal collective, insofar as it is a direct reference to this "'we' in joint action". Thus our legal acts, according to Lindahl, assume closure (the *pre*-given unity of meaning-relations) just as they disclose closure (disclosing the *co*-given unity of meaning-relations anew). Lindahl fills up a full 150 pages explaining this aspect of his theory, so I hardly expect to do him justice in this meagre paragraph. This barebones outline is simply provided to show the parallels between legal ordering as described by Lindahl and the second aspect of identity (*ipse*-identity) presented by Ricoeur.

Lindahl discusses Ricoeur most extensively in the context of legal order (and indeed discusses the legal collective – the "who?" of identity – at some length under this same heading). His Part II is much more heavily focused on a-legality and considering how the legal order (the map) gets going in the first place. It explores the contingency of legal orders, the origins of law, and how a-legality may upset a legal order. Under the head of "legal order" then, Lindahl discusses both the legal "map" and the legal "map-in-use". In the pertinent section of his book, he states:

> a legal collective remains the same—and this is a matter of degree—not only insofar as the normative expectations [ie interactional expectations] about the who, what, where, and

[191] ibid 126. Note that the asterisk (*) is used in Lindahl's work to signal that "something" is always disclosed along the four vectors, that is: spatially, in time, subjectively and behaviourally. There is a who/what/where/when to disclosure.

> when of behaviour remain more or less unchanged over time, but also insomuch that behaviour [ie citational use] accords with these normative expectations. In other words, a legal collective remains the same over time to the extent that its members develop and deploy the dispositions that allow them and third parties to say that they are living by its law, i.e. that individuals abide by who ought to do what, where, and when.[192]

Indeed, he explicitly states: "My thesis is that we do well to understand legal orders as a particular way of organizing and securing collective identity as sameness and selfhood over time."[193] It seems a shame to appeal to the legal order (as embodying *both idem*-identity and *ipse*-identity) when Ricoeur himself was at such pains to distinguish the exclusively "who?" from the simply "what?" Further, Ricoeur's narrative theory (which insists on a partial overlap between *idem*- and *ipse*-identity) seems extraordinarily well-placed to support Lindahl's theoretical endeavour. I am not sure then why Lindahl skipped over this important point.

To recall: Ricoeur sees *idem*-identity as the "what?" aspect of identity. With his *ipse*-identity, Ricoeur wanted to bring back in the "who?" as distinct from the "what?" and he also wished to recover emplacement in space and time (which seemed egregiously lacking from the Cartesian *cogito*).[194] Ricoeur saw one of the defining features of human existence to be its temporal dimension and was convinced that a narrative theory of identity was best able to provide this feature. Thus, *ipse*-identity was conceived as self-constancy or keeping one's word: "I will hold firm". This self-reflexive aspect of identity involves keeping to the self's story or narrative. It involves an ongoing commitment to the self so-far conceived. This is a form of permanence in time for persons that moves entirely beyond *idem*-identity, for there is no "what?" answering to self-constancy, but only a "who?"

However, *idem*- and *ipse*-identity were not completely separate in Ricoeur's mind and this aspect of his theory is less clear in Lindahl's rendition. For Ricoeur, "character" is a second aspect of a self's permanence in time. It represents "the set of lasting dispositions by which a person is recognized" and reidentified as the same individual over time.[195] As such, character

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[192] ibid 85.
[193] ibid 97.
[194] Strangely, Lindahl suggests that Ricoeur's narrative theory cannot alone provide a solid foundation for his account of legal order because of its lack of attention to the temporal and spatial dimensions of identity (ibid 191: "while I share Ricœur's conviction that Strawson's approach to identification neutralizes identity as selfhood to the benefit of identity as sameness, Ricœur's subsequent development of this criticism leads him to abandoning the discussion of identification as concerns its spatial and temporal dimensions.") This comment seems particularly surprising given Ricoeur's explicit intention to provide spatial and temporal "emplacement" to a disengaged *cogito*.
[195] Ricoeur (n 171) 121.

is part of the "what?" of identity for it includes habits and traits, preferences and values that (qualitatively) identify an individual. Moreover, there is a process of "sedimentation" by which these characterful habits and traits acquire a stability in time that makes it possible to speak of permanence. In some sense, these are the essential aspects of the part of the story that has already been told, the sedimented narrative. But character cannot be understood exclusively as *idem*-identity precisely because it contains some "who?" As Ricoeur says, "character is truly the 'what' of the 'who'".[196] Character, then, is the hinge in his narrative theory; it is the point where *idem*- and *ipse*-identity overlap:

> character has a history which it has contracted. […] It is then comprehensible that the stable pole of character can contain a narrative dimension, as we have seen in the uses of the term "character" identifying it with the protagonist in a story. What sedimentation has contracted, narration can redeploy. And it is dispositional language […] which paves the way for this narrative unfolding.[197]

The hinge in Lindahl's theory is less obvious. At least he does not explicitly treat this aspect of Ricoeur's account. Nonetheless, I would be tempted to argue that Ricoeur's hinge is also a good fit for Lindahl's description of the "point" of joint action. Lindahl's point of joint action is embodied in the existing distribution of ought-spaces ("character has a history which it has contracted") but it also leans towards a future distribution of ought-spaces, which will be recognisably similar in "character" but never precisely the same ("[w]hat sedimentation has contracted, narration can redeploy"). This future comes into being only through the repeated citational use of the existing distribution (a "narrative unfolding"). Presumably Lindahl would agree then that the ongoing process of maintaining a legal order (what I call "legal ordering") is of the *ipse*-type even if this is not made explicit in his writing. Nevertheless, the presentation above shows clearly, I hope, that Lindahl could easily have relied on Ricoeur as the theoretical backdrop for the division between Parts I ("Legal Order") and II ("Legal Ordering") in his book.

With this said, I would like now to insist on three ways in which I depart from Lindahl's account. First, the parallel drawn here between Ricoeur's narrative theory and Lindahl's legal order/legal ordering assumes that individual identity maps precisely onto collective identity, that the same tools may be used to understand the one and the other. In one sense, this symmetry

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[196] ibid 122.
[197] ibid.

is attractive. We imagine the collective self as being identifiable and self-identifying in the same type of way as an individual self might do. It is after all made up of a collection of individual selves. But this parallel is drawn too quickly. There are many differences between an individual self and a collective self. Collective identity is made up of parts, parts that may participate in multiple collective identities simultaneously. In addition, these parts may join or leave existing collective identities without disrupting the existence of the collective identity itself. Finally, these parts may be more or less involved with / inspired by / faithful to the collective identity without such variations in commitment necessarily undermining the collective identity. An individual self, on the other hand, tends not to have parts that participate in multiple individuals; tends not to lose and gain parts (at least not important parts); and the parts of my body are generally committed to participating in my existence. Does this undo the parallel completely then? I would argue no. Perhaps it is just Ricoeur's narrative theory which needs a little tweaking?

Tweaking the "we-perspective"

Spinoza considered that human bodies (among other things) were "composite bodies" made up of a "union of bodies"[198] – "so constrained by other bodies that they lie upon one another"[199] – that strives to persist (in time) by preserving a particular relation between its parts that enables it to have certain effects.[200] Following Ricoeur, Lindahl interprets identity as being composed of a "what?" and a "who?"; he applies this thinking to collective identity, singling out a "what?" (the legal order in the form of a distribution of ought-spaces) and a "who?" (a "we-together", the legal collective). This leads us to misinterpret collective identity (and indeed perhaps also individual identity… but that is a discussion for another time!). In the context of collective selves, the question "who?" is just another way of saying "what person?" or "which people?" We are not actually taking identity of the self much further than insisting that the "whatness" of identity must also implicate some personhood. And personhood is defined, in Ricoeur's vocabulary as something self-reflexive, something that represents itself to itself. This makes it very difficult to get collective identity off the ground, because presumably there is no collective

[198] Spinoza (n 175) 253 (*Ethics*, Part II, prop 13).
[199] ibid (*Ethics*, Part II, prop 13).
[200] ibid 244 (*Ethics*, Part II, definition 7). "For Spinoza, a collection of things constitutes a singular thing or individual to the extent to which the members of this collection join together to have certain effects (2def7)" (Della Rocca (n 80) 107).

self-reflective being that springs from a collection of individuals, a thinking "we" that could collectively self-represent itself to itself.

Spinoza comes to the rescue here, because his definition absolves us of this need to limit ourselves to "thinking" self-reflexive things. Spinoza's definition of "composite bodies" includes the units that are human bodies, but also the units that are a pencil, a sardine, or a beehive. While we may ask "what?" in these cases, it is more rare to ask "who?" And yet Spinoza is convinced that these composite bodies are similarly identifiable as individual units insofar as they, too, strive to persist. Remember that, for Spinoza, striving to persist simply means preserving a concrete relation between one's parts such that the whole may engender certain effects.

Perhaps it is sufficient then to simply ask "what?" of a collective identity such as a pencil or a beehive or a legal order? But this question does not get to the heart of Spinoza's definition because the parts must be related to each other in a specific manner. A pencil is not just a pile of wood, graphite, clay, glue and lacquer. These member bodies must have a certain (persisting) relation which achieves certain effects (eg makes writing possible) for the composite body to be identified as a pencil. Further, the pencil "strives to persist" insofar as it preserves these relations and effects (ie so long as an external cause does not destroy or damage it). Spinoza's "striving to persist" (his *conatus*) was never an "intentional" or self-reflexive endeavour. For Spinoza, all bodies strive to persist (from rocks, to chairs, to oaks, whales and humans), the only difference being one of degree: that is, some bodies are more often (or more easily) prevented from persisting by external causes.

The "what?" question is able to give a good overview of the parts involved. It may even be suggestive of the relation that maintains among them (their "character" in some sense). But it is clearly not sufficient. Similarly, the "who?" question gets us nowhere in this context. Spinoza surmised that composite bodies are in a sense collections of doings (since we human beings, and all other composite bodies, are just collections of states of "Nature or God", "Nature or God" being the only true substance). Whether or not we are agreed on the single Spinozist substance – "Nature or God" – it is notable that the *ipse*-part of identity is already at the heart of Spinoza's composite body in the form of *doing* (rather than the doer). As Spinoza says, "If

several individual things concur in one *act* in such a way as to be all together the simultaneous cause of one effect, I consider them all, in that respect, as one individual."[201]

Perhaps then the more appropriate *ipse*-question is "how?": *How* do these parts strive together to persist? *How* do they behave such that their relations and the attendant effects are preserved? If we focus on the "how?" rather than the "who?", we find the same kind of overlappingness between *idem*- and *ipse*-identity that Ricoeur detailed. When we ask, "How do these parts relate?", we are getting at the overlapping "character" aspect of identity. "How do these parts relate?" is partly a "what?" and partly a "how?" question: what is the unit? And how do the parts come together in this unit? But the question, "How do these parts strive together to persist?" no longer appeals to a "what?" This is the "self-engagement" aspect, which is only achieved through *acting* in the world, having effects. Together the "character" of the related parts and their "narrative"[202] direction result in a series of iterative "engaged doings". And these engaged doings embody the related parts' striving together to persist. A "narrative" may be (and in most cases is) a very simple affair: a simple striving towards continued future existence (in addition to a striving to preserve *actual* existence, actual relations between parts). In this sense, all bodies (including composite bodies) have narratives, whether pencils, sardines or beehives. And legal orders are no different. These narratives are not (or at least not necessarily) self-reflexive in the way suggested by Ricoeur, that is, requiring personhood in the form of a thinking mind that self-represents the ongoing narrative. By replacing the question "who?" with the question "how?", I am suggesting that pencils, sardines, beehives and legal orders are identified through their particular version of striving to persist: this is their "narrative", whether they are self-reflexively aware of it or not.

What does this change? Lindahl's phenomenological account is heavy on personhood. After all, phenomenological experience and consciousness are always person-specific. As far as I know, phenomenological inquiry has not spent much time considering the phenomenological experiences of nonhuman beings or nonhuman nonbeings… obviously, since we have no personal access to the experiences of these selves! Not having access is one thing; assuming experience is exclusively human is another. Phenomenologically-inspired theory has this

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[201] Spinoza (n 175) 244 (*Ethics*, Part II, definition 7), my emphasis.

[202] Narrative is probably not the best choice of terms here since the way we use the term most often suggests something self-reflexive. Antonio Damasio refers to the earliest forms of such "narratives" as "homeostasis" or (more precisely) "homeodynamics" (Damasio (n 67) 50–51) and I fully support this account. Nonetheless, I have conserved the term "narrative" to insist on the link to what does look much like a narrative in modern-day legal orders.

tendency to produce very person-centred theory. Perhaps this is not a problem? Law is arguably person-centred too; and, if our only aim is to find a reliable account of legality, person-centring is plausibly the right way to go.

But perhaps not. I have insisted instead on the "how?" question with regard to legal ordering because I believe this makes a difference to how we conceive of legality. Person-centring has the inevitable effect of intention-centring. Indeed much of the discussion about individual selves (and even collective selves) revolves around this idea of intentionality.[203] Spinoza makes room for the idea of collective identity without the need for intentionality. For Spinoza, the will (or intention/volition) is not something separate from mental representations (or ideas); all ideas enjoy a degree of power, they are all (to some degree at least) "inherently powerful, inherently active, and even inherently affirmative".[204] There is only one type of thinking thing in Spinoza's world and that is representations (or ideas). This version of the mental as entirely representational rather than requiring extra layers that tie representations to Cartesian consciousness makes it possible for Spinoza to provocatively accept the thinkingness of all extended things (bodies), even if this panpsychism comes in various degrees. A pencil obviously has an ideational existence that is as limited (ineffective) as its physical existence; a sardine's physical existence (its ability to have effects in the world) is less limited and so, too, according to Spinoza, is its ideational existence (the ability of sardine-ideas to be "active", ie to have effects in the world); and finally, a legal order's material existence is powerful in its ability to have effects in the world, just as its ideational existence is highly developed.

This decentring of intention is one of the most interesting consequences of adopting a "how?" focus over a "who?" focus. It is interesting, first of all, because it opens up the possibility that the identity of selves (including the complex self that is a legal order) extends not just to humans but to the more-than-human too, perhaps even to selves combining both the human and the nonhuman. Second, it is interesting because it opens up the possibility that "narratives" (that overlapping part of *idem*- and *ipse*-identity) may not be strictly intentional (ie they may not require conscious (human) willing). Narratives may in fact be partly or entirely non-intentional. I will leave both these possibilities here as open questions. My first qualm with

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[203] See, for example, Michael Bratman's work on individual intentionality as planning (Michael E Bratman, *Shared Agency: A Planning Theory of Acting Together* (Oxford University Press 2014) <https://academic.oup.com/book/11830> accessed 24 November 2023) and collective intentionality (Michael E Bratman, 'Shared Intention' (1993) 104 Ethics 97 <https://www.jstor.org/stable/2381695> accessed 24 November 2023).
[204] Della Rocca (n 80) 126.

Lindahl then is that he relies too heavily on a "we", one that is fundamentally difficult to define at any point in time and even more difficult if we take into account the regular losing/gaining of members and the unequal committedness of those members over time.

In addition, the "we-ness" of his account may have other inconvenient consequences.

The "we-perspective" and interlegality

The second aspect of Lindahl's theory that may need questioning is also tied to his phenomenological insistence on the "first-person plural perspective", the "we-perspective". Insofar as the legal collective shares a phenomenological "world" that is horizonal ("pre-given"), I cannot have anything appear to me that is not referenceable in terms of this horizon (at least not without provoking some serious trembling…).[205] And yet this presents us with a conundrum. In the legal pluralism literature, it is common knowledge that an individual may navigate multiple legal orders: a priest living in France may be subject to the French legal order, the EU legal order, and the ecclesiastical legal order (and potentially many others). What then is his "horizon"? Is the "we-perspective" he partakes in driven by the French context, the EU context, the ecclesiastical context or a mix of the three? His "world" is obviously not strictly identical to the "we-world" of any one of these legal collectives. Worse, part of the distribution of ought-spaces in the ecclesiastical legal order may actually conflict with parts of the distribution of ought-spaces in the French legal order or the EU legal order. What then are we to say of this priest's horizonal "world"? Are these different legal "maps" overlain on each other, with the priest navigating between them? Does the priest only "belong" to a particular "we-perspective" insofar as he is using a particular map? Can the priest actually extract himself from one or other of the legal orders so easily?

These questions seem to suggest that Lindahl has indirectly espoused either a "single-world" theory in which all these legal orders are combined into one global "legal" horizon or, alternatively, a multiple "exclusive-worlds" theory, where each legal order has its own strict horizon and no overlapping is possible.

The first of these options seems to me highly unlikely. Lindahl goes to great pains to show that the point of his theory is that legal orders are constituted by their boundaries (the way they include and exclude) and that global legal orders are *not* exceptions to this rule. A legal collective draws boundaries to "code" places, times, subjects and behaviour as legal/illegal. In

[205] This is what Lindahl refers to as the appearance of a-legality along "fault lines". Such appearances create havoc for the legal order (Lindahl, *Fault Lines of Globalization* (n 98) 174–182).

so doing, it separates the self from the "strange" (*not* the foreign) other. The "strange" other is the illegible other, the other that our horizonal "world" provides no coordinates for. In addition, in his conclusion, Lindahl refuses to adhere to the monist "globalization as universalization" position, railing against such a "fusion of horizons" which he describes as "globalization as imperialism".[206] Globalisation, he says, does not produce a global "single-world", encompassing all other legal orders. For Lindahl, an international or global legal order – like every other legal order – has boundaries (founding a specific distribution of ought-spaces), its own limits or horizon, and a "strange" other. Finally, Lindahl also goes to great lengths to "identify" the legal collective. But if there is only one global legal horizon, corresponding to a single legal "world" which encompasses all codings of legal/illegal, presumably the legal collective is global too, extending to all of humanity, and thus there would be no need to "identify" it. This cannot be Lindahl's argument.

The second option identified above seems equally unlikely. Lindahl is after all a legal pluralist at heart. He is concerned to acknowledge the multiplicity of overlapping legal orders, *contra* "the monism of universalism and the simple pluralism (hence the multiplication of monism) of particularism".[207] As he states:

> On the one hand, there is a host of novel legal orders which *overlap* with state law and with each other […] [including] World Trade Organization, the Internet Corporation of Assigned Names and Numbers, the Fédération Internationale de Football Association, […] the European Union, the South African Development Community, the Association of Southeast Asian Nations and Mercosur. […] On the other hand, and no less importantly, there are a manifold of *overlapping* legal orders that have been around a long time, often predating the nation-state, yet which only now are again recognized as putative legal orders irreducible to state law [including] some forms of religious law, such as Islamic, Hindu, and Jewish law; the laws of subordinated peoples, such as the law of indigenous peoples throughout the world and Romani law; and 'illegal legal orders', such as the law of squatter settlements or legal orders set up by insurgent movements in contemporary states. […] [I]t is striking how little attention has been granted to actually making concrete spatial sense of the term **'*overlap*'** as it pertains to legal orders. It remains, by and large, an emblematic metaphor that has eluded theoretical scrutiny. [my emphasis]

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[206] Lindahl, *Fault Lines of Globalization* (n 98) 267.
[207] ibid 7.

Despite this attachment to the notion of overlappingness, it is unclear in his account how the strength of the "we-perspective" can be combined with interlegality. For at the core of interlegality, we find individuals or subgroups that are hinges between legalities. They navigate multiple legal orders and thus multiple "we-worlds". How can we explain the strong first-person plural account of legal order based on a "we-world" of meaning-relations while accepting that sub-parts of the "we" have much wider horizons than the legal order itself will acknowledge?

Perhaps interlegality is accounted for by Lindahl's inclusion of the foreign? If we return to our French priest example, Lindahl clearly accepts that the laws of other legal orders – insofar as they are relevant to the "domestic" legal collective – are not necessarily "outside" or "strange". They may actually be included in the legal order in the sense of being recognised as playing a role in the "coding" of domestic legal/illegal places, times, subjects and behaviour. We might surmise then that parts of ecclesiastical law are recognised in this way as part of the horizonal "world" that is the French legal order's distribution of ought spaces. This is clearly true for some aspects of ecclesiastical law: the French legal order (among others) leaves it up to canon law and ecclesiastical courts to deal with priest child abuse for example.[208] However, this does not get to the heart of the problem, for the French priest is also subject to aspects of the ecclesiastical order that are *not* recognised or relevant to the French legal order (eg respect of the secrecy of confession). His horizonal "world" then does not map precisely onto the horizonal "we-world" of the French legal collective. And we could take this further, because it would seem that the French priest is not the only individual to find himself in this situation. A French activist living within (what was) the well-known ZAD Notre Dame des Landes would be similarly subject to multiple legal orders (French law, municipal law, EU law, international human rights law, ZAD "law", etc). Indeed, any individual – if we take the legal pluralism literature seriously – is subject to multiple legal orders and thus lives by reference to a horizonal "world" that does not map precisely onto the "we-world" tied to a specific legal order. What does a-legality mean in this case? A-legal for who?

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[208] Clémentine Vergnaud, 'Pédocriminalité : L'église Catholique Clarifie Son Droit Canonique Sans Éteindre Toutes Les Critiques' <https://www.francetvinfo.fr/societe/religion/pedophilie-de-l-eglise/pedocriminalite-l-eglise-catholique-clarifie-son-droit-canonique-sans-eteindre-toutes-les-critiques_4876649.html> accessed 24 November 2023; although note that the Paris diocese gave up this right in 2019 by signing a *Protocole* with the Parisian public prosecutor, see Alexis Campo, 'Le Protocole Entre Le Diocèse Et Le Parquet de Paris : Une Capitulation ?' <https://www.resnovae.fr/protocole-entre-le-diocese-et-le-parquet-de-paris/> accessed 24 November 2023.

This heavy reliance on an intersubjective phenomenological "we-world" has a second inconvenient consequence.

The "we-perspective" and legalness

Lindahl's treatment of the question of legalness is surprisingly succinct. He considers that once the question of distinctness (his main focus) has been dealt with, legalness will tend to follow.[209] As he says:

> if making sense of the individuation [ie distinctness] of legal orders requires delving into collective identity as sameness and selfhood, then *legal* collectives, in contrast to other collective agents, are characterized by structures of authority that monitor and uphold the consistency over time of what should count as joint action.

Lindahl is not explicit here, but he seems to be linking legalness to *ipse*-identity. *Ipse*-identity gives us the means by which identity is confirmed and re-confirmed over time; and identity, it seems, is a *legal* identity when this confirmation over time is achieved by "structures of authority". This appeal to "structures of authority" is made even stronger in Lindahl's later work where he describes the "IACA model of law" as "institutionalised and authoritatively mediated collective action".[210] It is not sufficient, then, that the identified legal collective, the "we", embody their commitment to a legal order by reiterative citation as I suggested above (what I have called legal ordering in line with *ipse*-identity as I read it). The quotation from Lindahl above seems to suggest that the *legalness* of a legal order is obtained through authoritative control, sanctions, enforcement of the legality/illegality map. Is legalness *enforced* legal ordering then, *control over* the map-in-use? Again we return to structures of authority, legal officials, the edifice. Perhaps we have not travelled that far from the accounts of law-by-design after all?

To make sure we need to consider Lindahl's definition of structures of authority:

> a collective legal agent involves a structure of authority whereby *certain individuals, acting on behalf of the group*, (i) monitor joint action as concerns its normative point and

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[209] "[T]he central question that drives Western legal theory concerns the criteria that allow of distinguishing law from other kinds of normative order. […] [T]he reader will have noticed that the question about the distinction between law and other kinds of normative order has been addressed when specifying the notion of collective identity […] [that is] making sense of the individuation of legal orders [in terms of] collective identity as sameness and selfhood." (Lindahl, *Fault Lines of Globalization* (n 98) 96).

[210] Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge University Press 2018) 1.

> consistency over time, and (ii) take steps to uphold joint action when its normative point is breached or when the consistency of joint action over time is otherwise undermined or imperilled. [My emphasis][211]
>
> In short, *the difference between collective legal agents and other kinds of group agents* turns on how questions about joint action are dealt with: we are witness to a legal collective when questions about the normative point of joint action; about the rights, obligations, entitlements, and responsibilities that arise in the light of that normative point; about the consistency of participatory agency with regard to the normative point of joint action; and, finally, about the consequences that follow from inconsistency therewith, are not left over to the collective's members to decide separately for themselves. In a legal order, these and related questions, especially if they are the source of conflict, are settled by authorities who act on behalf of the group as a whole, such that dissenters are bound by that decision and can, in principle, be forced to comply with it. [My emphasis][212]

So "structures of authority" refer to any sub-part of the legal collective, provided they act "on behalf of the group" to ensure the actualisation of the point of joint action. The legal subject has not disappeared it seems: the legal collective remains at the centre of this definition even if, separately, individual legal subjects have faded into the background. The material unity of the legal order is not provided by a manifold of norms tied to a central authority; the material unity of the legal order is tied to this we-perspective which persists. No, Lindahl's account is not a law-by-design account!

Nor though is it a law-as-interactional-practice account since the bottom-upness of Lindahl's theory remains only so long as the distribution of ought-spaces is non-obtrusive for legal subjects. While Lindahl refers to this activity as legal too, he clearly states elsewhere in the book that no place/time/subject/behaviour boundary is *legal* until it has been authoritatively qualified as such.[213] Thus legality requires an interruption to day-to-day normativity. Whenever and wherever the distribution of ought-spaces is interrupted by a-legal behaviour, an authoritative form of control is required to keep things in check. Only once this authoritative interpretation has been provided can that something be disclosed as something* anew. This is why Lindahl says, "In the beginning was a-legality."[214] With a-legality playing such a

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[211] Lindahl, *Fault Lines of Globalization* (n 98) 87.
[212] ibid 88.
[213] ibid 25: "the qualification of behaviour as legal, in scenarios such as the one we have been probing, already presupposes situations in which behaviour has been authoritatively qualified as such, hence in which the legality of behaviour is obtrusive, the outcome of an authoritative decision".
[214] ibid 155.

foundational role in legality and "structures of authority" being essential to the qualification of something as legal, the motto "we will hold firm" adapted from Ricoeur's discussion of *ipse*-identity would be better reformulated as "they will hold us firm" (referring to control of the "we" by the relevant structures of authority). While the structures of authority must act on behalf of this "we", the power of the law seems clearly in their camp. This seems to detract from Lindahl's insistence that his theory provides a "first-person plural concept of legal order".[215]

This is perhaps a moot point. It may be that Lindahl doesn't require a central "we-perspective" for his theory to be groundbreaking. But I would argue that the problem for his theory cuts deeper than what might first appear. Central to his thesis is the idea that legal orders enclose and foreclose possibilities: they include "a determinate realm of practical possibilities, in the twofold sense of certain legal possibilities and certain possibilities of illegality" and they exclude "other practical possibilities that are deemed irrelevant, unimportant, in light of joint action by the members of a legal collective".[216] This "determinate realm" harks back to the "limited unity", the "horizon" of Husserl's phenomenological "world" discussed earlier. Legality is just this: a certain limited (legal) subpart of the phenomenological world that maps the (legal) compossibilities and fixes a (legal) "horizon" for our joint action. But how is this subpart carved out of the much broader phenomenological world which backgrounds our everyday experiences? I noted earlier that, in Lindahl's account, a legal order is experienced as simple normativity unless and until an a-legal event interrupts the everyday normative order and requires authoritative qualification of something as something*. Similarly the phenomenological "world" remains unthematic for us unless and until the "strange" interrupts this quiet order. So without the intervention of the strange, we are unaware of our shared legal order or our shared phenomenological "world". But since the two (the legal order and the phenomenological "world") exist concurrently and are rendered thematic by the same irruption of the strange, how can we tell whether the irruption brings to light a legal order or a phenomenological "world"? The interruption itself is not sufficient to signal that we have a shared legal order; it may simply signal that we have a shared "world". But this suggests that to qualify the normative order as legal for us following a strange interruption, we would need first to be able to qualify the interruption (that forces authoritative qualification) as a-*legal* (and not just as phenomenologically "strange"). Surely this is impossible, for at the time of the

[215] ibid 11.
[216] ibid 157.

irruption, the a-legal is fundamentally unqualified (in terms of the existing distribution of ought-spaces), unqualifiable even (in the terms of the normative point of joint action). Lindahl says as much: "whether an event is a-legal […] is established retroactively, in the responses it calls forth, in particular in the course of authoritative boundary-setting".[217] In this case, are not a-legal events simply "strange" events that later become qualified as tied in some sense to legality? The legalness of the a-legal seems to come after the irruptive event.

But if legalness cannot be found in the founding irruptive event, presumably we must find it within the existing distribution of ought-spaces, within the map. But this legal order *qua* normative order is part-and-parcel of a phenomenological "world": "a legal order partakes of the structure of a *Heimwelt*, a world which is 'already known, already familiar'".[218] How can we carve out this subpart without relying on the qualifications of "structures of authority" which are always attendant on a-legality? Is it possible to distinguish a nexus of meaning-relations that is legal among a more general nexus of meaning-relations without appealing to authority? If we cannot and a "world" is all we have, any subcategory of meaning-relations being fundamentally undetermined or undeterminable, we have a serious problem for a dissertation on interlegality.

This question goes to the heart of dedifferentiation problems, and it is a question we will have to face if we want to make any progress on an investigation into legal rupture. A subject for another chapter!

Conclusion: Kafka's oxymoron

This chapter has taken us on a number of detours via Santos' maps, Kafka's parable, and Ricoeur's narrative account of identity. The aim of these detours has been to determine how we might think about the "distinctness" of legal orders in a way that goes beyond traditional conceptions of legal order based on an identifiable body of law, handed down by some ultimate legal authority or deemed valid on the basis of a foundational grundnorm. This traditional top-down image of legal order was rejected because of its incompatibility with a more expansive legal pluralism. And yet, without it, any discussion of interlegal friction between legal orders was at risk of foundering. Might there be an alternative conception of legal order expansive

[217] ibid 163.
[218] ibid 160.

enough to acknowledge pluralism, but watertight enough to allow us to point to friction between distinct legal orders?

I used Santos' map metaphor as a thought experiment to gauge how far the metaphor might go. The metaphor proved a useful tool insofar as it provided an image of the legal order as limited; it made palpable the ways in which a legal order codes social reality into acceptable/unacceptable and so provides a means of orienting oneself to social reality and a means of navigating the social terrain by making acceptable behavioural moves; and it highlighted the fact that a map (like a legal order) always has a "point", a reason for its ongoing existence. It also foundered in some respects: first, because Santos tied certain representative schema too tightly to particular forms of legal order; and second, because Santos failed to look beyond the map itself. This time, I turned to Kafka's parable "Before the Law" to consider how legal order might be viewed from multiple standpoints. This story helped me point out the distinctive characteristics of legal orders depending on one's viewpoint, with some legal orders relying more heavily on top-down law-by-design and other legal orders relying more heavily on bottom-up law-as-interactional-practice. The combined image produced in the Kafka parable of both law-by-design and law-as-interactional-practice served as a reminder that no legal order belongs exclusively to one pole or the other. I then used this insight to parse the two most important aspects of the identity of legal orders with the help of Lindahl and Ricoeur: in order to distinguish a legal order, we must necessarily be able to grasp its sameness (*idem*-identity) and its selfhood (*ipse*-identity) over time. The former corresponds to the map or legal order (law-as-object), while the latter corresponds to the map-in-use or ongoing activity of legal ordering (law-in-use).

Separating out law-as-object (that is, the legal order's *idem*-identity) and law-in-use (that is, the *ipse*-identity of legal ordering) highlights a final riddle in Kafka's "Before the Law". The title of his parable is suggestive of an object-relationship. We place ourselves in a position relative to the Law, law-as-object. The preposition "Before" suggests both that the Law is *temporally prior* to our coming "before" it (just as the Text precedes the reader) and also that the Law is *spatially separate* from its subjects, superior even: we prostrate ourselves before the Law; we are passive before the Text.

But Kafka's tale also highlights the oxymoron of the title, for there is no time "Before" the Law in the story itself. The Text does not arrive before the reader, for without a reader/legal subject, the Text/Law is an empty signifier. Moreover, just as the form of the parable forces the reader to adopt an active stance, the outcome of the story similarly suggests that the legal

subject must be active rather than passive in order to "access" the Law. Likewise, spatially, as I argued earlier in the chapter, the Law is all over: in the interaction that goes on before the edifice as much as in the edifice itself. Nothing is "Before" the Law insofar as everything in this tale is "of" the Law. The active stance required of legal subjects to access/sustain a legal order will be discussed further in Chapter 4 when we turn to consider the "intersectingness" of legal orders.

Thus we can close this chapter by suggesting that a distinct legal order may be identified when we find a composite body (in Spinoza's terms) of which we may ask: "*what* is shared?" (*idem*-identity, legal order, the map) and "*how* is it shared?" (*ipse*-identity, legal ordering, the map-in-use). Thus, we have provisionally determined how to set apart "distinct" orders such that we might talk about friction (and eventually ruptural events) at the point of intersection of multiple orders. We have come some way then towards conceptualising interlegality in a form that may help us think about "What the law can do?" What we have not done, though, is show what is distinctly "legal" about orders as we have conceived of them here. Our description of the identity of a (legal) order remains overexpansive: it could easily categorise both a game of sport and municipal law[219] as constitutive of an order. Nothing about it points to a specifically "legal" order or ordering. The next chapter will take up this issue.

[219] See Roger Cotterrell, 'Does Global Legal Pluralism Need a Concept of Law?' in Abdul Paliwala, Christopher McCrudden and Upendra Baxi (eds), *Law's Ethical, Global and Theoretical Contexts: Essays in Honour of William Twining* (Cambridge University Press 2015) 311–314 <https://www.cambridge.org/core/books/laws-ethical-global-and-theoretical-contexts/does-global-legal-pluralism-need-a-concept-of-law/E05BF74BECA4D4AAA1C5B31ACFF40646> accessed 2 November 2022 (who raises this issue in relation to Hart's concept of law).

Chapter 3 — Legalness and its undoing

Before I built a wall I'd ask to know
What I was walling in or walling out,
And to whom I was like to give offense.
Something there is that doesn't love a wall,
That wants it down.
— Robert Frost, 'Mending Wall'[220]

In the previous chapter, I concluded that a distinct legal order may be identified when we find a composite body (in Spinoza's terms) of which we may ask: "*what* is shared?" (legal order, the map) and "*how* is it shared?" (legal ordering, the map-in-use). It might seem, with this parsing of legality into legal order and legal ordering, that I have provided a satisfactory (or "convenient to use") account of the "distinctness" of legal orders and that we may now move on to the assumed "legalness" and "intersectingness" that still trouble our study of interlegality. I should warn against too much optimism! The detour via Kafkaesque maps to get here strongly suggests that our experimental forays into the meaning of law may hold surprises that cannot be contained in the "truth of the matter" type definitions.[221]

First, I have relied on Ricoeur's narrative theory of individuality, a theory developed for individual human selves (which are relatively distinct at least to the human eye) to describe what must necessarily be a social body or self. Social bodies – as compared to individual human selves – are notoriously difficult to individuate; they are indistinct. On this basis, I encouraged an *ipse*-shift from the "who?" question to a "how?" question. It is not entirely clear, however, that this will suffice to solve the "distinctness" problem.

Second, Schlag warned in 2009[222] of the black hole of dedifferentiation which threatened to suck up law as a distinct object of study, and legal theory along with it. He suggested that as we become increasingly attuned to the complex relations between law and the social, we are

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[220] Robert Frost and Edward Connery Lathem, *The Poetry of Robert Frost: The Collected Poems* (1er édition, Henry Holt & Company 1969).
[221] Schlag comments that "there are a variety of significantly different intellectual projects that one might pursue in law". The bare-bones typology he provides includes "explanation" at one end and "art" at the other as two types of possible projects in the study of law. These projects stand on "different epistemic footings—explanation having perhaps more of a need to grasp 'the truth of the matter' than say, art, which need not even reference a truth of the matter" (Schlag (n 46) 55).
[222] Schlag (n 46).

driven to pursue these thoughts to their logical conclusion. It is not simply that the relations between the two are complex, it is that:

> the various terms cannot be disentangled [and so] we find ourselves in the odd position where there is nothing of any positive character to be said about their relations. Each is already the other and, thus, they can have no relation. This is rather bad news for the ways in which we have traditionally conceived theories of law—indeed any theory that gets off the ground by distinguishing law from a discrete something else (which, on first glance, would seem to include all legal theory).[223]

I had hoped, in unpicking the threads of legal order, that I might come some way towards determining the "legalness" of law. If Schlag is right though, there is no purifying of law to be had. It is an illusion to think there is some essential "legalness": many (indeed most) legal concepts are "hybrid", just as most cultural concepts are "hybrid".[224] If this is correct, distinguishing a legal order from any other legal (or even normative!) order is a lost cause: the "legalness" problem remains.

Third, Schlag's warnings about dedifferentiation apply just as cogently to the "intersectingness" of legal orders as they do to the "intersectingness" of law and the social. With *inter*legality, we are trying to get at the way legal order A interacts with (or "verbs"[225]) legal order B. But beyond the centralist case of the state, legal orders A and B are fundamentally under-specified and simultaneously evolving through their interaction, just as are the law and the social. Is *inter*legality something we can even talk about without wallowing in dedifferentiation?

It seems then that despite the semblance of progress made in Chapter 2, Schlag's pointed dedifferentiation attack brings everything crumbling down again. In this chapter, I will therefore take up Schlag's challenge. More specifically, I will consider how two more aesthetic / phenomenologically-minded thinkers have responded to his concerns, namely Lindahl and Cover. Both of these thinkers, I will argue, failed to take Schlag's critique the full distance. Nevertheless, they have both brought profound insights to the table. Using these insights as a

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[223] ibid 35.
[224] "Hybrids, as the term is used here, are not merely 'mixed' identities. They are identities mixed in such a manner that their different social and legal aspects are inextricably intertwined—both conceptually and ontologically." (ibid 45). As an example of one of the many cultural concepts that is hybrid, we might consider the French concept of "*laïcité*" which is so central to the ideals of the *République* but is at the same time grounded in law. Other cultural concepts such as gender, *la bise*, murder, humour, etc all have legal aspects intertwined with their cultural existence.
[225] ibid 36.

launchpad, I will suggest a way of extending the notions of legal order and legal ordering sketched in the previous chapter, such that they describe a form of "legality" (of degrees). I then provide an aesthetic "mapping" of legality that gives us one way of apprehending how the different types of dedifferentiation set out in Schlag's article (Law/Culture, Law/Economics, Law/Morality, Law/Religion, etc) may play out in practice.

The dedifferentiation plague

Schlag acknowledges at the beginning of his 2009 article[226] that our best legal theories appreciate law's complex relations with a host of other fields, in a "dynamic, interactive and dialectical" relationship.[227] He argues though that if we dig deep into this relationship – if we trace all the effects law has on some other field X and all the effects X has on the law such that the law evolves as a result of X and vice versa in a never-ending spiral of "reciprocal determination"[228] – we undo the threads of the legal endeavour itself. Without these other fields, it becomes impossible to conceive of the identity of the law (and presumably the reverse is true too). Everything we discuss as legal scholars, all our legal constructs, are "hybrids",[229] that is, "identities mixed in such a manner that their different social and legal aspects are inextricably intertwined".[230] This leads him to define the dedifferentiation problem:

> Identities previously thought separate and distinct (e.g. law and culture) turn out to be inextricably intertwined. Each is already inextricably the other—in ways that cannot be disentangled through any definition, specification, stipulation or theorisation. The upshot, of course, is that if we cannot distinguish the two […] we have nothing to relate, nothing to connect. *We have, in short, nothing of any positive character to say about their relations.*[231]

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[226] Schlag (n 46).
[227] Naomi Mezey, 'Law as Culture' (2001) 13 Yale Journal of Law & the Humanities 35, 46 <https://openyls.law.yale.edu/handle/20.500.13051/7304> accessed 7 February 2023.
[228] Schlag (n 46) 39.
[229] This is an extension of Bruno Latour's "hybrids". While Latour limited his attack on the "purifying" tendencies of our theories to theories concerned with the binaries nature/social, subject/object, global/local, Schlag argues that the "purifying" tendencies are rife in scholarship more generally and that they concern many more binaries than those discussed by Latour (ibid 28).
[230] ibid 45.
[231] ibid 37 (my emphasis).

We should note here that Schlag is hardly the first to point out the intertwinedness of law and society (or law and X more generally).[232] Many authors had insisted on this social fact earlier than 2009. Gordon, for example, states in 1984:

> Maybe the point that law and society are inextricably mixed seems hard for legal writers to grasp because they sometimes restrict their view of what law is to a bunch of discrete events that occur within certain specialized state agencies (in the most restrictive view, the courts alone) and therefore assume that the only question for a social history of law is the relation between the output of these agencies and social change. But if that output is all there is to law, how on earth are we going to characterize all the innumerable rights, duties, privileges, and immunities that people commonly recognize and enforce without officials anywhere nearby?[233]

Law is always tethered to these other fields (culture, society, etc) by relationships of reciprocal determination. In Schlag's world, there is nothing purely "legal" to discuss; we are always out of our depth, grappling with hybrid constructs that have been bowdlerised to suit our disciplinary purposes. What are we to do then?

Fortunately for his fellow legal theorists, Schlag does not leave it at that. In the last part of his article, he discusses how we might respond to the plague of dedifferentiation. Four responses are outlined. First, the political turn (or what Tomlins terms "practical rejection"[234]). Some readers have apparently suggested that political or normative activity would still be possible. Yes, Schlag responds, as long as we accept in existentialist fashion that the justification for our political or normative action is falling away: "political and moral engagement depends upon a willingness to act without warrant".[235] I doubt this is what his readers had in mind. Second, the

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[232] On law and religion in particular, see for example Harold Joseph Berman, *The Interaction of Law and Religion* (Abingdon Press 1974) <https://repository.library.georgetown.edu/handle/10822/766889> accessed 24 February 2023; Rowan Williams, 'Civil and Religious Law in England: A Religious Perspective' (2008) 10 Ecclesiastical Law Journal 262 <https://www.cambridge.org/core/journals/ecclesiastical-law-journal/article/civil-and-religious-law-in-england-a-religious-perspective/DF63E3CC682629D2AA066BE75E87A650> accessed 8 February 2023; Werner Menski, 'Fuzzy Law and the Boundaries of Secularism' (2010) 13 Potchefstroom Electronic Law Journal (PELJ) 30 <http://www.scielo.org.za/scielo.php?script=sci_abstract&pid=S1727-37812010000300002&lng=en&nrm=iso&tlng=en> accessed 19 February 2023.

[233] Robert W Gordon, 'Critical Legal Histories' (1984) 36 Stanford Law Review 57, 107 <https://heinonline.org/HOL/P?h=hein.journals/stflr36&i=69> accessed 20 February 2023. Gordon writes this in a section entitled "Blurring the 'Law/Society' Distinction" (ibid 102). Davies ((n 52)).

[234] Christopher Tomlins, 'Historicism and Materiality in Legal Theory' in Maksymillian Del Mar and Michael Lobban (eds), *Law in Theory and History : New Essays on a Neglected Dialogue* (Hart Publishing 2016) 66 <http://www.bloomsburycollections.com/book/law-in-theory-and-history-new-essays-on-a-neglected-dialogue> accessed 9 February 2023.

[235] Schlag (n 46) 58.

particularist turn (or "passive acceptance"[236]). This response involves retreating from the ambitions of theory to the refuge of the concrete, hewing as close to the facts as possible. Given that the facts exist within dedifferentiated webs of meaning, however, this leaves us "wallowing"[237] in dedifferentiation rather than going beyond it. Third, ignore the problem. We could (and do no doubt) continue with business as usual. Perhaps all our knowledge projects are just artistic or aesthetic endeavours, so what? We can still "do law", provided we take an "as if" orientation, "as if" our knowledge projects produced dependable truths. But Schlag decries this as "disingenuous": how can we pretend that law compels certain outcomes while at the same time acknowledging that legal analysis never really gets off the ground? Finally, and Schlag nods in this direction, we can reckon with dedifferentiation, acknowledging our tendency to differentiate and accepting that our "differentiations […] are not simply received, but collectively created and maintained".[238] Presumably then, this response requires (a) that we acknowledge what we are doing when we "paint"[239] such differentiations (ie engaging in an aesthetic endeavour) and (b) that we recognise the status of the differentiations so "painted" (ie they are just one way of "artistically creating the identities and relations that [we] reveal, describe and affirm"[240]). This position requires some modesty: one must "drop the pretense to knowledge or truth in any strong sense". It also demands ambition, because one must venture beyond the "protection of […] disciplinary routines".[241]

But what does all this have to do with legal rupture and interlegality? At the beginning of Chapter 2, I noted three assumptions that seemed to underlie the notion of interlegality. It struck me that the term would not prove useful to a discussion of legal rupture unless these assumptions were acknowledged and discussed. I set out then to try and clarify the basis for these assumptions by looking at the following three questions:

1. How does one distinguish one legal order from another? (ie Where are the boundaries of legal*ity*?[242] Where does the map end?) This is the question of the **distinctness** of legal orders.

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[236] Tomlins (n 234) 66.
[237] Schlag (n 46) 59.
[238] ibid 60.
[239] ibid 59.
[240] ibid 57.
[241] ibid 60.
[242] The suffix "-ity" denotes an instance or degree of a quality or condition. In this case we are looking for individual instances or degrees of legal order.

2. What is so legal about a legal order? How can one differentiate *legal* overlaps between two (or more) legal orders, which go to the heart of inter*legal*ity, from other types of overlaps (between legal and cultural/religious/economic/etc orders)? This is the question of the **legalness** of legal orders.
3. How does one determine potential sites of legal rupture within a legal order? (ie What is it about the consistency of legality that makes it particularly susceptible to rupture rather than reform? Can we describe the site of interlegality?) This gets to the heart of *inter*legality. This is the question of the **intersectingness** of legal orders.

Schlag states in his abstract that the plague of dedifferentiation is "bad news" for the ways in which we do theory in law, since most of the time this involves "distinguishing law from a discrete something else".[243] A quick review of the three questions I posed reveals that I am indeed trying to do theory by "distinguishing law from a discrete something else". If these are the types of basic questions that guide legal theorists,[244] then Schlag is surely right that *all* legal theory is afflicted.[245] Both the distinctness question and the legalness question are about differentiating one thing (X) from another (Y) where both X and Y are fundamentally nebulous in character and the relations between them make their identities increasingly nebulous over time. And the "bad news" is not limited to distinctness and legalness, for intersectingness too requires differentiated bodies to intersect. It seems then that legal theory is essentially an exercise in differentiation and, as such, the dedifferentiation plague is likely to strike indiscriminately among legal theorists.

How have legal theorists fared, then, since 2009? Has the dedifferentiation plague been fended off? Ignored? Or quietly revoked? Much to my surprise, Schlag's 2009 article is rarely cited. In fact, the majority of citations are to be found in Schlag's own later publications.[246] Has the legal academy simply turned its back on Schlag's dedifferentiation plague?

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[243] Schlag (n 46) 35.
[244] Twining seems to suggest as much when he argues that three questions are at the heart of legal theory: "First, what counts as one normative order? (the problem of *individuation*). Second, how should we distinguish the legal and the non-legal in this or similar contexts (the problem of *identification* of the legal). Third, are there useful ways of categorising the candidates that have been identified for inclusion in this mapping exercise? (the *classification* of legal traditions, families, systems, and cultures)." (Twining (n 170) 73–74).
[245] Schlag (n 46) 35.
[246] See, for eg, Schlag (n 3); Schlag (n 4).

Fending off the plague?

While Schlag's paper was quite a radical attack on legal scholarship, especially for those engaged in critical legal scholarship, a quick search of the literature shows that the dedifferentiation plague was very much contained.[247] Nevertheless, I would like to suggest that there have been outlier responses to Schlag's plague, even if it is not explicitly named by these authors. When looking for these kinds of responses, I have kept in mind the closing words from Schlag's article:

> one appropriate response to dedifferentiation would be to reckon with the creative and aesthetic aspects of our intellectual projects. But what would this mean? In an important sense, this would be a critical project—an attempt to experience and evoke the ways in which disciplinary differentiations are created and sustained.[248]

It seems to me then that an adequate response to the dedifferentiation plague requires (a) the adoption of an aesthetic or creative approach to legal theory (of which much is concerned with differentiations); (b) an intellectual project that recognises that our differentiations are "collectively created and maintained";[249] and finally (c) an acceptance that this reasoning also applies to our disciplinary edifices. Lindahl and Cover both rise to the occasion in this sense. Each adopts a creative – playful almost[250] – approach to (legal) theory. They both consider the distinctions habitually created and maintained in law and then take the time to parse alternative identities, relations and distinctions. Finally, these two authors have both used

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[247] Of the rare articles found, two use the idea of dedifferentiation to question the approach of other theorists: John Henry Schlegel, 'Three Globalizations: An Essay in Inquiry' (2015) 78 Law and Contemporary Problems 19 <https://heinonline.org/HOL/P?h=hein.journals/lcp78&i=32> accessed 17 November 2022 questions Kennedy's exclusion of economics, politics and culture in his arguably over-differentiated article on "three globalizations" (Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in Alvaro Santos and David M Trubek (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006) <https://www.cambridge.org/core/books/new-law-and-economic-development/three-globalizations-of-law-and-legal-thought-18502000/95DADE9D6DF22A4FEAF1B99AA9896135> accessed 17 November 2022); Tomlins (n 234) uses dedifferentiation to question the approach adopted by historicist legal history. A further two engage directly with the problem raised but seek ways to bypass its uncomfortable conclusions (cf Heather Hughes, 'Counterintuitive Thoughts on Legal Scholarship and Secured Transactions Essay' (2007) 55 Buffalo Law Review 863 <https://heinonline.org/HOL/P?h=hein.journals/buflr55&i=882> accessed 10 February 2023; Julen Etxabe, 'Law as Politics: Four Relations' (2020) 16 Law, Culture and the Humanities 24 <https://doi.org/10.1177/1743872116679392> accessed 8 February 2023).

[248] Schlag (n 46) 60.

[249] ibid.

[250] See for example Cover's reference to his own work as belonging to the vein of legal anarchism (Robert M Cover, 'The Folktales of Justice: Tales of Jurisdiction' (1985) 14 Capital University Law Review 179, 181 <https://heinonline.org/HOL/P?h=hein.journals/capulr14&i=185> accessed 11 February 2023).

"indisciplinarity" to great productive effect.[251] Lindahl's work in legal theory is particularly rich in philosophical references and draws heavily on the insights of phenomenology. Cover drew extensively on Jewish Talmudic stories and was insistent on the narrative foundations of law.

The corpuses of both of these authors are too vast to treat in a detailed fashion. Instead, what I would like to do here is extract one indisciplinary thought from each of them, a thought that is useful in facing the dedifferentiation plague. To each of these thoughts, I will add an indisciplinary layer, in the form of an excursus.

Lindahl and boundaries: Differentiating galore

Lindahl has been insistent throughout his work on the importance of boundaries and limits in a general theory of legal order. Boundaries join and separate ought-spaces, mapping the legal/illegal; they are internal to the legal order. Limits, on the other hand, include and exclude, creating an inside and an outside. The inside/outside divide points to a distinction between what the legal collective considers its "own" space and a "strange" place.[252] According to Lindahl, unlike territorial borders that are everywhere contingent, these limits are constitutive of legal orders, including those (such as global legal orders) that claim validity everywhere.[253] "No global legal order is universal or universalisable because unification and pluralisation are the two faces of the single, ongoing process of setting the boundaries of legal orders, global or otherwise."[254] His thought sits squarely in the camp of differentiation then, but recognises

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[251] They take the term "indisciplinarity" from Rancière. When asked in his interview with Marie-Aude Baronian whether he considers his work as "interdisciplinary" or "a-disciplinary", Rancière responded, "Neither. It is 'indisciplinary'. It is not only a matter of going besides the disciplines but of breaking them. My problem has always been to escape the division between disciplines, because what interests me is the question of the distribution of territories, which is always a way of deciding who is qualified to speak about what. The apportionment of disciplines refers to the more fundamental apportionment that separates those regarded as qualified to think from those regarded as unqualified; those who do the science and those who are regarded as its *objects*." (Marie-Aude Baronian, Mireille Rosello and Jacques Rancière, 'Jacques Rancière and Indisciplinarity' (2008) 2 Art & Research: A Journal of Ideas, Contexts and Methods 3 (emphasis in original)) To be indisciplinary, then, is not to be outside disciplinary frameworks, but instead to engage in questioning the disciplinary order that allows certain voices to speak while others are silenced. For Rancière (as for Schlag), "discipline is always a provisional grouping, a provisional territorialisation of questions and objects that do not in and of themselves possess any specific localisation or domain." (ibid) This is also referred to as "inside-out" interdisciplinarity by Mitchell who may have actually coined the term "indisciplinarity" (see WJT Mitchell, 'Interdisciplinarity and Visual Culture' (1995) 77 Art bulletin 541 <https://dialnet.unirioja.es/servlet/articulo?codigo=4953621> accessed 11 February 2023).

[252] Lindahl (n 210) 23.

[253] "[G]lobal law is local law because it involves a spatial closure that separates and joins an inside and an outside" (ibid 1).

[254] ibid 2.

outright that differentiation ("the ongoing process of setting boundaries") just is the way in which legal orders affirm jurisdiction and authority.

His recognition that boundary-setting is an act of apprehending and creating is reinforced by his acknowledgement that his own theoretical project proceeds in the same way:

> Like all accounts of law, the model of legal order I sketch out opens up a domain for practical involvement and theoretical enquiry by *revealing phenomena in a certain light*. There is no alternative to this way of gaining conceptual access to law; it is the necessary implication of the insight that our practical and theoretical engagement with reality is mediate or indirect. But the price to be paid for this mediated relation to law is that representation cannot open up a domain for enquiry without also closing down other ways of accessing it. *Representation discloses something as this, rather than as that, which entails that it is not possible to include without excluding when conceptualising a range of phenomena as law*. If I speak of a politics of conceptualisation with regard to models of legal order it is because the marginalisation they bring about is never merely conceptual; it is also – and even primarily – practical in nature, prescribing certain ways of dealing with behaviour that has been excluded from the domain of law. […] There is no reason to expect that the IACA model of law can extricate itself from this double movement of inclusion and exclusion and its attendant politics of conceptualisation.[255]

Lindahl accepts then that at some point in theory we must act without warrant. Moreover, once this foundational act of conceptualisation is engaged, one must turn to defending one's particular "politics of conceptualisation". Theory that insists on boundaries must inevitably resort to policing those boundaries. We differentiate to apprehend and so "create" identities; and we police to maintain these identities against the dedifferentiating forces that abound.

In the context of Lindahl's IACA model (institutionalised and authoritatively mediated collective action), the legal order – and the inside/outside distinction it relies on – is "policed" by authority. This is what distinguishes *legal* orders (such as the WTO) from a cooking team in a student dorm, as Lindahl says. Lindahl defines authority as those who act on behalf of the group (or legal collective) to regulate the concordance of participant agency with the normative "point" of the collective. Importantly, the articulation, monitoring and upholding of joint action is "not left over to the collective's members to decide for themselves".[256] This vision of law

[255] ibid 5–6 (my emphasis).
[256] ibid 54.

leaves little space for individual agency. The map is weighty, heavy-handed: where legal order exists, it is applied.

Officials of some sort seem an obvious necessity in such a conception of law, but they are not sufficient. A head chef could potentially be appointed to manage the cooking extravaganza in the student dorm, but surely – Lindahl says – this does not make it a *legal* affair. The position of officials must be institutionalised such that they are potentially replaceable, and in fact regularly replaced. Relying on Shapiro,[257] Lindahl agrees that authority in the context of "massively shared agency" (ie the context of state and global law) requires a relaxing of certain conditions: first, since there are participants who are inevitably "alienated, marginal or virtually invisible",[258] not all participants need concord in the point of joint action, a majority suffices; second, all participants must nonetheless submit to institutionalised "'impersonal' authority relations" that involve "relatively stable and persistent positions of power where turnover in occupancy is not only possible but expected".[259]

One gets the impression reading Lindahl that the many comments on his 2013 monograph have led him to add more and more detail to his account, layers of specification. So much so, in fact, that what seemed at the outset a revolutionary conception based on boundaries and limits has partly lost its radicality in the IACA-version now presented. IACA seems increasingly to resemble traditional top-down law-by-design accounts of law. What have we lost that might be recovered?

Lindahl's account of boundaries and limits insisted on three aspects of legal orders that seem to me essential. First, he argued that legal orders originate from the a-legal outside, from an anarchic political moment of unilateral representation of something as something*. Second, he argued that legal orders are maintained by articulating, monitoring and upholding the boundaries that join and separate ought-spaces with regard to a normative point. Much is spent on defending the map that is the legal order, and this includes guarding the relevant inside against the irrelevance of the a-legal or unmapped outside. Third, he insisted that the inside/outside distinction was normatively charged, the inside preferred over the outside. These

[257] Scott J Shapiro, 'Massively Shared Agency' in Manuel Vargas and Gideon Yaffe (eds), *Rational and Social Agency: The Philosophy of Michael Bratman* (Oxford University Press 2014) <https://doi.org/10.1093/acprof:oso/9780199794515.003.0011> accessed 12 February 2023.
[258] Lindahl (n 210) 57.
[259] ibid 50; citing Shapiro (n 257) 284.

three aspects of his account make it a very convincing answer to the distinctness question that plagues legal theory.

When dealing with the issue of legalness, however, Lindahl gets bogged down in visions of law-by-design; he grants too much to institutionalised authority.[260] Perhaps this is due in part to Lindahl's focus on globalisation and global law, which is his field of expertise after all. But even in the field of trans-state and super-state law, this account may run aground. While Lindahl accepts that "upholding" need not refer to coercion or court sentencing, the example of alternative forms of upholding he provides (eg fines and the negative impact on corporations' bottom line of bad publicity in reports) does not take us much further. What of "soft" law regimes that have no explicit legal bite (or obvious financial consequences)? Are these forms of "law" not actually law? The UN Framework Convention on Climate Change was unequivocal in describing the 2015 Paris Agreement as a "legally binding international treaty on climate change", yet the treaty itself has few legal teeth. It does not impose penalties, fees, fines or embargoes on parties that violate its terms, nor are non-compliant parties ousted from the Agreement. And there is no international court, governing body or institutionalised authority to enforce compliance. The "upholding" of the Paris Agreement (if indeed "upholding" can be achieved) is mainly the remit of reporting obligations and peer pressure. This can hardly be classified as institutionalised authority… Would Lindahl suggest then that the Paris Agreement is not "legal" after all?

In another context, Levit has shown how informal standards, procedures and agreements in the field of transnational trade finance bind banks and credit agencies without any official instances being invoked.[261] So powerful were these "non-legal" norms that formal lawmaking institutions such as the World Trade Organisation (WTO) have over time integrated the norms into their official legal instruments. Levit calls this "bottom-up lawmaking" and in so doing

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[260] It is hard to criticise him for taking this route. After all, this is one of the most enduring conceptions of law (see Max Weber, *On Law in Economy and Society* (Max Rheinstein ed, Edward A Shils tr, Harvard University Press 1954) 13: "The term 'guaranteed law' shall be understood to mean apparatus, i.e., that there are one or more persons whose special task is to hold themselves ready to apply specially provided means of coercion (legal coercion) for the purpose of norm enforcement."; E Adamson Hoebel, *The Law of Primitive Man* (Harvard University Press 1954) 28: "A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting.")

[261] Janet Koven Levit, 'A Bottom-up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments' (2005) 30 Yale Journal of International Law 125 <https://heinonline.org/HOL/P?h=hein.journals/yjil30&i=131> accessed 16 February 2023.

suggests that the traditional divide between hard and soft law in the international realm is "arbitrary and perhaps archaic":[262]

> [T]he practical impact of this line appears largely semantic, for the rules [described in the three examples of bottom-up lawmaking in her article] effectively functioned as authoritative and binding on the lawmaking group (and in some cases others) before they crossed the magical line dividing hard law from other international rules and norms. The awkwardness in this categorical classification scheme breeds a type of schizophrenia regarding the bottom-up lawmakers' self-understanding of the status of their norms. The conceptual misfit between the hard-and-soft law distinction and the bottom-up lawmaking dynamic invites two questions. First, what is the utility of separating law from other norms? Second, if no utility can be found, how should the line between legal and non-legal norms be drawn?[263]

She insists that such bottom-up lawmaking is not confined to the three examples discussed in her article, but abounds in the international field. Indeed she includes a list of six other fields of bottom-up lawmaking for future research in the sector of international commerce and business alone![264] Her detailed study insists not just that the hard/soft law dichotomy is misinformed, but also that the desire to focus on compliance is in some instances misguided. After all, bottom-up lawmaking emerges through practice and not through rules that must then be enforced. In such an environment, we are inevitably driven to pay more attention to the emergence of law and less to the enforcement of such laws. Given the focus on "upholding" in Lindahl's IACA model, this may be another aspect of his theory then that requires adapting.

For convinced pluralists, interested as much in the novel forms of intra-state law as the novel forms of trans-state and super-state law, it is similarly frustrating to find oneself back with an account that requires institutionalised officialdom and vertical renderings of authority to denote legalness. Surely one need not necessarily rely on "effective coercion", when there are just as many available means of "effective inducement".[265] Moore describes the power of "effective inducement" in the context of the New York garment trade:

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[262] ibid 190.
[263] ibid.
[264] Lisa Bernstein, 'Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21 The Journal of Legal Studies 115 <https://www.journals.uchicago.edu/doi/abs/10.1086/467902> accessed 16 February 2023.
[265] Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 Law & Society Review 719, 721 <https://heinonline.org/HOL/P?h=hein.journals/lwsocrw7&i=729> accessed 29 October 2022. "[A]n

> All these givings of gifts and doings of favors are done in the form of voluntary acts of friendship, and the occasions when they are given are holidays such as Christmas or other times when this would be in keeping with a relationship of friendship. None of them are legally enforceable obligations. One could not take a man to court who did not produce them. But there is no need for legal sanctions where there are such strong extra-legal sanctions available. The contractor has to maintain these relationships or he is out of business.[266]

Perhaps Lindahl would not want to recognise such "semi-autonomous social fields"[267] as legal. He would not be alone.[268] And yet effective inducement or a "desire to stay in the game and prosper"[269] is used widely, not just in the New York garment trade. Moore compares the unofficial law of the garment trade to the customary law of the Chagga tribe of Mt Kilimanjaro, but other examples abound in the literature. Gypsy communities regulate many of their inter-clan disputes by way of informal proceedings called "divano". Divano is a form of mediation, where the chiefs of the respective clans come together to discuss the dispute. The chiefs make recommendations to the parties, none of which are technically binding. However, blatant disregard for the chiefs' recommendations may result in the parties losing the respect of their community.[270] Is this "law"? The gypsy communities who live by such law certainly consider it as such; indeed, they consider it superior to all other law.[271] Can we disregard such legal orders in our discussion of legality?

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emphasis on the capacity of the modern state to threaten to use physical force should not distract us from the other agencies and modes of inducing compliance (Pospisil, 1971: 193-232; Weber, 1954: 15). Though the formal legal institutions may enjoy a near monopoly on the legitimate use of force, they cannot be said to have a monopoly of any kind on the other various forms of effective coercion or effective inducement.".

[266] Moore (n 265) 726.

[267] The term proposed by Sally Falk Moore in ibid.

[268] Moore herself preferred not to see her "semi-autonomous social fields" lumped under the legal banner. She thought a more nuanced typology was in order to parse the variety of non-state normative systems (see further Sally Moore, 'Legal Pluralism as Omnium Gatherum' (2014) 10 FIU Law Review 5 <https://ecollections.law.fiu.edu/lawreview/vol10/iss1/5>). But others too have made a stand against using the term 'legal' for normative orders other than state law or not recognised as law by the state. They claim this betrays ethnocentrism and obscures differences in form, structure and effective sanctioning between state law and other normative orders (see Tamanaha (n 160); Simon Roberts, 'Against Legal Pluralism' (1998) 30 The Journal of Legal Pluralism and Unofficial Law 95 <https://doi.org/10.1080/07329113.1998.10756517> accessed 28 February 2023).

[269] Moore (n 265) 729.

[270] Walter Otto Weyrauch and Maureen Anne Bell, 'Autonomous Lawmaking: The Case of the "Gypsies"' (1993) 103 The Yale Law Journal 323, 353–354 <https://www.jstor.org/stable/797098> accessed 13 February 2023.

[271] ibid 360.

What of the Akawaio, a Carib-speaking people in the Guiana Highlands, where leaders lead only by example and suggestion?

> If people do not want to co-operate with their village leader then the latter has no means of enforcing his will. His admonitions, persuasions and direct requests are simply ignored. […] The Akawaio leader is not therefore, a ruler with instituted authority or power. He is accorded respect and he exerts influence but even these cannot be commanded.[272]

Where members of the community are unable to settle disputes under their own steam, the shaman intervenes to restore health to the individuals concerned and the community at large. Thus a Shamanic "medical" enquiry becomes the space for the redress of grievances and the settlement of disputes. If such seances participate in "upholding" the fabric of Akawaio society in much the same way as traditionally defined law does in other communities, can we refuse the label of "law"?

These examples suggest that the requirement of authoritative enforcement is blinkered in a second way. Not only does it exclude the possibility of bottom-up lawmaking discussed above (where "upholding" is less of an issue), but it also disregards non-authoritative forms of "upholding". There clearly are a wide diversity of compliance mechanisms available to groups who wish to ensure order. These include (but are not limited to) the influence of peers or spiritual others; the power of healing rituals; the desire to "stay in the game"; and the fear of ostracism or spiritual retribution. As Gordon says:

> The power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.[273]

Both these considerations toll the bell of dedifferentiation for legal accounts that would too quickly dismiss bottom-up lawmaking, implicit law,[274] microlegal systems,[275] indigenous law,[276] the quasi-legal, the proto-legal, and even social, religious or business norms more

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[272] Audrey Butt, 'The Shaman's Legal Role' (1966) XVI Revista do Museu Paulista 151, 152 <http://www.etnolinguistica.org/biblio:butt-1966-shaman> accessed 13 February 2023.
[273] Gordon (n 233) 109.
[274] See Lon L Fuller, *Anatomy of the Law* (F A Praeger 1968) pt 2.
[275] See W Michael Reisman, *Law in Brief Encounters* (Yale University Press 1999); Daniel Jutras, 'The Legal Dimensions of Everyday Life' (2001) 16 Canadian Journal of Law and Society 45 <https://heinonline.org/HOL/P?h=hein.journals/cjls16&i=47> accessed 19 February 2023.
[276] Among some of the more recent works, see Hadley Louise Friedland, *The Wetiko Legal Principles: Cree and Anishinabek Responses to Violence and Victimization* (University of Toronto Press 2018);

generally. Lines such as these are infuriatingly difficult to draw, for pulling on one (intricately interwoven) thread tends to bring the whole knotted ball with it. As Teubner says, "Like the old Roman god Janus, guardian of gates and doors, beginnings and ends, with two faces, one on the front and the other at the back of his head, legal pluralism is at the same time both: social norms *and* legal rules, law *and* society, formal *and* informal, rule-oriented *and* spontaneous."[277] Bottom-up lawmaking and alternative compliance mechanisms are at work at all levels of the legal world: in "the 'asphalt law' of the Brasilian [sic] *favelas*, the informal counter-rules of the patchwork of minorities, the quasi-laws of dispersed ethnic, religious, and cultural groups, the disciplinary techniques of 'private justice,' the plurality of non-State laws in associations, formal organizations, and informal networks".[278]

While an account of "massively shared agency" was no doubt necessary in the context of globalisation, given the diverse forms of compliance that can be achieved, oftentimes entirely without institutionalisation or outright authority, perhaps other forms of shared agency also co-exist in the legal field? How might these alternative and sometimes supplementary orders be integrated into the account of legality? Based on these many examples of binding but not necessarily "institutionalised and authoritatively mediated" trans-state and intra-state orders, I would like to remove a layer from Lindahl's account: rather than require the existence of "institutionalised and authoritatively mediated collective action", I suggest that all social bodies practise legality insofar as they seek to and effectively maintain unity. "Upholding" compliance then is just one possible translation of this practice of maintaining unity, but we should remain alert to the other possible translations. The realisation of unity is ongoing: it may be top-down or bottom-up, egalitarian or hierarchical, formal or informal, etc. A unity obviously requires internal ordering of its parts, but this is subservient to the purpose of unifying. This is the basic 'what?' or *idem*-identity of a legal order: a unity of concretely ordered existence that persists in time.[279] We are back at the map/mapping.

Pasternak (n 82); Carola Lingaas, 'Indigenous Customary Law and Norwegian Domestic Law: Scenes of a (Complementary or Mutually Exclusive) Marriage?' (2022) 11 Laws 19 <https://www.mdpi.com/2075-471X/11/2/19> accessed 28 February 2023.

[277] Teubner (n 137) 1443.

[278] ibid 1443.

[279] This definition is fundamentally indebted to Romano's concept of legal order as an institution. Not an institution in the sense used by Lindahl, but an institution in the sociological sense of a *social body* with its own norms and internal organisation. Romano does not define an institution in any detail, but it is clear that it is a social body, which has a concrete and effective existence ("a concrete and effective unity"). I draw on both aspects of his account: the concreteness and the effectiveness of the ordered existence that is a social body (see Romano (n 91); and more recently Filippo Fontanelli, 'Santi Romano and

I see you throw up your arms! If one un-layers the legal to this extent, do we not simply undo the meaning of legality itself?[280] I would suggest not. Admittedly this definition is much broader than we might be comfortable with, but its broadness allows us to recognise, first, that social orderings all seek the same thing (a concrete unity), the survival of which they defend in a variety of ways; and, second, that orders of all types intersect. It would not be of much use to a discussion of intersecting orders to limit ourselves to the strictly top-down or the strictly hard law or the strictly institutionally enforced. I suggested at the outset that legal theorists would need to effect a number of shifts in focus. This, then, is the third shift: We need a capacious definition of legality able to encompass Gypsy law, state law, bottom-up standard-setting and international *jus cogens* (among a vast number of other orderings); and alive to the fact that differentiations must always be defended both within (among subparts) and without (where intersections abound).

While I accept that this is clearly a blow to traditional forms of legality, nothing here is revolutionary. Indeed, the fact that legality of this sort can be found in so many different accounts of law and legal order across history suggests that this particular differentiation has been seen as widely useful,[281] if not entirely persuasive. The theorist who went the furthest – and who did perhaps provide a revolutionary account – is Romano.[282] Unfortunately his ideas, published in Italian in 1918, were for a long time unknown to the English-speaking legal

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L'ordinamento Giuridico: The Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Legal Relations' (2011) 2 Transnational Legal Theory 67 <https://www.academia.edu/1078198/Santi_Romano_and_Lordinamento_giuridico_The_Relevance_of_a_Forgotten_Masterpiece_for_Contemporary_International_Transnational_and_Global_Legal_Relations> accessed 17 November 2022). Pierre-Marie Dupuy has also insisted on Romano's account in his discussion of the international legal order (Pierre-Marie Dupuy, 'L'unité de l'ordre Juridique International (Volume 297)' <https://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*A9789041118592_01> accessed 16 February 2023; Pierre-Marie Dupuy, 'A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law' (2007) 1 European journal of legal studies 25 <https://cadmus.eui.eu/handle/1814/6839> accessed 16 February 2023).

[280] Cassese suggests that this kind of definition is circular and therefore inherently useless (see Sabino Cassese, 'Istituzione: Un Concetto Ormai Inutile' (1979) 10 Politica del diritto 53). Tamanaha also suggests that social-scientific definitions of law are all dead in the water (see Brian Z Tamanaha, 'An Analytical Map of Social Scientific Approaches to the Concept of Law' (1995) 15 Oxford Journal of Legal Studies 501, 534: <https://www.jstor.org/stable/764562> accessed 19 February 2023 "What law is and what law does cannot be captured in any single scientific concept. The project to devise a scientific concept of law was based upon the misguided belief that law comprises a fundamental category.")

[281] I accept without any qualms the suggestion made by von Benda-Beckmann that theoretical positions on the "legal" will depend on the question one chooses to research (Franz von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?' (2002) 34 The Journal of Legal Pluralism and Unofficial Law 37, 70 <https://doi.org/10.1080/07329113.2002.10756563> accessed 28 February 2023).

[282] Santi Romano, *L'ordinamento Giuridico: Studi Sul Concetto, Le Fonti e i Caratteri Del Diritto* (Sansoni 1918).

academy since his work was not translated into English until 2017!![283] But he was followed in one way or another (whether consciously or not) by a whole line of thinkers from diverse backgrounds including: Schmitt[284] (in Germany), Ehrlich[285] (in Austria), Dupuy[286] (in France), Fuller[287] (in the UK), Cover,[288] Ewick and Silbey[289] in the US), Santos[290] (in the Global South). These are just select examples; an exhaustive list would require much more space.

How does all this relate to the dedifferentiation plague? Lindahl's work is a prime example of the human tendency to differentiate. His account of legal order is centred around boundaries and limits:[291] every legal order draws them, says Lindahl, separating an ordered inside from an unordered outside. He goes too far though in suggesting that, in *legal* orders, the differentiated inside is kept ordered by a representative sub-part, an institutionalised authority. I argue we should remove this layer from his otherwise compelling account and focus instead on the three aspects noted above (with my additions). First, legal orders originate from the a-legal outside, from an anarchic political moment of unilateral representation of something as something* (which itself suggests bottom-up lawmaking is possible). Second, legal orders are maintained by articulating, monitoring and upholding the boundaries that join and separate ought-spaces with regard to a normative point (but this may be achieved in a variety of ways from effective coercion to effective inducement). Third, the inside/outside distinction is normatively charged,

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[283] Prior to the publication of an English translation (in 2017, a century after Romano wrote it), Prof Paulsson, then president of both the London Court of International Arbitration and the World Bank Administrative Tribunal, commented in his Lalive lecture, "it is a scandal of intellectual history that this seminal monograph has never been translated into English" (see Jan Paulsson, 'Unlawful Laws and the Authority of International Tribunals: The Lalive Lecture, Geneva, May 27, 2009' (2008) 23 ICSID Review: Foreign Investment Law Journal 215 <https://search.informit.org/doi/abs/10.3316/agispt.20102455> accessed 17 February 2023). Prior to this date, only four translations existed: in Spanish (Santi Romano, *El Ordenamiento Jurídico* (Sebastián Martín-Retortillo tr, 1st edn, Instituto de Estudios Políticos 1963)); in French (Santi Romano, *L'ordre Juridique* (Lucien François and Pierre Gothot trs, 1st edn, Dalloz 1975)); in German (Santi Romano, *Die Rechtsordnung* (Werner Daum tr, 1st edn, Duncker & Humblot 1975) <https://www.duncker-humblot.de/en/buch/die-rechtsordnung-9783428034253/?page_id=1> accessed 17 February 2023); and in Portuguese (Santi Romano, *O Ordenamento Jurídico* (Arno Dal Ri tr, 1st edn, Fundação Boiteux 2008) <https://www.academia.edu/39940047/_O_Ordenamento_Jur%C3%ADdico_by_Santi_Romano> accessed 17 February 2023).

[284] See Schmitt (n 143).

[285] See Ehrlich, 'The Sociology of Law' (n 147).

[286] See Dupuy, 'L'unité de l'ordre Juridique International (Volume 297)' (n 279); Dupuy, 'A Doctrinal Debate in the Globalisation Era' (n 279).

[287] See Fuller (n 155).

[288] See Cover (n 2); Cover (n 250); Cover (n 184).

[289] See Patricia Ewick and Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998).

[290] See Santos (n 42); Santos (n 59); Santos (n 89).

[291] Again, I must insist that, for Lindahl, this is specifically *not* a reference to territorial borders.

the inside preferred to the outside (though intersectingness may complicate one's normative positioning).

Rather than refuse differentiations, the aim of this section has been to acknowledge the fact that in differentiating we act without warrant.[292] The best we can do, then, is question how such differentiations take shape and are defended, adjust them as necessary, and perhaps add a few shades of grey.[293] Another important point made by Lindahl is that differentiations must always be defended. They are never 100 per cent secured and they do not hold for long without regular maintenance. Lindahl dealt with this aspect of differentiation by appealing to institutionalised authority. I have tried to show here that this is just one option. Other options are possible and may look very different to institutionalised authority. For example, boundaries are sometimes defended by creative practices of "law-inventing" rather than strict enforcement of "law-abiding".[294] "Strategic defence", as Haraway referred to the problem of individuality,[295] cannot be confined to the pole of "defence" (or upholding); it also involves "strategic" (or creative) responses to threats.[296] Along the mapped axis of *idem*-identity, then, we find a variety of "strategic defence" tools which help to preserve this unity in the face of a threat to the unity's identity. Rarely will a legal order employ one strategic defence tool: the mixed bag of creative tools for ensuring the permanence of the map is an essential aspect of the identity of legal orders.[297]

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[292] As Fitzpatrick notes, "the selection necessitated by abstraction, the inclusion of some things and the exclusion of others, is itself an arrogation of power" (Peter Fitzpatrick, 'Law and Societies' (1984) 22 Osgoode Hall Law Journal 115, 138 <https://heinonline.org/HOL/P?h=hein.journals/ohlj22&i=125> accessed 17 February 2023).

[293] See further the section entitled "Excursus on avoiding binaries".

[294] See Kleinhans and Macdonald (n 142).

[295] Haraway (n 172) 212.

[296] This might be compared to "strategic defence" through diplomatic means.

[297] It should perhaps be noted here that some theorists have tried to present a definition of law that combines the law-by-design and law-as-interactive-practice poles. This would be ideal, since as I note here both aspects are always present in a legal order. One example of such a theory is Luhmann's autopoiesis. According to Luhmann, law is not primarily coercive and exists in all societies (Niklas Luhmann, *A Sociological Theory of Law* (Routledge & Kegan Paul 1985) 78, 83) so his account would seem to fall into the law-as-interactional-practice group, but law evolves as society does to become more institutionalised (ibid 83) so we are back to law-by-design. On the same page, however, he points to the development of legal institutions as an "important step […] which permits a clearer separation between law and language, truth, art and rational practice" and thenceforth he focuses on this institutionalised version. The combining of the two is lost (cf Tamanaha (n 280) 520–522). Having exposed Luhmann's failure, Tamanaha makes (a very) half-hearted attempt to combine the two poles himself. He considers whether a theory of one leading to the other – in either direction – could work (ibid 525–529); though this is a common position, it fails insofar as it neglects the ongoing presence of both aspects of legal order post-transition. He then considers whether the overlap between the two constitutes law, but – for obvious reasons – dismisses this as too restrictive (ibid 529–531).

I hope that this rejection of *institutionalised* authority will not be read as a rejection of authority *tout court*. I see the ongoing usefulness of the map and the intelligibility of the attendant narrative as part and parcel of an order's authority. While the authority of an order may be imposed in a top-down fashion by institutions and perhaps even tools of repression (upholding), its authority may also be secured through interactive-practice (articulating) in the sense that the map proves useful and is widely bought into by the relevant subparts. Authority then is simply the ability to secure an order's permanence in time. As noted above, this involves an appeal to a diverse range of "strategic defence" practices. The more successful orders will ensure the ongoing authority of their map over time; the cracks in the authority of the map start to show precisely when the everyday practices of the map-in-use become too disconnected from the map itself.

Excursus on avoiding binaries

In the previous section, I refused to accept the very common position in legal theory that for a normative order to be a *legal* order, it must be able to enforce compliance, often through institutionalised authorities. This position is in no way original,[298] but it does strike a rather severe blow to exclusive law-by-design accounts of law (even those that recognise legality beyond the State). If legalness is not to be found in institutionalised authority relations, and attempts to combine the poles of law-by-design and law-as-interactional-practice (based on a relationship between them or, alternatively, their common features) have so far failed,[299] is there anything left to which we might attribute legalness? Or is Schlag correct in suggesting that dedifferentiation undoes the terrain to which the discipline of law has traditionally been so attached?

I have a very tentative answer: perhaps legalness exists, but only in degrees.[300] There are shades of legality: deeper hues and paler hues.

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[298] Romano was adamantly against such a position (see Romano (n 91) paras 8, 22); as was Cover, at least in regard to paideic legal orders (see Cover (n 2)). Teubner similarly dismisses sanctions as a marker of legalness (Teubner (n 157) 12). But I could refer to the whole canon of legal theorists who fall within Tamanaha's first category of social-scientific definitions of the law (see Tamanaha (n 280) 503–506, of which the prime examples given are Ehrlich and Malinowski).

[299] See the final fn in the section entitled "Lindahl and Boundaries" above.

[300] This tentative answer should not be confused with Schauer's tentative suggestion that "lawness" might be considered a question of degrees. Schauer suggests that a prototype or ideal-type of law be constructed on the basis of regularly encountered features (eg "a differentiated […] legal profession, a systematically organized collection of social rules, a mechanism for engaging in common transactions of commerce and exchange, a system of coercion to enforce both the constitutive and regulatory rules, and various other noteworthy features"). Once the (admittedly "provincial") prototype constructed, "other normative systems

I do not mean by this that certain types of social orderings are to be considered by their essence more or less legal. Instead, I mean that while legal orders abound along the *idem*-identity continuum, they may be more or less legible as such. A *legal* order must be legible (a) to its subparts (ie to what extent is the ordering – and thus the concrete unity – legible to the parts that make up the unit?) and (b) to others beyond the legal order (ie to what extent is the unity of the ordering legible to concerned-others?) Both are important to the stability of internal and external relations and thus to the permanence of the legal order. Where a legal order is highly legible, we might accept that there is a high degree of legality; where the "order" has difficulties ensuring legibility, legality is present to a lesser extent. This would help explain why group action is not immediately a legal order. It becomes so only as and when the group begins to see itself as a unit and as bound by some mutually recognised ordering principles. Its permanence is driven by the legibility of the ordering to its parts. It explains too how a legal order within a larger legal order – but substantially illegible to the latter – may suffer from an externally imposed lesser degree of legality: indeed, the permanence of the sub-order's own specific ordering may be under threat as a result of this lack of external legibility, because of the knock-on effects on its ability to persist in its being. This is not to say, though, that the sub-order is not legal. On the contrary, a theory that espouses degrees of legalness must accept that insofar as identity is always a question of strategic defence, orders are in an ongoing quest to increase (or at the very least preserve) their degree of legality. While those orders that are only partly legible lead a fragile existence as legal orders, they cannot be dismissed outright as lacking legalness. Legality may be conceived then as a matter of degree: the legibility of a legal order denotes the degree of legality and successful legibility better ensures permanence of the unity.

Aside: You may have wondered what was to become of the law-as-narrator's-prerogative, the non-essentialist definition of law, which I suggested was the third interpretation lurking in Kafka's *Before the Law*. Its time has come.

A legality of degrees admits that law is kaleidoscopic and that no transcendent perspective exists from which to determine one solid contour. As in Kafka's parable, the narrator (or the

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[could be characterized] by their degree of relevant resemblance to the prototype, and we might further designate this degree of resemblance—or similarity—as the lawness of a system". He suggests this could help us avoid the "hoary debates" over whether international law and customary law are law (Schauer (n 58) 1144–1145). Above and beyond the fact that in 2018 (the date of publication) debates over the "lawness" of international law and customary law seem "dead" rather than "hoary", my tentative suggestion here has nothing to do with determining degrees of legality on the basis of resemblance to a Global North-centric prototype.

transcendent omniscient legal theorist) has given us only widely divergent narratives or insights into the meaning of legal. Tamanaha suggests that, if we want to get a sense of the legal, we need to ask the reader (or the legal subject). He is right in one sense and wrong in another.

He is right in the sense that only the reader engages directly with the text, and only a legal subject (assuming legal officials are also subjects) engages directly with a presumed legal order. Someone who has not read the text cannot tell me of its content. Someone who has not lived within the presumed legal order is not well-placed to speak to me of its existence. It is surely best then to ask the reader to define the content and the legal subject to define the order.

On the other hand, he is wrong insofar as he ignores the existence of the confused reader, the baffled reader, the unsettled reader. I admit that reading Kafka is oftentimes an experience of this sort. The text is illegible (as Derrida insists).[301] It is only through active engagement with his parables that some things become slightly clearer (or more obscure… it depends!) The confused reader is not in a position to report on the content of the narrative, or perhaps only in piecemeal fashion. Grasping in the dark, the baffled reader finds one or two details that are intelligible, but the overall arc of the narrative is lost. When the reader compares reading notes with other readers, they are likely to be astounded by the diversity of "content" that the narrative has invoked. Even amongst a collective of Kafka-readers, then, it is highly unlikely that the result of compared reading notes will be collegial agreement on a single received narrative. In such a situation, we are back with the question raised in Chapter 2: Whose story is *the* (legal) story? This aspect of Tamanaha's non-essentialist theory is problematic. It provides no solution in situations where there is disagreement among members (and concerned-others) as to whether they are dealing with "law" or not.

My account insists that it is not the members' (and concerned-others') differing ideas on law that should settle the question, but the legibility of the ordering to these populations. A legible order will have a high degree of legality; a poorly legible order (or one that is legible only to a small portion of members and/or concerned-others) will have a low degree of legality. Instead of asking the reader what the story is, I suggest that the appropriate question is: "How accessible or intelligible is this tale?" This is not the same question. (Indeed, it may even be a meta-question if we are talking about tales.) Nevertheless, this is what I am trying to get at in referring to degrees of legality. The question is not "What label would you give your order?", which suggests outright that the order (or story) clearly exists, and it is just an issue of labelling

[301] See Derrida (n 141).

it (or giving it content).[302] Instead, the appropriate question is something along the lines of "Is there an order intelligible to you?"

Intelligibility does not mean much though if it is limited to one person's appraisal. The more readers who are agreed on the intelligibility of a specific tale, the more likely it is that the adjective is actually a good fit. Indeed, in such circumstances, it may not be ridiculous after all to double up on appraisals, appealing to both readers of the tale *and* those who have not read the tale but have come into contact with it somehow. After all, the latter may also have a sense of the tale's intelligibility from snatches of conversation among friends or family, from web-surfing or academic by-references (in class, in articles, on Twitter, etc), from radio shows or from reading the blurb or a section in passing. While none of these prove definitive individually, the collection gives us a clearer picture of whether or not the tale is actually accessible. This type of collage-intelligibility seems more fruitful when considering legalness.

Of course, the need to ask the reader or the (potentially) legal subject (ie the heart of Tamanaha's non-essentialist theory) is still very much there. This shift in perspective is no doubt necessary. The law-as-narrator's-prerogative accepts that the narrator's true intentions are always beyond reach. An essentialist definition of legal order is likely to suffer the same fate. All we have is our interpretative wherewithal to try and map the kaleidoscopic variety of orders we might call legal.

However, in avoiding the temptation to create (or re-create in Tamanaha's case) a binary out of the legal (law vs not-law), the possibility of a legality of degrees allows us to be more sensitive to the individual's experience of legalness, while also acknowledging that an order's legalness is not determined by one member alone, no more than the intelligibility of a narrative is confirmed by one reader alone. At the risk of repeating myself, for a degree of legalness to exist, there must be (a) a subset – or better yet a majority – of members who clearly apprehend the ordering such that it structures their interactions and (b) a subset of concerned-others that recognise this unity beyond their own, a fact also likely to have effects on their interactions. A legality of degrees, I argue, goes beyond Tamanaha's conventionalist perspective, while clearly recognising the importance of his contribution.

But what makes a unity of concretely ordered existence intelligible? It is one thing to talk of the intelligibility of a tale… and quite another to talk of the intelligibility of a legal order. To

[302] Indeed, it suggests also that the labels we use have common meaning for all those questioned, that they can escape their imperial origins, etc… and this is hardly something we can say of the label "law".

deal with this outstanding question, I suggest we turn to Cover's remarkable essay "*Nomos* and Narrative".

Cover and narrative: The return of dedifferentiation

Cover directly grapples with the question of what makes a legal order intelligible in his article "*Nomos* and Narrative". The first paragraphs contain a snapshot of his radical vision:

> We inhabit a *nomos*—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. … [T]he formal institutions of the law … are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.
>
> In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse — to be supplied with history and destiny, beginning and end, explanation and purpose. […] [P]rescription, even when embodied in a legal text, [cannot] escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations.[303]

A ***nomos*** is a normative world.[304] When the precepts (rules, principles, norms, commands, etc) of a legal order are charged with meaning – meaning that can only be found in narrative – we have a *nomos*, "a world in which we live". There is not one *nomos*, but an effervescence of them. Far more important in number than states themselves, these intra-state nomic groups populate the map of legality. Indeed, for Cover, they are the beating heart of legal meaning. Without the bubbling creativity of these nomic groups, Cover argues, state law itself would be an empty shell.

The *nomos* is composed of a legal map of sorts (the law or "precepts" in Cover's vocabulary) *and* a **narrative** that breathes life into the map. Cover's theory recognises that without the narrative backdrop,[305] precepts in general are empty and un-emplaced shells of meaning. The

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[303] Cover (n 2) 4–5.

[304] The "*nomos*" in Cover's work corresponds to the legal order as I have tried to describe it in the preceding chapters. When I use the term "nomos", then, it should be considered as interchangeable with "legal order".

[305] It should be noted that "backdrop" is not the appropriate term in this context (as Gal Hertz, 'Narratives of Justice: Robert Cover's Moral Creativity' (2020) 14 Law and Humanities 3, 6–7 <https://doi.org/10.1080/17521483.2020.1752437> accessed 26 October 2022 notes). A "backdrop"

narrative is what renders the map intelligible. We cannot act on a legal map without appealing to its origins and its ambitions.[306] This legal narrative is embodied in language itself, but also, and more broadly, it weaves together the existing socio-material world[307] and visions of tomorrow, relying on (for example) collective traditions, special places, honorific figures or deities, the specificities of local or collective history, the material environment, and (importantly) future possibilities. These stories, Cover explains, are like the bridge between "reality and vision",[308] or the actual and the virtual; they are the realm of becoming. As such, they also drive behaviour, for what is a vision without a commitment to strive towards its realisation? On this point, Cover notes that when the tension between reality and vision is lost, its practical potential neglected, the legal nature of the enterprise dissipates.[309] This impulsion to act can be found in the force of the narrative's normative charge. Thus, the attention of the legal theorist is drawn beyond the legal text to a multitude of other-than-law resources which give the text its normative "charge"[310] and concurrently arrange relational-expectations and relational-doings with regard to the future.

Interestingly, this narrative aspect of Cover's article has often taken a back seat in later analyses of his work. The article is, admittedly, overflowing with insights that deserve unpacking, so perhaps relative neglect of this particular aspect is just an inevitable consequence of Cover's creative drive. But it does seem slightly disingenuous to focus on the courts' role as a jurispathic disposal house for legal meaning, without attending to the importance of these narrative threads. This type of blinkered analysis can have the unfortunate consequence of

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suggests that the narrative is removable; it is not. It is difficult, though, in the English language to find a term that appropriately expresses the relation between a map and its sources of meaning. As Cover states: "[L]aw and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse – to be supplied with history and destiny, beginning and end, explanation and purpose." (Cover (n 2) 5).

[306] It is my opinion that Cover's narrative weaves together the two aspects of maps (a "guide for locating oneself in the world" as it exists) and blueprints (a "story of possibility") set out in Johnson's article on legal cartography (Johnson, 'The Persuasive Cartographer' (n 66) 249–250).

[307] When we talk of narrative, we have a tendency to imagine a strictly cultural construct. Cover's narrative explicitly avoids this caveat. He sees law as deeply anchored in the socio-material world. As a result, in Cover's work, a narrative that remains a simple figment of the imagination with no link to concrete circumstances and no practical consequences is the sign of madness.

[308] Cover (n 2) 9.

[309] ibid 39: "If law reflects a tension between what is and what might be, law can be maintained only as long as the two are close enough to reveal a line of human endeavor that brings them into temporary or partial reconciliation. All utopian or eschatological movements that do not withdraw to insularity risk the failure of the conversion of vision into reality and, thus, the breaking of the tension. At that point, they may be movements, but they are no longer movements of the law."

[310] ibid 21.

reinforcing accusations of liberal proceduralism,[311] for example, which (I feel) would be an unfair characterisation of Cover's work.[312]

Other authors have appealed to narrative-like structures. Lindahl, for example, refers to the "normative point" of a legal order, but his concept lacks the depth of Cover's narrative.[313] While the "normative point" also holds a yearning for the future, it does not convey how the past, present and future existence of the legal order are woven together. Nor does it insist, as does Cover's narrative bridge, on a grounding in what is collectively known or has been collectively built. Finally, it fails to relate the power of the narrative: stories carry one towards an end-point, stories colour our experience of reality, and the best stories compel a passing-on down the generations. The "normative point" seems lacklustre in comparison.

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[311] See Jason A Beckett, 'The Violence of Wording: Robert Cover on Legal Interpretation' (2011) 8 No foundations: An interdisciplinary journal of law and justice 3 <http://nofoundations.com/NoFo8Beckett.html> accessed 4 November 2018., who accuses Cover of being a "procedural liberalist, albeit a more sensitive one than Dworkin" (ibid 12) despite noting later on that "before engaging a critique of Cover, it should be noted that his thesis represents a distinct advance over the Rawlsian or Habermassian claims of the neutrality of liberalism or deliberative democracy" (ibid 13). John Alder, 'Robert Cover's Nomos and Narrative: The Court as Philosopher King or Pontius Pilate' (2006) 6 Issues in Legal Scholarship [i] <https://heinonline.org/HOL/P?h=hein.journals/iulesch6&i=104> accessed 22 February 2023 is perhaps a counter-example since he neatly unpacks the ambiguity in the text that may lead to accusations of liberal proceduralism, while also recognising the narrative insights.

[312] I do not have time to treat this criticism in depth here. I accept that there is some ambiguity in the text. For example, Cover clearly states that, "In the world of the modern nation-state – at least in the United States – the social organization of legal precept has approximated the imperial ideal type that I have sketched above, while the social organization of the narratives that imbue those precepts with rich significance has approximated the paideic." (Cover (n 2) 16) Nevertheless, I remain convinced that wider reading of Cover's work dispels such a myth. For eg, Cover states (in Cover (n 250) 181): "I have recently staked out a position about the nature of law that has obvious and consciously chosen political significance. My position is very close to a classical anarchist one—with anarchy understood to mean the absence of rulers, not the absence of law. […] The upshot of such a claim, of course, is to deny to the nation state any special status for the collective behavior of its officials or for their systematic understandings of some special set of 'governing' norms." A closer reading of his *nomos* article must also lead one to reject the idea that courts are above narrative: "Any nomos must be paideic to the extent that it contains within it the commonalities of meaning that make continued normative activity possible" (Cover (n 2) 14)

[313] I erroneously based this claim on Lindahl's theory as it was originally presented in Lindahl, *Fault Lines of Globalization* (n 98). In that book, the word "narrative" is not mentioned. In Lindahl's second book (*Authority and the Globalisation of Inclusion and Exclusion* (n 210)), however, this narrative aspect is clearly addressed: "This fourfold process of spacing, timing, subjectifying and materialising has a *narrative* structure. In other words, the representation of unity in the course of collective action always has the form of a story, even when representation takes place by way of lawmaking. Indeed, no legal order can sustain itself only as a process of creating and applying rules: every legal order requires a narrative about its emergence and about its point, a yarn that creates/recreates the first-person plural perspective of a we* and that allows for time to appear to participants as *our* time; space to appear as *our* space; subjectivities as *our* subjectivities; acts as *our* acts." (Lindahl (n 210) 68 (emphasis in original)). The presentation here is very much in line with Cover's discussion of narrative. I would therefore be interested to see where a lengthier engagement with Cover's work and narrative in particular might take Lindahl's theory.

M'Gonigle's Green Legal Theory (GLT)[314] has similarly grappled with this idea of narrative, which subtends the law and give it a particular "charge". He has referred to it using a variety of terms, the most recent of which is "social law". As he says:

> I call this the "social law" because it emanates not from human intention (at least, not directly) but from the "logics" of a society's historical creations, its "animations." From the medieval galley to the modern automobile, merchant trade to the iPhone, political parties to the courthouse—countless animations provide the generative context for the "power that gives itself its own law." Yet they are unrecognized and unacknowledged as law. The primary task of green legal theory (GLT) is to explicate this social law that, despite the claims of legal law, drives the liberal order and the problematic of planetary health and survival.[315]

M'Gonigle's work better seizes the imprint of history on narrative, the way it forges identity. There is a sense in which he acknowledges, too, the yearning of these social laws (driven by their deep-seated content) to continue shaping behaviour going forward. So, while the term is, I feel, somewhat less expressive of the idea than Cover's, he sees these same two faces at work: the past charging towards the future. Nonetheless, unlike Cover, his account focuses exclusively on the "social laws" that subtend "legal laws", and the legal laws that interest him are primarily those of the state. As a result, there is no discussion of the creative possibilities fomenting in other legal orders. His target is "the 'hegemony' of liberal ipseity and its legal law [which] eased the world into the Anthropocene—and now impedes its escape".[316] Only one "liberal ipseity" is mentioned, suggesting that all states (and perhaps international law too) sit on the same "social laws". My argument is slightly different. Like Cover, I consider a legal order's particular narrative to be specific to that legal order. Inevitably, with the infinite overlaps between orders, some aspects of any legal order's narrative will be shared with others, but each legal order takes (or rejects) these (supposedly) shared aspects and shapes them into a narrative fit for their world.[317]

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[314] Discussed in M'Gonigle, 'Green Legal Theory' (n 14); M'Gonigle and Takeda (n 10); M'Gonigle, 'Green(ing) Legal Theory' (n 14).
[315] M'Gonigle, 'Green(ing) Legal Theory' (n 14) 179.
[316] ibid 180.
[317] In this sense, Legrand's "other law-text" is closer to Cover's idea of narrative insofar as it applies to all legal orders. Legrand argues that law is always singular, that it carries the spectral or constitutive traces of a people, a place, a culture, a language, just like our everyday action within a family carries the spectral traces of family history, culture and language, etc. As he says (citing Derrida): "Whether he wants to affirm it or not, the comparatist-at-law is hostage to the trace. […] The comparatist-at-law must be faithful to the other law-text: there is 'the law of the other [law-]text, its injunction, its signature'." (Pierre

M'Gonigle's idea of "social law" raises another interesting issue. He proposes that "social laws" arise "not from human intention (at least, not directly)". This side-comment is worth probing, as it marks a second divergence from Lindahl's "normative point". In espousing large parts of Shapiro's planning theory of law and the theoretical corpus on "massively shared agency",[318] Lindahl explicitly adopts an intentionalist paradigm. To a certain extent, this explains why his choice of term is decidedly forward-pointing. M'Gonigle, on the other hand, considers this an important aspect of social laws: they do not require human intention to exist or to have effect. Instead, these "emergent tendencies" may be driven by non-human "actants" (to borrow from Latour), may self-perpetuate through spontaneous citational practice, or may develop as a result of interactions with the material context itself.[319] The reference to their non-intentional nature is perhaps deceptive, as "social laws" may certainly be "created or facilitated by human intention" as M'Gonigle readily concedes.[320] I would argue that they are not in fact distinguishable by the *lack* of human intention, but rather by their potential to self-organise or self-perpetuate. A useful comparison may perhaps be drawn with Connolly's discussion of "self-organising processes", a number of which – he argues – have "teleodynamic" properties.[321] He uses a wonderfully revealing metaphor of such processes in the example of the Millennium Bridge in London.[322] This footbridge, built across the Thames and opened to the public in June 2000, was designed to be flexible rather than rigid, reacting a little to the wind and the elements. On days where the wind was mild, the bridge would rock slightly back and forth. When pedestrians crossed the river, however, they adapted their step to the sway of the bridge and this simultaneous adaptive behaviour by many thousands of feet resulted in the gradual amplification of the initial sway until the bridge was swinging dangerously. There was no collective agreement to amplify the sway, nor was an order given to walk in step with others; the creative interaction of human adaptive capacity and (intentionally human-designed) material context simply produced an amplified outcome. The bridge was intended to sway; but

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Legrand, '"Il n'y a Pas de Hors-Texte": Intimations of Jacques Derrida as Comparativist-at-Law' in Peter Goodrich and others (eds), *Derrida and Legal Philosophy* (Palgrave Macmillan 2008) 136). It might be queried, however, whether Legrand has the forward-marching narrative aspect in mind when he speaks of the spectral trace.

[318] See in particular Shapiro (n 257); Scott J Shapiro, *Legality* (Harvard University Press 2011).

[319] M'Gonigle, 'Logics as Law' (n 14) 6 (on file with the author).

[320] ibid.

[321] Connolly (n 68) 82.

[322] ibid 82–83.

it was not intended to sway out of control. This is a perfect metaphor for the self-reinforcing tendencies (or "teleodynamism"[323] as Connolly calls it) of some of M'Gonigle's social laws.

While I think this example aptly characterises M'Gonigle's idea, I am reticent to onboard the notion of teleodynamism. It seems to me that the idea of a *telos* contained within it (and M'Gonigle regularly appeals to a *telos* in this context too) is misleading. A narrative does not necessarily have a *telos*, a "final cause" (in Aristotle's terms) or a driving purpose. While it stretches into the future, carrying a "tantalizing promise of what *might* be",[324] it is not spontaneously end-directed as Kafka's parables make unsettlingly obvious. A narrative evokes a field of possibilities, rather than insisting on a specific end. In appealing to narrative, Cover is, I think, appealing as much to the narrative journey as to the specific destination. With this proviso in mind, I think the more appropriate term would be "homeodynamism". Homeodynamism conjures up creative potential along with a yearning to maintain a state of equilibrium.[325] It is difficult to define equilibrium in the context of a story, but I am referring to the narrator's desire to provide an organisation of the narrative parts that holds together as a unity. This unity may be creatively upset along the way, but the narrative imperative is to provide enough unity for the story to be intelligible as a whole. I will come back to this idea of homeodynamism later.[326]

As the above discussion reveals, Cover left the precise content of the narrative rather vague, preferring to develop a number of examples at length. Nevertheless, there are some helpful clues to be found in his work. We know, for example, that he sees "common narratives [as] locating the social group in relation to the cosmos, to its neighbors, to the natural world".[327] Narratives are not cultural artefacts detached from a physical reality: they are imprinted with the concrete conditions of existence of the social body. This makes it possible to orient the map to the physical terrain or to concrete interactions.

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[323] ibid 82.
[324] Johnson, 'The Persuasive Cartographer' (n 66) 250 (emphasis in original). I should note, here, that I believe that the map and the blueprint have more in common than meets the eye. Johnson suggests that the blueprint contains an "explicit agenda" (with little reference to the past or the way things are), while the map is a "neutral marker of what *was*" (with little reference to future possibilities). On the contrary, I would argue that the blueprint is always embedded in a current material context (Johnson's family chose a particular spot to imagine their blueprint for example) and a map inevitably shapes future action and thus possibilities (by indicating specific pathways to follow for example).
[325] I appropriate this term from the work of Damasio, where it is put to such productive work in describing the orientation of the central nervous system in all living beings (see further Damasio (n 67) ch 3).
[326] See discussion later in this chapter (section entitled "A map of legality") and again in chapter 4 under the heading "Interpretive commitments".
[327] Cover (n 2) 14.

In terms of content, we know that narratives appeal to "a language and a mythos",[328] both of which drive map usage:

> These myths establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves – a lexicon of normative action – that may be combined into meaningful patterns culled from the meaningful patterns of the past.[329]

His reference to Kuhn's paradigms gives us further clues, demonstrating that these paradigmatic narratives are strictly linked to our "doings", the ways we act in the world.[330] "To inhabit a nomos is to know how to live in it."[331] Further, Cover insists that the bridge the law constructs between one extant state of affairs and a potential, future state of affairs is *normatively* charged through the use of narrative:

> The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative. The various genres of narrative – history, fiction, tragedy, comedy – are alike in their being the account of states of affairs affected by a normative force field. To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the "is" and the "ought," but the "is," the "ought," and the "what might be." Narrative so integrates these domains.[332]

As mentioned at the outset, we know that the narrative is the source of meaning and locatedness: it alone provides the keys to the legal map's intelligibility. Cover does not suggest, of course, that meaning is unitary.[333] As the discussion in the previous section revealed, in interacting with a narrative, no reader receives a carbon-copy of meaning. Interaction with the narrative itself produces diversity. Nevertheless, my reading of a narrative is unlikely to be

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[328] ibid 9.
[329] ibid.
[330] ibid 10.
[331] ibid 6.
[332] ibid 10.
[333] ibid 15: "The unification of meaning that stands at its center exists only for an instant, and that instant is itself imaginary. Differences arise immediately about the meaning of creeds, the content of common worship, the identity of those who are brothers and sisters."

completely idiosyncratic, unless I am "quite mad".[334] In some very basic sense, I must be able to relate the meaning I have "found" back to the common script and the meanings of others.[335]

Narratives, then, are tied to a material context; they drive map usage; they give the legal map its normative charge; and they are (potentially at least) what make the map-as-object and the map-in-use intelligible. Despite all this, it is still unclear what populates the narrative. A clue as to their content comes in a later article:

> [E]ach community builds its bridges iwth [sic] the materials of sacred narrative that take as their subject much more than what is commonly conceived as the "legal." The only way to segregate the legally relevant narrative from the general domain of sacred texts would be to trivialize the "legal" into a specialized subset of business or bureaucratic transactions.[336]

Cover does not limit narratives to subjects commonly conceived as legal. He has clearly been affected by the dedifferentiating plague… I would like to add some depth to Cover's account here by appealing to Chiba. I do not think this bastardises[337] Cover's account by any means. It is just a way of rendering explicit what I read as implicit in his article. In discussing law in the

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[334] ibid 10: "Any person who lived an entirely idiosyncratic normative life would be quite mad. The part that you or I choose to play may be singular, but the fact that we can locate it in a common 'script' renders it 'sane' – a warrant that we share a nomos." When a person loses the ability to have emotional responses to the "images" that populate their mind (whether these are sensorial or memory-based), this impairs their ability to have meaningful social interactions (sometimes leading to the label "quite mad"). Their social integration comes undone, as it did in the case of Phineas Gage in 1848 (see the fascinating account given in Antonio Damasio, *Descartes' Error: Emotion, Reason and the Human Brain* (Vintage 2006) ch 1). Our emotions and the mirrored emotions of our peers (Antonio Damasio and Hanna Damasio, 'Minding the Body' (2006) 135 Daedalus 15 <https://www.jstor.org/stable/20028048> accessed 22 February 2023) are important supports for the development of social behaviours and their attendant maps. Without them, we are literally lost. This may go some way towards explaining how completely dissociated readings of a common narrative place an individual outside beyond the pale.

[335] Cover (n 2) 15: "The unification of meaning that stands at its center exists only for an instant, and that instant is itself imaginary. Differences arise immediately about the meaning of creeds, the content of common worship, the identity of those who are brothers and sisters. But even the *imagined* instant of unified meaning is like a seed, a legal DNA, a genetic code by which the imagined integration is the template for a thousand real integrations of corpus, discourse, and commitment" (recalling Connolly's "teleodynamism", see discussion above).

[336] Cover (n 250) 182.

[337] I employ this term in the methodological sense, as Deleuze did in speaking about his forays into the theoretical work of others: "My way of getting out of [the philosophical tradition] at that time was, I really think, to conceive of the history of philosophy as a kind of buggery or, what comes to the same thing, immaculate conception. I imagined myself getting onto the back of an author, and giving him a child, which would be his and which would at the same time be a monster. It is very important that it should be his child, because the author actually had to say everything that I made him say. But it also had to be a monster because it was necessary to go through all kinds of decenterings, slips, break-ins, secret emissions, which I really enjoyed. My book on Bergson seems to me a classic case of this" (Deleuze, quoted in Elizabeth Grosz, *Time Travels: Feminism, Nature, Power* (Duke University Press 2005) 226 <https://www.degruyter.com/document/doi/10.1515/9780822386551/html> accessed 23 February 2023)

context of Asian cultures, Chiba agrees with Cover that the "cultural factor of law"[338] has been ignored. Chiba presents a layering of law composed of official law, unofficial law and legal postulates. It is the latter that most interests me here, since legal postulates are said to "found, justify and orient"[339] the official or unofficial law with which they are connected. Chiba (as Cover) clearly sees these postulates as providing normative charge, since he refers to them as "value principle[s] or value system[s]".[340] More useful yet is his list of examples of what precisely might fulfil this role:

> [Legal postulates] may consist of established legal ideas such as natural law, justice, equity, and so on in [Western] jurisprudence; sacred truths and precepts emanating from various gods in religious law; social and cultural postulates affording the structural and functional basis for a society as embodied in clan unity, exogamy, bilineal descent, seniority, individual freedom, national philosophy, and so on; political ideologies, often closely connected with economic policies, as in capitalism or socialism; and so on.[341]

This list is not exhaustive of course, but it gives us an idea of the breadth of sources from which narratives draw. I would like to discuss a couple of them before I move on to my own mapping exercise.

Language is the primary carrier of narrative "charge". Growing up in a particular language does not limit the field of thought (as it was once supposed), but it does determine what we are habitually obliged to think about. As the linguist Roman Jakobson noted, "Languages differ essentially in what they *must* convey and not in what they *can* convey."[342] Certain indigenous languages (such as the Australian Guugu Yimithirr from north Queensland) use cardinal directions (north, south, etc) rather than egocentric directions (left, right, in front of, behind, etc) to refer to movement and to the place of objects in space. Research has shown that, as a consequence, the Australian Aboriginals who speak Guugu Yimithirr have an almost superhuman sense of orientation and from a very young age. This is true of all groups (and

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[338] Masaji Chiba, 'Introduction' in Masaji Chiba (ed), *Asian Indigenous Law: In Interaction with Received Law* (Routledge 1986) 1.
[339] ibid 6.
[340] ibid.
[341] ibid.
[342] Roman Jakobson, *Selected Writings: Word and Language*, vol II (Mouton & Co 1971) 264 <https://www.abebooks.com/book-search/title/selected-writings-ii-word-and-language/author/jakobson-roman/> accessed 21 February 2023; quoted in Guy Deutscher, 'Does Your Language Shape How You Think?' [2010] New York Times Magazine <https://www.nytimes.com/2010/08/29/magazine/29language-t.html?pagewanted=5&sq=language%20and%20culture%20english&st=nyt&scp=16> accessed 3 November 2018.

there are many, from Polynesia to Mexico, from Namibia to Bali) who exclusively use cardinal coordinates to situate things in space.[343] While we may be reticent to accept any of this as law, it undoubtedly inflects a legal map's becoming, giving it a particular "charge".

Language is not alone though in providing a legal order or map with its "charge". We may appeal to elements of nature, science, philosophy, religion, morals, economics, technology, medicine, politics, etc. The possibilities are endless: narrative creativity knows no bounds! A legal order or map is not birthed ex nihilo as Hart himself readily conceded.[344] It is infused with all the subtending ordering principles that populate our complex social lives as humans and which give social direction to our collective lives.[345] If a collective is held together by animist structures[346] (among others), their legal map will be infused with animism.[347] If a collective lives under a neoliberal banner (among others), their legal map will be infused with neoliberalism.[348] Not just infused with, but composed in part by, such that removal of the animist or neoliberal undertones of the map or legal order undoes its unity. Since these are both

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[343] For further discussion of this point, see Deutscher (n 342).

[344] HLA Hart, *The Concept of Law* (Penelope A Bulloch and Joseph Raz eds, 2nd edn, Clarendon Press 1994) 113–116, 250.

[345] Damasio (n 67) argues that our social capacities and drives are innately linked to our emotional experiences and drives. He shows how the internal emotion system (an innate system which maps the state of the body as a whole and gives each state valence) is what preserves homeostasis in all living beings. Homeostasis is defined as the force that ensures that "life is regulated within a range that is not just compatible with survival but also conducive to flourishing, to a projection of life into the future of an organism or a species" (ibid 40). He argues convincingly that the emotion system also drives collective pursuits and the cultural precepts that accompany them in an attempt, even here, to ensure homeostasis for the collective. It is fascinating reading and deserves a section all to itself, but the structure of the dissertation demands that I leave it for another day.

[346] Harvey defines animism as the "the label given to worldviews in which the world is understood to be a community of living persons, only some of whom are human. […] Animists inculcate locally meaningful means of communicating with other-than-human persons, especially in order to express respect." (Graham Harvey, 'Animals, Animists, and Academics' (2006) 41 Zygon® 9, 9 <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-9744.2006.00723.x> accessed 23 February 2023)

[347] This point is well made by Povinelli, who argues that "Western ontologies are covert biontologies" dismissive of animism through their Life/Non-Life binaries (Povinelli (n 59) ch 1). Kelsen is an example of such dismissal, considering animistic tendencies outright dangerous: "The Pure Theory of Law considers it as one of its main tasks to free the science of law from the relics of animism, which play a particularly dangerous role whenever jurists operate with the concept of juristic person." (Hans Kelsen, 'Law, State and Justice in the Pure Theory of Law' (1947) 57 Yale Law Journal 377, 377 <https://heinonline.org/HOL/P?h=hein.journals/ylr57&i=389> accessed 23 February 2023) (See further interesting discussions in Abram (n 88); John Gray, *The Silence of Animals: On Progress and Other Modern Myths* (Allen Lane 2013); Robin Wall Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge and the Teachings of Plants* (Milkweed Editions 2015) <https://milkweed.org/book/braiding-sweetgrass> accessed 23 February 2023; Arianne Conty, 'Animism in the Anthropocene' (2022) 39 Theory, Culture & Society 127 <https://doi.org/10.1177/02632764211039283> accessed 23 February 2023).

[348] This point is well made by Blalock who insists that legal theory needs to wake up to the hegemony of neoliberalism insofar as it is "disseminated and legitimated by the legal discourse" (Corinne Blalock, 'Neoliberalism and the Crisis of Legal Theory' (2014) 77 Law and Contemporary Problems 71, 103).

the explanatory features of the map and the driving forces behind future mappings, the legal order falters in their absence.

This is very much Schlag's point when he claims that legal hybrids such as "employee" cannot be parsed into a socio-cultural element and a legal element, the two co-exist in a single term (or *nomos*) and indeed are co-dependent on each other for their continuing existence. In his article, he focuses on the socio-cultural elements that verb the law and vice versa, but he explicitly admits that the dedifferentiation plague applies to any of the mutually-influencing binaries: "law and cognition, law and language, law and religion, law and economics, law and… (so on)".[349] The law's narrative is composed of the relevant bits of them all. Dedifferentiation gets the upper hand in this instance: legality is clearly composite.

Cover's addition of narrative to the legal universe seems a useful addition to my proposed metaphor of legal order as map/mapping, for maps are similarly infused with any number of (sometimes divergent) narratives. I want to insist here that narratives should not be confused with the map-in-use. Rather, they are the tools required to make sense of the map-as-object (and by extension the map-in-use): a language, a legend, a scale and a way of orienting the map to the actual terrain. These are explanatory factors that help spell out why any particular map is the way it is. And they are simultaneously orienting factors that will influence how the map is used. It is through narrative that a legal map affirms its intelligibility for legal subjects.

Reimagining the approach to dedifferentiation

The previous section on Fending off the plague? was an attempt to deal with the differentiation plague set out in its clearest form by Schlag. In sum, the plague was this: a good legal theory grapples with identities (law/culture, law/society, etc) that are necessarily intertwined and reciprocally determined such that the original identities (which themselves were fuzzy[350]) are now indistinguishable. The upshot was this: legal theorists must recognise fuzziness and accept the need to dabble in "non-legal" identities; legal theorists who refuse to take this path are either faking it or abandoning the ambitions of theory. In response, I solicited the help of Lindahl and Cover. Both faced the dedifferentiation plague head on.

[349] Schlag (n 46) 53.
[350] Menski (n 232).

Lindahl did this by adopting strong differentiations (legal order vs the unordered outside) *and* acknowledging the fragile ground on which he walks. He concedes that a concept of legal order can never be detached from a "politics of conceptualisation".[351]

Cover similarly recognises such groundlessness within the legal order itself. Indeed, his entire article may be seen as a riff on the topic of the groundless judge who, faced with the multiplicity of laws generated by innumerable nomic groups, has the most violent of tasks: that of choosing which law to kill.

> Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that this one is law and destroy or try to destroy the rest.[352]

Remember that, in Cover's work, law is not just precept, but a way of being in the world. The violence is not a technical point (though the stakes are often ignored in much these terms[353]); it is a matter of life and death. The question then, as Etxabe observes, is "how to kill off the law while preserving a sense of justice, in the absence of an objective and superior hermeneutical principle".[354] Cover urges judges not to avoid this responsibility but recognises that waging peace in such circumstances is "no simple or neutral task".[355]

More importantly, Cover faces the dedifferentiation plague in a second, more obvious, way: he concedes the foundational presence of dedifferentiation in the legal field.[356] His concept of narrative brings back into the realm of the law all those identities previously set apart from it. These fields breathe meaning into the legal map and provide its normative charge. This is not to say that law, culture, religion, economics, science, etc should be conceived of as a nebulous

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[351] Lindahl (n 210) 5.
[352] Cover (n 2) 53.
[353] As Cover notes: "The only way in which the employment of force is not revealed as a naked jurispathic act is through the judge's elaboration of the institutional privilege of force – that is, jurisdiction." (ibid 54). He calls this the "hermeneutic of jurisdiction" (ibid 60). Though not limited to the judicial function, a similar concept was developed by Jessop under the label "spatiotemporal fixes". He argues that the success of governance in complicated and interconnected contexts is likely to come down to the "consolidation of specific spatiotemporal fixes" which makes governance problems appear manageable because the "ungovernable" is removed from the spatiotemporal picture (Jessop (n 158) 181).
[354] Julen Etxabe, 'The Legal Universe After Robert Cover' (2010) 4 Law and Humanities 115, 146 <https://doi.org/10.1080/17521483.2010.11423778> accessed 26 October 2022.
[355] Cover (n 2) 60.
[356] Etxabe (n 354) 124: "In distinction to the autopoietic theories of Luhmann and (to a lesser extent) Teubner, the division between legal/illegal is never sharp and crispy […] [Law is] an essentially porous entity, distinguishable from, and yet permeable by, its exterior."

blob. Rather, it suggests that such disciplinary boundaries may sometimes prevent us from truly capturing what is at stake in cases of overlapping legalities. Following Cover's lead, we are obliged to concur that anything can – through narrative – become a part of a legal order and thus "legal" (though thankfully not everything actually does).

Having re-differentiated (without warrant) and dedifferentiated the "legal", I feel it is only fair to propose a map of sorts so that the rest of the discussion may be visualised in the most basic sense. In what follows, I will use the insights from Lindahl and Cover to draw out what I consider to be some useful features of legal order, features that will come into play in discussing interlegality in the next chapter.

Mapping idem-legality

In Lindahl and boundaries: Differentiating galore, I described legality as embodying a continuum of concrete situations of organised existence ranging from orders based on law-by-design to orders based on law-as-interactional-practice. I would like to map this aspect of legality to make it easier to refer back to. I will add to this map as we go. I insist that this map is not intended as a "world-scale theory",[357] but simply volunteered as a tool that may potentially help us self-locate and navigate in the legal world. The aim of the map is to recognise the diversity of systems that order and the resulting diversity of potential intersections, such that we may discuss interlegality with this great diversity in mind. Below I have set out one axis of this map: the focus here is on *idem*-identity, the "what?" of the legal order. Of what is composed the unity of concretely ordered existence? And what sets it apart from other legal orders? How are the boundaries of the unity manifested and defended? Lindahl's answer to this question appears in the top half of the diagram. His account focuses on the unity that is the map, as drawn up by a distribution of ought-places, ought-times, ought-subjects and ought-behaviour. The boundaries are manifested (as legal) in the authoritative articulation, monitoring and upholding of joint action in accordance with the map. Importantly, this task is "not left over to the collective's members to decide for themselves".[358]

In the bottom half of the diagram is the additional layer that seems necessary to correct for the existence of bottom-up lawmaking and alternative compliance mechanisms. Here the mapping

[357] Valverde distinguishes monologic "world-scale theory" which (citing Haraway) takes the "God's eye view" from her preferred "pragmatically oriented assemblages of ideas" where the precise meanings of terms depend to a large extent on the uses they are put to, the struggles they tend to. The latter provide rudimentary tools to be put to use, rather than monoliths to admire (see Valverde (n 53) 3–5).
[358] Lindahl (n 210) 54.

itself is initiatory. However, what I want to refer to along this axis is not the creative mapping itself, but rather the unity of the legal order that is rendered concrete along the way. For mapping too creates a map of sorts, it lays down its own historical pathways and ways of doing things. For ongoing mappings, the map is clearly there even if functioning at a subconscious level.[359] This concrete unity is not necessarily defended by institutional authority, but it may be (and generally is) upheld by pairs, spirits, healing rituals, the appeal to "legal postulates",[360] etc.

It might seem strange to invoke here the role of mapping / legal ordering (the form taken by *ipse*-identity) while focused on the map / legal order (or *idem*-identity). It cannot be ignored, however, that identity is two-faced. At times, it will be driven primarily by the map (the *idem*-side of the equation); at other times – often[361] even? – it will be driven by the concrete mapping activities of individuals (the *ipse*-side of the equation). In Fuller's account of law as "a language of interaction [the map] which creates interactional expectancies", we can see how the language of interaction might be born of *practices*, which become so common, so regularly used and thus regularly relied upon (ie interactional expectancies) that they come to create a language of sorts. *Idem*- and *ipse*-identity are simply poles of identity, which interact to reinforce each other. Of course, this reinforcement flows in both directions. For we should note that the practices (informal standards, procedures and agreements) in the field of transnational trade finance discussed by Levit were also reinforced by their integration into the WTO's more formalised map.

I insist then that the focus here is on the *concrete unity* of the legal order, whether it arises primarily by design or primarily through interactional practice. It is worth insisting here that I do not see these two poles of *idem*-identity as mutually exclusive: all legal orders are a mixed bag. The use of an axis is intentionally meant to denote a continuum, along which the "mixed

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[359] Reisman skilfully shows how through a lifetime of engagement with mappings, we come to have a map even for brief everyday encounters such as glancing/staring and standing in line (see further Reisman (n 275)).

[360] See Chiba (n 338) who identifies three layers of law: official law, unofficial law, and legal postulates. See further discussion in the section entitled "Cover and Narrative".

[361] Indeed Tamanaha, in mapping competing definitions of law, suggests that law-as-interactional-practice (which seems to approximate his first category) is almost always dominant: "It would appear that the map is not divided into territories of equal size. The base upon which the first category of the concept of law sits extends to three corners of the map, with the base of the second category left to occupy the last remaining corner. […] [M]ost long-term, stable communities should have a greater proportion of the first category to the second. Perhaps only totalitarian societies would have this proportion reversed." (Tamanaha (n 280) 531).

bag" becomes increasingly design-heavy or increasingly practice-heavy. In addition, a legal order's particular mix may change over time and across space.[362] I volunteer this axis of legality simply to encourage theorists to contemplate how the legal order's concrete unity is created, apprehended and defended; and furthermore, how it might evolve across time and space.

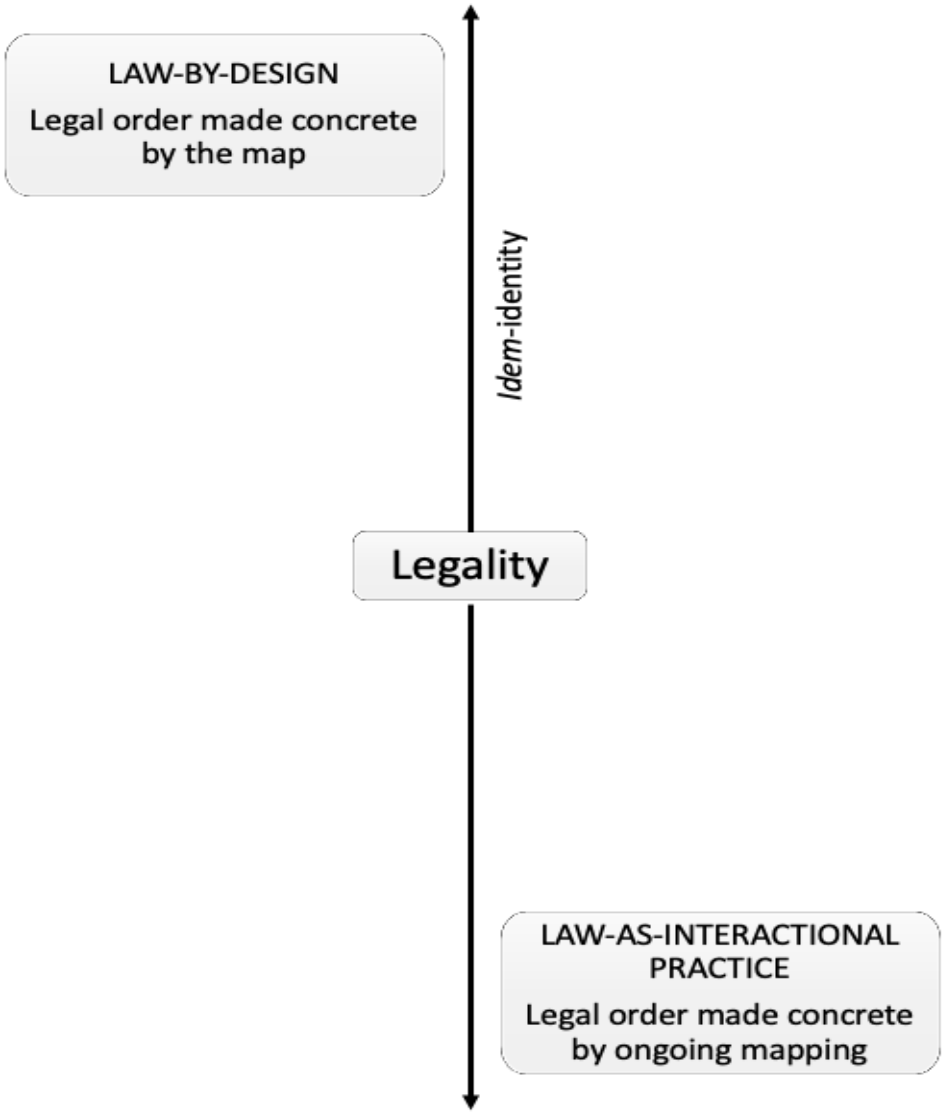

Figure i: Legality along the idem-axis

One comment is perhaps in order. The poles of law-by-design and law-as-interactional-practice might lead some to suggest that this is simply a continuum from hierarchical orders to egalitarian orders. This assumption would be a mistake. While many legal orders of the by-design type (such as the Catholic Church or the Russian state) are typically hierarchical, many

[362] Indeed, I will argue that the particular mix is determined primarily by the legal subject/official… See further chapter 4.

others do not fit the bill. Hierarchy cannot be circular and yet oftentimes it will be in by-design legal orders: the European Union for example is a legal order which sometimes has the EU institutions at its apex and other times a member state. It would be better referred to as a heterarchy.[363] The Belgian state, similarly, does not fit the hierarchical mould: the considerable autonomy of the Belgian subparts (Communities and Regions) comprises authority in international affairs, including the *ius tractati* (the right to conclude treaties). In many domains then, the Belgian federal government is not able to sign an international treaty without the agreement of the five lower parliaments. On the other hand, while many legal orders of the interactive-practice type are typically heterarchical (as the private micro-societies in Levit's work)[364] or even egalitarian (as some queue situations attest),[365] not all legal orders will fit the heterarchical bill. Macdonald's wonderful description[366] of the Marylebone Cricket Club's "Laws of Cricket"[367] is testament to this: while cricket was originally (from its invention around 1700) a practice-driven game, at one point in (colonial) history it was considered necessary to draw up the laws of the game to encourage compliance with a basic set of rules. The Marylebone Cricket Club (MCC) took it upon themselves to birth these laws and so became "the accepted Custodian of the Laws".[368] Hierarchy was instigated. Greenpeace, too, was founded as a small close-knit group of interactive-practice. Over time, its worldwide reach has meant that its structures have had to evolve. Today, Greenpeace's internal legal order is described as hierarchical.[369] These structural changes may of course effect a shift in the legal

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[363] Described by Carole Crumley as "the relation of elements to one another when they are unranked or when they possess the potential for being ranked in a number of different ways" (Carole L Crumley, 'Heterarchy and the Analysis of Complex Societies' (1995) 6 Archaeological Papers of the American Anthropological Association 1, 3 <https://onlinelibrary.wiley.com/doi/abs/10.1525/ap3a.1995.6.1.1> accessed 1 March 2023). She argues that heterarchy is not therefore the opposite of hierarchy, but more appropriately the opposite of homoarchy (where elements are rigidly ranked on one way only with no potential for changes in rank).

[364] Levit (n 261).

[365] See further Reisman (n 275).

[366] Macdonald (n 143) 312–315. Note that Macdonald does not refer to these rules as forming a legal order, but simply uses the example as an allegory for law. Given the breadth of the legality map we are dealing with, I see no obvious reason not to include the legal order held together under the "Laws of Cricket" on the map of legality.

[367] See https://www.lords.org/mcc/about-the-laws-of-cricket, which fascinatingly refers in its Preamble to the "Spirit of Cricket".

[368] See Preface to the 'The Laws of Cricket 2017 Code (3rd edition – 2022)' available at https://www.lords.org/mcc/about-the-laws-of-cricket. The Preface also states: "Since its formation in 1787, Marylebone Cricket Club (MCC) has been recognised as the sole authority for drawing up the Code and for all subsequent amendments."

[369] A long-time theorist of pressure groups describes the governance situation as follows: "Even modern organisations such as Greenpeace are very hierarchical and have supporters rather than members." (Wyn Grant, 'Pressure Politics: The Role of Pressure Groups' (2014) 5 Political Insight 12 <https://doi.org/10.1111/2041-9066.12055> accessed 21 February 2023).

orders placement on the map. (It is possible, for example, that Greenpeace has shifted over time from the bottom-half to the top-half of the axis.) The point is that such shifts are not driven by changes in the structural context alone.[370]

In mapping the space of legality that emerges when we assume our differentiations, my aim has also been to show that differentiations are a human tool to navigate the world we live in: they are not social facts, but a particular way of reading those facts. And they have their own internal nuances and their own shady borders, which – if we are to avoid reifying tendencies – are equally deserving of our attention.

Mapping the idem/ipse overlap

In the earlier section Cover and narrative: The return of dedifferentiation, I described each legal order as being intelligible only on the basis of its own particular narrative. The narrative was briefly chalked out as tied to a socio-material context, enjoining the past and the future, providing the legal map with normative charge, and (potentially at least) rendering the map-as-object intelligible. I gave only suggestive indications of the narrative's actual content. We need now to dig a little deeper into narrative by considering the two types of *nomoi* discussed in Cover's articles: the imperial and the paideic.

Cover sets out two ideal-types that sit at the extremes of the spectrum. In its "ideal" form, the first, the paideic *nomos*, is "world creating": it presumes a common body of precepts and narrative; a common and personal way of being educated into the *nomos* through strong interpersonal bonds; and a sense of direction constituted by the individual and community working out the implications of their law.[371] Here, paideic law is pure meaning and, in its ideal form, no further explanation or interpretation is necessary. Through socialisation, the legal map becomes implicit, translated only in acts. The paideic *nomos* harbours a "shared sense of a revealed, transparent normative order".[372] Of course, this unified meaning can only exist for an instant, and an imagined one at that. We are talking about an ideal-type! But, as I mentioned earlier, "the *imagined* instant of unified meaning is like a seed, a legal DNA, a genetic code by which the imagined integration is the template for a thousand real integrations of corpus,

[370] The "Laws of Cricket" for example are regularly updated to reflect practice which still drives the sport. Similarly, there are examples of emerging hierarchy in Reisman's discussion of micro legal situations (eg where unsanctioned deviance from the norms of conversation transforms the context from coarchical to hierarchical). See discussion in Jutras (n 275) 62.
[371] Cover (n 2) 13.
[372] ibid 14.

discourse, and commitment".[373] This provides the paideic *nomos* with huge jurisgenerative potential. It also explains its tendency towards instability, for the reproduced commitments of the legal DNA never conform entirely to the original narrative. As a result, the paideic *nomos* often uses exclusion and exile to preserve its community of meaning.

At the other end of the spectrum stands the imperial *nomos*, which (in its "ideal" form) is "world maintaining". The multiplicity of meaning generated by the innumerable paideic nomoi may lead to instability, incoherence, fear and even violence. In response, the imperial *nomos* embodies precepts and narrative as social control:

> [A]s the meaning in a *nomos* disintegrates, we seek to rescue it — to maintain some coherence in the awesome proliferation of meaning lost as it is created — by unleashing upon the fertile but weakly organized jurisgenerative cells an organizing principle itself incapable of producing the normative meaning that is life and growth.[374]

Where strong relational bonds cease, the imperial nomos appeals instead to objectivity to enforce justice through institutions. Here, precepts need not so much be understood, as they must be effective. Again, we see the privileging of social control over meaning. Cover chooses the term imperial on purpose in order to highlight two aspects of this *nomos*: first, the nomos, in imperial fashion, must organise a variety of autonomous nomic entities each with its own distinctive normative world and, second, the nomos is tightly associated with violence insofar as the imperial price of pluralism is "the often coercive constraints imposed on the autonomous realization of normative meanings".[375]

Cover uses these ideal types to discuss the relations between the (US) state and sub-state legalities. We can see that the imperial maps relatively well onto by-design legal orders and the paideic onto interactive-practice legal orders. Cover does not discuss how his account applies to the trans-state, supra-state and super-state legalities.

One should not infer from the above that narrative is absent from the imperial nomos, that the imperial nomos represents a kind of neutral arbiter in the pluralist nomos-verse. Cover believes, on the contrary, that all nomoi are a mix of the imperial and the paideic.[376] All stake their legality on a mix of precepts and narrative. In this sense, a *nomos* can never be exclusively

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[373] ibid 15 (emphasis in original).
[374] ibid 16.
[375] ibid 36.
[376] ibid 14: "no normative world has ever been created or maintained wholly in either the paideic or the imperial mode".

"world creating" or exclusively "world maintaining": a real-life *nomos* will regularly adopt both behaviours. An imperial *nomos* cannot have empty shell-like precepts, shorn of narrative, any more than a paideic *nomos* can survive without a legal map of sorts.[377] On the other hand, Cover accepts that the imperial *nomos* has a coordinating role, that it must – if only to ensure its own preservation – promote peace and order among nomoi. Most often, the imperial nomos will deal with inter-nomic clashes by appealing to objectivity and a supposed-neutral hermeneutic of jurisdiction. Nevertheless, Cover explicitly recognises that this is no more than a fig leaf to hide from view the office's inherently jurispathic role. He is at pains to show that such manoeuvres are just a way of closing one's eyes to the fundamental clash of laws at issue: this is the violence of the imperial. In reality, conflicts between the imperial and the paideic are frequent, with neither able to lay claim to narrative superiority.[378] No "law" is preferable a priori to the other. The responsible judge, then, must join the jurisgenerative process, accepting and engaging directly with the role he/she plays in "other-world maintaining" and, inevitably, "other-world killing".

In sum, all *nomoi* are paideic to some extent insofar as common meanings are what make possible continued relational activity. And even the smallest of nomic entities must, at some stage in their trajectory, appeal to imperial forms in the hope of sustaining the normative world they have created. Nevertheless, these ideal-types go a long way to helping us understand the differences in normative worlds, from the nomos of the family to that of the school, from the union to the corporation, from the ZAD to the nation, and beyond. Cover's theory helps to highlight the jurisgenerative potential of the paideic *nomoi* and thus the source of innovatory narratives. It also reveals that the imperial *nomos* suffers from a lack of personal jurisgenerative potential and thus is in no position to create radically new normative meanings.

I want to use these further insights from Cover to map the narrative aspect of legality. It is clear I think that we cannot distinguish narratives exclusively along jurispathic–jurisgenerative lines. The paideic *nomos* exercises jurispathy, but differently: by exclusion and exile. The imperial can be jurisgenerative, but differently: by drawing on and making a collage from others' narrative creativity. How then can we topographise the narratives of legality? One thing that

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[377] We do get a sense though that the imperial fills its precept-shells by pilfering from others, effecting a collage from the narratives existing within its boundaries. As such, the imperial nomos is jurisgeneratively lacking. It must rely, for this, on the many nomic groups that exist within its boundaries.

[378] As he notes, "The weakness of the state's claim to authority for its formal umpiring between visions of the good is evidenced by the state's willingness to abdicate the project of elaborating meaning." (Cover (n 2) 61).

stands out in Cover's account is the chasm between the claimed objectivity of the imperial legal order and the innate subjectivity of the paideic legal order. The former relies on "weak"[379] or flexible, impersonal bonds and appeals to rationality or neutrality in the disposition of these bonds; the latter relies on "strong" or tightly-knit, interpersonal bonds and appeals to affect in the disposition of the bonds. Perhaps "person"-al is the wrong word, because the bonds may extend well beyond the human, but the types of bond described are valid nonetheless. In appealing to bonds, we are concerned partly with the "what?"ness and partly with the "how?"ness of the legal order, that is, the *idem/ipse*-overlap. (Recall that "How do these parts relate?" is partly a "what?" and partly a "how?" question: what is the unit? And how do the parts come together in this unit?) The weak supposed-neutral bonds or the strong affective bonds are what holds the parts together. Over time, they make up the legal order's character. But narrative, as I have tried to show, is more than just these bonds. It also, and perhaps most importantly, what provides the normative charge of the legal order. The narrative adds valence[380] for the parts of that order and drives their common pursuits, their doings (ie the map-in-use). I would like to suggest that at one end of the continuum that normative charge is at arms' length: it is diffuse and weak, adopting a supposed neutral or rational form. At the other end of the continuum, on the other hand, the normative charge is close-to-hand: it is powerfully pregnant, adopting a primarily affective form.[381] This is the space of the *idem/ipse*-overlap discussed in the section Tweaking the "we-perspective", which we can now add to the map of legality.

[379] ibid 12.
[380] In psychology, "valence" is the (emotional) value associated with an event, object or situation.
[381] Note that the reference here to a "strong" narrative force field and a "weak" narrative force field does not map onto Cover's own use of the adjectives "strong" and "weak". Cover suggests that paideic nomoi will produce "strong" interpersonal commitments, while the imperial nomos produces only "weak" commitments. "Commitments", in Cover's work, are the everyday doings driven by nomos and narrative. For my own part, I am referring not to strong and weak doings, but to strong and weak normative charge. In the former case, the individual's everyday doings have variable significance for the individual; in the latter case, the legal order's narrative has variable pull on the individual's drive to act in the world. I hope this distinction is clear enough to the reader.

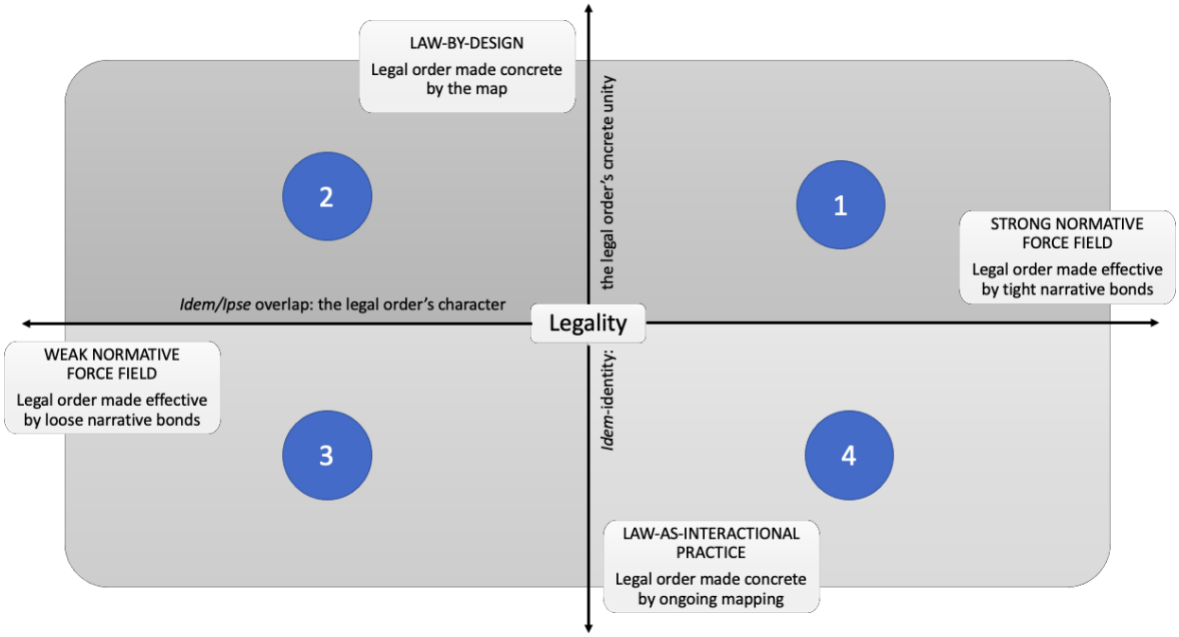

Figure ii: Legality along the idem/ipse-axis

Again, a number of comments are in order. The above mapping suggests that four types of legal order should be typified, rather than two; there are after all four quadrants. I need to explain then how Cover's imperial–paideic binary maps onto these quadrants. I would argue that, while Cover's insights greatly extend our comprehension of legality, his focus on the (US) state and intra-state legalities led him to overlook the potential variety of *nomoi*. The US form of (weak normative force) governance, typically identified with liberal proceduralism and a touted narrative hands-offness,[382] does not apply to all state legal orders. For example, the French legal order edges toward the strong normative force end of the continuum while very much remaining a by-design legal order. Similarly, the tight-knit (strong normative force) paideic nomos does not seem to cover the endless possibilities at the sub-state level. For here too, we find examples – such as Reisman's "brief encounters"[383] – which clearly do not rely on tight communal bonds, but which nevertheless sustain narratives capable of driving interactional-practice. If we add into the mêlée trans-state, supra-state and super-state

[382] Admittedly, such adjectives are more questionable today with the strong politicisation of the Supreme Court (see Peter Coy, 'Opinion The Politicization of the Supreme Court Is Eroding Its Legitimacy' [2022] The New York Times <https://www.nytimes.com/2022/06/27/opinion/dobbs-supreme-court-legitimacy.html> accessed 24 February 2023; James F McHugh and Lauren Stiller Rikleen, 'The Politicization of SCOTUS Threatens Its Legitimacy' <https://news.bloomberglaw.com/us-law-week/the-politicization-of-scotus-threatens-its-legitimacy> accessed 24 February 2023).
[383] Reisman (n 275).

legalities,[384] I argue that we need some additional ideal-types to cover the full range of possibilities. In the following section, I will do just that, filling in the quadrants of the legality map.

A map of legality

Cover's discussion of the imperial and the paideic ideal-types suggest that they should fall into quadrants 2 and 4. The imperial legality (in quadrant 2) obviously exhibits weak normative pull in its ideal-type form. It is also reasonably clear, I think, that the imperial legality is of the by-design type: the legal map is staked on precept rather than practice, with legal judgments tending to reflect this bias. The paideic legality (in quadrant 4), on the other hand, exhibits strong normative pull along with a close attachment to the narrative direction provided by interactional-practice. This is the case of each of the examples discussed by Cover: the Mennonite community as they appear in his discussion of *Bob Jones University v United States*;[385] the creation of a polity out of the corporate charter of Massachusetts Bay;[386] and Garrisonian antislavery anticonstitutionalism.[387]

But this leaves quadrants 1 and 3 unfilled. How might we typify the legal orders that fall within these two remaining quadrants? Quadrant 1 is relatively easy. Here, the by-design legal order is accompanied by strong normative pull: legal subjects are driven to act on legal precepts by a compelling narrative. I suggest we call these legal orders "hegemonic" in the sense used by Gramsci.[388] This is the type of legal order best typified by Lindahl's work. Despite the fact that Lindahl discusses a wide range of legal orders when arguing for his boundaried vision,[389] his later forays into the realm of massively shared agency and institutionalised authority tend to bring us back towards more typical sites of legality. The ideal-type of the "hegemonic" legal order might be exemplified by the Catholic Church.

The Catholic Church first promulgated a systematic body of law in the 12th and 13th centuries. At the time, canon law governed virtually all aspects of the lives of priests and monks, but also many aspects of the lives of the laity. Church courts had exclusive jurisdiction over laymen in

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[384] Alongside intra-state legalities, these are the three legal phenomena that tend to fall outside the purview of analytical jurisprudence, as noted by Culver and Giudice (n 159) xvii–xxiii.
[385] 'Bob Jones University v United States' 2017 (1983); discussed in Cover (n 2) pt IV.
[386] Cover (n 2) 30–31.
[387] ibid 35–40.
[388] Thomas R Bates, 'Gramsci and the Theory of Hegemony' (1975) 36 Journal of the History of Ideas 351 <https://www.jstor.org/stable/2708933> accessed 24 February 2023.
[389] See the legalities discussed in Lindahl, *Fault Lines of Globalization* (n 98) ch 2. Again, I note here that I believe this to be the most interesting and persuasive part of his argument.

matters of family law, inheritance, and various types of spiritual crimes, and concurrent jurisdiction with secular courts over contracts (whenever the parties made a "pledge of faith"), property (whenever ecclesiastical property was involved – and the church owned one-fourth to one-third of the land in Europe), and many other matters.[390] The Decretals of 1234 remained the basic law of the Catholic Church until 1917, when the Code of Canon Law was introduced. It was later extensively revised (over a period of 24 years) and appeared in its current version in 1983. This basic law is supplemented by legislative acts,[391] community custom,[392] international treaties[393] and a hierarchy of courts[394] to implement all of the above.[395] Interestingly, the basis for revision of the Code of Canon Law was that the new law should reflect the theology (or the narrative) of Vatican II:

> [T]heology without law results in antinomianism. It deprives the ecclesiastical community of the instrument that functions to secure an ordered, just, and peaceful life. Second, the separation of canon law from its inner theological meaning sets the conditions for legalism. Such a law is bereft of the Gospel meaning and fails to assist individuals and the church in knowing the saving mystery of God. […] Canon law functions as a bridge between theology and norms for practical action.[396]

The by-design nature of the Catholic Church legal order speaks for itself. In terms of its compelling narrative, we need look no further than the theology of Vatican II. As quoted above, in very Coverian terms, the canon law is seen as providing a bridge between the theological narrative and Catholic doings in the world.

Quadrant 3 is more difficult because so rarely considered within the legal literature. Nevertheless, my argument here is that it very much deserves to be considered. In quadrant 3, the interactional-practice legal order is accompanied by weak normative pull. The sociological

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[390] See Berman (n 232).
[391] Bishops may enact law for their own diocese and binding norms may also be issued by provincial chapters or religious superiors.
[392] Interestingly, if a custom conflicts with enacted law, it will only be recognised if the custom has perdured for more than 30 years (Canon 26, Code of Canon Law 1983).
[393] The Holy See is an international juridic person whose territory, the Vatican City State, enjoys sovereignty under international law. As such, the Holy See may enter into treaties and pacts with other states; these are known as concordats. There are also partial agreements between the Holy See and other international bodies known as accords, *modi vivendi*, or protocols that enjoy the force of law.
[394] Judicial power is vested in the bishop and the highest court is the Apostolic Signatura.
[395] The details of this account were garnered from John J Coughlin, 'An Overview of Canon Law' in John J Coughlin (ed), *Canon Law: A Comparative Study with Anglo-American Legal Theory* (Oxford University Press 2010) <https://doi.org/10.1093/acprof:oso/9780195372977.003.0002> accessed 24 February 2023.
[396] ibid 49.

literature often analyses these kinds of influences on social interaction.[397] Narratives of this type may be inculcated through explicit educational practices or more implicit socialisation. Given the lack of recognition of such legalities in the legal literature,[398] I have chosen to call these legal orders "apocryphal". The term "apocryphal" signifies a story or statement of doubtful authenticity, though widely circulated as being true. I feel that this aptly characterises the blinkered view we tend to take in the discipline of law – these things are Apocrypha, outside the accepted canon of (legal) Scripture – while insisting on the practical import these legal practices nonetheless have. Partly, these legalities are ignored because they are supposed not to have the bite of positivist law (as is the case of soft law, eg the EU's Open Method of Coordination); partly, they are disregarded because, in this quadrant, *"les normes sont dociles aux corps"*[399] (as in the case of algorithmic governmentality)[400] which would seem to turn on its head the traditional self-characterisation of the law.[401] The concept of algorithmic governmentality will be explained in further detail once we get to the section entitled

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[397] See, for eg, Mark Granovetter, 'The Strength of Weak Ties: A Network Theory Revisited' (1983) 1 Sociological Theory 201 <https://www.jstor.org/stable/202051> accessed 24 February 2023; Mark S Granovetter, 'The Strength of Weak Ties' (1973) 78 American Journal of Sociology 1360 <https://www.journals.uchicago.edu/doi/abs/10.1086/225469> accessed 24 February 2023.

[398] The literature on "legal socialisation" may be an exception here (see the overview in June Louin-Tapp, 'The Geography of Legal Socialisation : Scientific and Social Markers' (1991) 19 Droit et Société 329 <https://www.persee.fr/doc/dreso_0769-3362_1991_num_19_1_1120> accessed 24 February 2023).

[399] This is a quote from Antoinette Rouvroy, 'De La Surveillance Au Profilage' [2018] Philosophie magazine (Hors Série : Foucault) 60, 62 <http://www.crid.be/pdf/crid5978-/8304.pdf> accessed 23 November 2018. I have not found a better way to convey this than in the original. An approximate translation would be: "norms comply with bodies". See further a translation of her work (Antoinette Rouvroy and Bernard Stiegler, 'The Digital Regime of Truth: From the Algorithmic Governmentality to a New Rule of Law' [2016] La Deleuziana 6, para 69 <https://doaj.org> accessed 23 November 2018) where the concept is described as follows: "what we can do with Foucault, since he is dead, is to turn him on his head to show that […] it is no longer a matter of producing docile bodies according to a norm, but of making the norms docile according to the body".

[400] See in particular Antoinette Rouvroy, 'Algorithmic Governmentality: Radicalisation and Immune Strategy of Capitalism and Neoliberalism?' [2016] La Deleuziana 30 <https://doaj.org> accessed 23 November 2018; Antoinette Rouvroy, 'Governing Without Norms: Algorithmic Governmentality' [2018] Psychoanalytical Notebooks. Lacanian Politics and the Impasses of Democracy Today 99 <https://www.academia.edu/36177847/Governing_Without_Norms_Algorithmic_Governmentality_In_Psychoanalytical_Notebooks_32_Lacanian_Politics_and_the_Impasses_of_Democracy_Today_a_very_short_paper_intervention_> accessed 18 November 2020.

[401] A wonderful example of norms complying to bodies was pointed out to me by Rebecca Johnson. In 2020, Simon Weckert (an artist) walked a little cart of 99 mobile phones up and down empty streets in Berlin. Within a couple of hours, these streets were showing up red in Google Maps and traffic was being rerouted around the disruption, despite the fact that the streets were empty but for Weckert and his little cart. This artistic intervention aimed to show how Big Data technologies (such as Google Maps) drive our conduct, shutting down and opening up possibilities, purely on the basis of collected data on bodies. In this case, a grouping of mobile phones (habitually connected to bodies) created new (and in this case ridiculous) traffic norms (see further, Brian Barrett, 'An Artist Used 99 Phones to Fake a Google Maps Traffic Jam' [2020] Wired <https://www.wired.com/story/99-phones-fake-google-maps-traffic-jam/> accessed 4 March 2023).

Apocryphal quadrant in Chapter 5. For the moment, suffice it to note that Reisman's "brief encounters",[402] mentioned earlier, belong to this typology.

Another obvious example of an apocryphal legality is the global *lex mercatoria*. As Teubner explains, drawing on Ehrlich's "living law", *lex mercatoria* is structurally coupled to economic processes,[403] conducted through episodic (arbitration) pulses and is based substantively in a form of very soft law. The links between legal "episodes" remain weak (for the moment at least) which makes it difficult to ensure the coherent development of precepts. This looks a lot like the self-organising processes of "homeodynamism" we discussed earlier: a series of creative adaptations to potentially destabilising situations that nevertheless maintain the equilibrium of the whole. Like Connolly's Millennium Bridge example, these episodes are not entirely driven by intention. These weak links, as Teubner notes, mean that *lex mercatoria*'s "stabilization mechanism is so underdeveloped that in the foreseeable future the development of this law will follow the 'external' evolution of the economic system but fail to develop an 'internal' evolution of its own". I reject the internal/external labels of autopoietic theory, which I think are unhelpful here. Without the economic narrative, this order is as much a legal order as the shopping list on my fridge.[404] I consider the economic narrative to be an integral part of the legal order of *lex mercatoria*. Nevertheless, the description remains true: *lex mercatoria* relies on an adopted narrative, with few personalisations. Here, we might also note the compliance of norms with (economically-guided) bodies, similar to the ideal-type of algorithmic governmentality. Finally, Teubner says of its substantive nature that "[i]t is more

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[402] Reisman (n 275).

[403] Teubner (n 157) 14 suggests that, as a result, "[f]or the foreseeable future *lex mercatoria* will be a corrupt law" (because it fails to code exclusively by the legal/illegal binary). I refuse this characterisation, insisting with Schlag that economic coupling (and indeed any other apposite coupling) is part of the composite nature of *all* legal orders.

[404] This is perhaps not the best counterexample. As Rebecca Johnson has helpfully pointed out to me, the shopping list too is embedded in its own hybrid (and thus potentially legal) narratives. It may, for example, stand in for a family legality grounded in a strong commitment to ecological values of small-scale, local and organic agriculture. Or it may hail of a sports-driven legality committed to optimal nutritional input. Or a medical legality put together to deal with epilepsy through a ketogenic dietary intervention. Etc. Some have argued that the *food* content of the TTIP and CETA trade agreements explains why there has been so much pushback against them in Europe (see, for eg, Francesco Duina, 'Not in My Sandwich: How GMOs, Hormones and Values Combined to Make CETA and TTIP so Heavily Politicised' <https://blogs.lse.ac.uk/europpblog/2019/10/31/not-in-my-sandwich-how-gmos-hormones-and-values-combined-to-make-ceta-and-ttip-so-heavily-politicised/> accessed 5 March 2023; Francesco Duina, 'Why the Excitement? Values, Identities, and the Politicization of EU Trade Policy with North America' (2019) 26 Journal of European Public Policy 1866 <https://doi.org/10.1080/13501763.2019.1678056> accessed 5 March 2023). This would seem to confirm the idea (also acknowledged by work in economic sociology) that goods and services (including food) are embedded in their own hybrid (and thus potentially legal) narratives.

a law of values and principles than a law of structures and rules".[405] Similar in this regard to much issue-specific global law (eg *lex sportiva*), the precepts of *lex mercatoria* make up for their unenforceability with unlimited flexibility. In this instance, it is the flexibility of the legal order that ensures its survival, its thriving even.

Of course these typologies are not homogeneous labels, hence the decision to propose a mapping rather than a strict typology. Each of the quadrants evokes a particular mix of coordinates, but the precise combination can only be determined in specific instances. The idea is that legal orders are situated on the legality map according to where they find themselves along each of the two continua. Some, like the EU or Levit's examples of bottom-up lawmaking, may find themselves on the border, right at the centre of one of the continua.[406] Others, like algorithmic governmentality, may find themselves at the extreme of both continua. Still others, like the cricket legal order, will fall somewhere in the middle of a quadrant. (The cricket legal order falls within the paideic quadrant: while the MCC sets out precepts in official form, their narrative force is guided almost exclusively by practice, hence the very regular updating of the Laws of Cricket.)

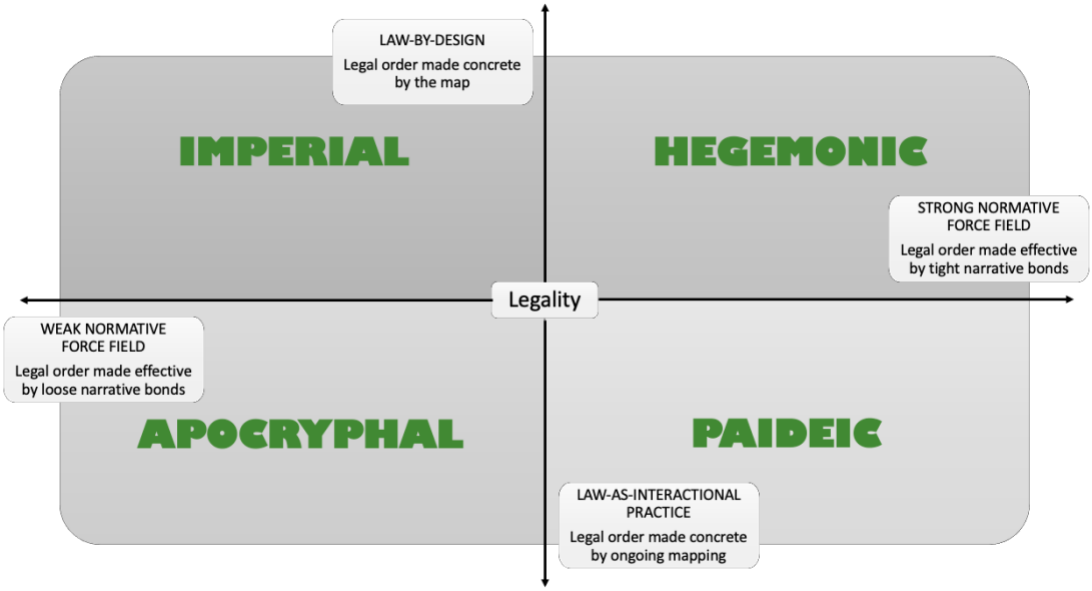

Figure iii: Quadrants of legality

[405] Teubner (n 157) 16.

[406] In the case of the EU, there are regular reversals of ranking within the EU heterarchy. This means that sometimes interactional-practice takes priority, other times by-design precepts are prevalent. In the case of Levit's examples of bottom-up lawmaking, the normative charge of the narrative is more difficult to characterise because the bonds that bind are simultaneously non-dense (ie often episodic), but nevertheless narratively tight (see further Levit (n 261)).

Despite their non-homogeneity, I think it is still worth qualifying the ideal-type corners of these quadrants in a little more detail before I move on. The top two quadrants (imperial and hegemonic) espouse predominantly "world-maintaining" narratives. The bottom two quadrants (apocryphal and paideic) are both characterised by specifically "world-creating" narratives. Each quadrant (again in its ideal form) has its own particular relationship to creativity. The hegemonic quadrant relies on a dominant narrative that is stifling of creativity. The imperial quadrant relies on a dominant narrative while simultaneously disavowing its existence (and concomitantly any role for creativity in the imperial legal order). The apocryphal quadrant relies on narratives as self-fulfilling prophecies (and so condemns creativity to the bin). The paideic quadrant experiences creativity as destabilising because of the fragmentation of narrative ("juridical mitosis" as Cover calls it[407]) at its heart.

Each of these ideal-type-corners betray the potential threats to the legal order's continued existence. In the first (hegemonic) case, an overbearing legal order unable to recognise the specificities or individuality of (certain of) its parts opens itself to resistance or revolt by an unhappy minority, who may deem the legal order unintelligible from their point of view. An example of this might be those who engage in "crimes of solidarity" against the state (see, for example, the case of Cédric Herrou in France).[408] In the second (imperial) case, there is also a risk of encouraging the "breakaway" of subparts who see their non-recognition as betraying an unacknowledged background narrative. Here the problem is not lack of intelligibility, but a disavowal of the existence of a subtending narrative. I would argue that Brexit was a prime example of this.[409] In the third (apocryphal) quadrant, there is a risk (always in the ideal-type corner) of the evacuation of the space of uncertainty from the sphere of the legal order. The narratives created by Big Data close down potentiality itself. For example, there are now algorithmic systems to help judges determine whether a prisoner should be given parole. For the moment, thankfully, the judge may still override these systems. But even in the non-ideal-type situation where this margin for action remains, the judge must develop arguments that question the viability of the algorithmic solution. Big Data is in a sense "producing the future"

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[407] Cover (n 2) 15.
[408] Discussed in Marianne Tazzioli, 'Crimes of Solidarity: Migration and Containment Through Rescue' (2018) 2 Radical Philosophy 4.
[409] See Richard Mullender, 'Two Nomoi and a Clash of Narratives: The Story of the United Kingdom and the European Union' (2006) 6 Issues in Legal Scholarship <http://www.degruyter.com/document/doi/10.2202/1539-8323.1073/html> accessed 10 October 2022.

for us: there is no further need then for doings or the creative spaces they potentially open up.[410] Finally, in the fourth (paideic) case, the vast possibilities for jurisgenesis mean that the fragmentation of meaning is difficult to hold at bay. As a result, paideic legal orders are always at risk of collapse from internal fissures. An example of this sort can be seen in the short-lived history of Extinction Rebellion in France.[411] Its beginnings were jubilant. But with so much passion and commitment involved, cracks quickly began to appear. One of these cracks was between those who wished to seek a wider support base and so water down some of the movement's more radical claims, and those who refused to transform what they saw as the "truth" into something more palatable for the general public. I have seen these types of schisms time and again in paideic social movements.[412]

Conclusion: What about ipse-identity?

I set out in this chapter to deal with two remaining assumptions that provide substance to spaces of interlegality: "legalness" and "intersectingness". I wanted to determine, first, whether legal orders might still display an element of "legalness" despite the onset of the dedifferentiation plague. My concern was that Schlag had destroyed the watershed of disciplinary boundaries and so fuzzied the object of legal theory in general. The answer to this question was provided, in part, by Cover. I argued, with his help, that legality is always more or less mixed up with what we have previously considered other types of social ordering. These separations – like disciplinary separations – are artificial constructs. Different legal orderings give priority in their narratives to different non-legal resources or inspirations (whether moral, religious, cultural, animist, scientific, economic, etc). These diversely inspired narratives are part and parcel of legal precepts. I concluded that a legal order without narratives would be hollow, bereft of meaning. This was an acknowledgement then of the power of Schlag's dedifferentiation plague.

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[410] These thoughts and examples are drawn from Rouvroy (n 399): she calls this new regime "a regime of neutralisation", as opposed to a Foucauldian regime of normalisation.

[411] I participated actively in the beginnings of XR France, so I have benefitted from the insider's view in this instance. I should note that XR France has not been disbanded as I seem to suggest here. Simply, the movement's base has collapsed rather than developed. Many members left the movement to join other environmental movements that already had a more solid existence in France (eg Friends of the Earth, Greenpeace, Youth for Climate, etc). Others created their own breakaway groups (eg Dernière Renovation and, more recently, Les Soulèvements de la Terre).

[412] See further Marc Hudson, 'Extinction Rebellion Says 'We Quit' – Why Radical Eco-Activism Has a Short Shelf Life' <http://theconversation.com/extinction-rebellion-says-we-quit-why-radical-eco-activism-has-a-short-shelf-life-197261> accessed 24 February 2023.

This is not exactly an answer, I admit. Rather than pinpoint a characteristic "legalness" that might set legal orders apart from other types of normative ordering, I have instead sided with Schlag in some sense by arguing that "legalness" can never be entirely excised from its founding narrative and this narrative is always imbued with multiple hues (whether economic, moral, religious, etc).

Despite this, I did not give up on "legalness" entirely. Instead I tried to come at it from a different angle. The second question I sought to answer was whether "intersectingness" might not be similarly plagued by dedifferentiation. Insofar as dedifferentiation undoes the identities of law and X (as academic fields) and makes it impossible to talk of their mutual relations, I wondered whether it might not by the same token undo the identities of legal orders A and B (as separate and potentially intersecting legal orders) and make it impossible to talk of friction between them. If this were so, talk of *inter*legality might lose all sense. In answering this question, I appealed to Lindahl's work. My first move was to accept, as Lindahl does, that all differentiations are themselves driven by a "politics of conceptualisation": they involve the theorist acting without warrant. In a second move, and gradually working my way away (this time) from Lindahl's very differentiated account, I proposed that legality may come in many shades: deep, convincing shades when the legal order is highly legible to its members and to others beyond the legal order; a pale, faltering shade when the legal order lacks legibility either for members or for others beyond the legal order. Legality, then, is a matter of degree. Spinoza talks of degrees of existence. This is inimical to humans who seem to consider that they either exist or they don't. Similarly, Ricoeur's theory suggests that there either is a self, or there is not. Spinoza's degrees of existence open up theoretical and practical possibilities. He argues that something exists insofar as it is fully intelligible, conceivable, explicable. If I can only partially explain the existence of some thing, X for example, then that thing only partially exists (for me).

If we take up this argument in the context of the legal order, it is possible to argue that the "legalness" of an order (which I refer to as its "legality" in keeping with interlegality) is experienced by degrees. The legality of a legal order is experienced both *internally* by the collective self (to what extent can the subparts self-explain their narrative – ie the causes and effects of our joint action) and *externally* by concerned others (to what extent is the pertinent narrative – ie the causes and effects of a legal order's joint action – intelligible to others). The former determines the permanence of a legal order and the latter determines the legal order's relevance. Both explain how legality, as Haraway describes it, is a "strategic defence problem".

Internally and externally, a legal order strives for a maximal degree of legality so as to self-preserve over time (permanence) and in relation to other legalities (relevance). The intelligibility of the legal order is tightly linked to its narratives since without them we cannot make sense of the precepts that bind us.

I used these insights to ground an aesthetic[413] proposal: a mapping of legalities. My aim here is to present "a new topography of the possible".[414] I insistently do not make a claim that this should shut down other possibilities since it is clearly acknowledged here that in differentiating anything fundamentally fuzzy from a fuzzy other, I am working without warrant. Nevertheless, I *do* claim that such a mapping may usefully expand the imaginative possibilities of legal theorising by suggesting alternative boundaries and new intersections. More specifically, I have tried to draw out two properties of legality (its composite nature and its existence by degrees) that seem mostly to have been ignored by legal theory.

A third question was raised at the outset concerning my conception of "distinctness". Specifically, I wondered whether the *ipse*-shift from the "who?" question to the "how?" question would be sufficient to solve the "distinctness" problem. In shifting the *ipse*-identity question from "who?" to "how?" I was unsure whether the doings of subparts (the map-in-use) could be characterised in a way that would sufficiently tie them to the map-as-object. In Chapter 2, I defined the *ipse*-identity (legal ordering, the map-in-use) of a social body to be those doings that respond to the question "How do these parts strive together to persist? How do they behave such that their relations and the attendant effects are preserved?". In this chapter, I noted that part of the answer to this question is provided by narrative, for narrative is central to the *idem/ipse*-overlap. It fixes the character of a social body, while also driving the future doings of the social body. Nevertheless, the actual doings – those make up *ipse*-identity itself – have not been touched on here. *Ipse*-identity is based on what I will call (following Cover) "interpretive commitments",[415] on acting in the world. This is where the narrative vision and reality stand in tension, awaiting a concrete integration. The problem, however, is that these doings are not "done" by legal orders; they are done by members or subparts. Here, again, we see that the notion of identity as applied to individual selves falters a little when we try to translate it to more complex entities. It is for this reason that the mapping of legality proposed

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[413] My proposal is aesthetic in Schlag's sense.
[414] Jacques Rancière, *Le Spectateur Emancipé* (La Fabrique Editions 2008) 55: <https://www-cairn-info.ezproxy.library.uvic.ca/le-spectateur-emancipe--9782913372801.htm> *"une nouvelle topographie du possible"* (my own translation).
[415] Cover (n 2) 7.

has so far been limited to a plotting of legal orders and not a plotting of their multiple *orderings*. I have tried to stick to the "what?". Now, though, it is time to turn to the "how?" and consider what legality looks like as legal ordering (map-in-use).

First though, an interlude.

Interlude — A story of suspended social licence

Image iii: Globe & Mail editorial cartoon by David Parkins (6 May 2016)

Negotiations on the Comprehensive Economic Trade Agreement between the EU and Canada (CETA) began many years ago in 2009. It is one among several multilateral agreements between WTO members[416] that seeks to reach beyond the traditional barriers to international commerce (tariffs) and into the sphere of what Dani Rodrik calls "deep economic integration".[417] This includes opening up market access for services and public procurement and working towards deeper coordination on investment protection, labour and environmental law, intellectual property rights, food safety, financial regulation, the temporary movement of

[416] Others include: TTIP (Transatlantic Trade and Investment Partnership, which would be the world's largest trade deal – 50% global output; 33% world trade; 20% FDI) and TTP (Trans-Pacific Partnership).
[417] The term was introduced in Robert Z Lawrence, *Regionalism, Multilateralism, and Deeper Integration* (First Edition, Brookings Institution Press 1996). According to Asche, "deep economic integration" moves "behind the border". It encompasses "all action that ultimately aims at harmonizing modes of production, private and public service delivery, of environmental and consumer protection, that is: society at large, across national or continental borders. This is the very reason why such endeavours are both fundamentally important and at times highly controversial, in particular when people discover that something flatly introduced as, say, a transatlantic 'trade' agreement may indeed 'deeply' alter their whole way of life" (Helmut Asche, *Regional Integration, Trade and Industry in Africa* (Springer 2021) 192). Dani Rodrik draws on deep economic integration to offer his own impossibility triangle. The political trilemma of the world economy, as he calls it, is that we cannot have deep economic integration ("hyperglobalization"), national sovereignty, and democratic politics at the same time. We have to sacrifice one of the corners of the triangle (see further Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (WW Norton 2011) xvii).

workers, domestic regulation, and public services. These agreements are also designed to be forward-looking, assuming ongoing cooperation on regulatory matters in the form of a "living agreement".

In the early years of negotiations, no one paid much attention to the planned trade agreement. The EU Commission was given a mandate by the EU member states to negotiate and did so mostly behind closed doors. The final draft text – which is 1600 pages long – appeared in September 2014. It then went through translation and legal tweaking and was published as a final legal text in February 2016. The Canadian Centre for Policy Alternatives called it a "sweeping constitution-style document".[418]

The document itself raises a number of controversial issues. First, under CETA's new investment court system (ICS) – which effects a small procedural shift away from its unpopular predecessor, investor–state dispute settlement (ISDS) – the substantive protections afforded to foreign investors remain largely intact.[419] Foreign investors still have the legal right to sue governments for compensation when they consider themselves the object of "indirect" expropriation measures or when they consider that regulatory changes undermine their future profits. Stiglitz gives the example of Philip Morris, which sued Uruguay (among other countries) for loss of future profits when they required plain package warnings on cigarette packets.[420] This means that regulation in the public interest, whether in the field of public health, the environment, safety, or finances, may be opposed if it is deemed to weigh heavily on foreign investors. These foreign investor protections – which are not available to domestic investors or ordinary citizens – may cause significant financial liability and could chill public

[418] Hadrian Mertins-Kirkwood and others, 'Making Sense of CETA: 2nd Edition' (PowerShift; CCPA 2016) 4 <https://power-shift.de/making-sense-of-ceta-en/> accessed 10 April 2023.
[419] Despite the move from investment protection in the form of investor-state dispute settlement (ISDS) (ie private ad hoc arbiters, who also act as lawyers, paid by the parties) to the Investment Court System (ICS) (ie a version of ISDS, with a permanent 15-judge panel appointed for 5-10 years from EU/Canada/third country in equal numbers, who for the moment will still be paid a daily fee of $3000 by the losing party), concerns still abound (Paul de Clerck and Lora Verheecke, ''New' CETA Tribunals - Old Undemocratic System: Analysis of the New Codes of Conduct for Members of the CETA Tribunals' (Friends of the Earth 2018) <https://friendsoftheearth.eu/publication/new-ceta-tribunals-old-undemocratic-system/> accessed 29 December 2023).
[420] Joseph E Stiglitz, 'The Secret Corporate Takeover' <https://www.project-syndicate.org/commentary/us-secret-corporate-takeover-by-joseph-e--stiglitz-2015-05> accessed 29 December 2023. Fortunately, Uruguay won against Philip Morris. Despite the win, the length and cost of the proceedings were themselves chilling: the tribunal proceedings took 6 years (3 years to determine jurisdiction and another 3 to adjudicate); and while Philip Morris was required to cover the $7 million in legal fees, Uruguay still had to foot a $2.6 million bill for financial costs.

policy. This is a concern for both parties and explains in part the label "supranational constitutionalism" applied by Clarkson to such agreements.[421]

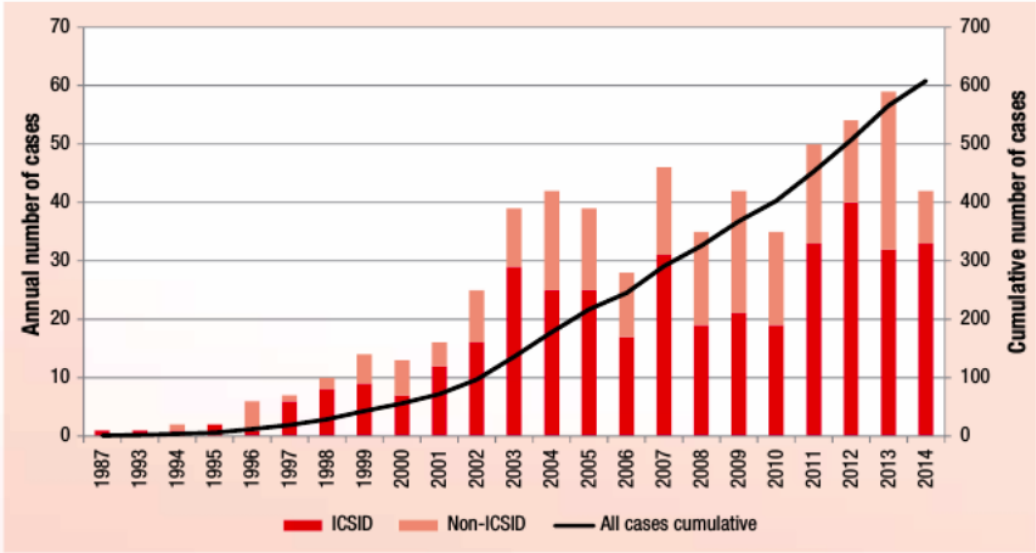

Figure iv: Known ISDS cases, annual and cumulative (1987–2014)

Canada's experience under NAFTA confirms that this is a very real risk. No NAFTA party has been sued more than Canada, its highly developed legal system and strong protections for private property notwithstanding.[422] Many of these challenges involve environmental protection policies.[423] In 2015, for example, Canada lost a NAFTA dispute over an

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[421] See Stephen Clarkson, 'Locked In? Canada's External Constitution Under Global Trade Governance' (2003) 33 American Review of Canadian Studies 145 <https://doi.org/10.1080/02722010309481153> accessed 25 February 2023; Stephen Clarkson, 'Global Governance and the Semi-Peripheral State: The WTO and NAFTA as Canada's External Constitution' in Marjorie Griffin Cohen and Stephen Clarkson (eds), *Governing under Stress: Middle Powers and the Challenge of Globalization* (Zed Books Ltd 2004) <http://www.bloomsburycollections.com/book/governing-under-stress-middle-powers-and-the-challenge-of-globalization> accessed 25 February 2023; Robert G Finbow, 'Constitutionalism by Stealth? CETA as an Exemplar of Clarkson's Supra National Constitutionalism' in Michèle Rioux and others (eds), *Governance Dilemmas in Canada, North America, and Beyond: A Tribute to Stephen Clarkson* (Springer International Publishing 2021) <https://doi.org/10.1007/978-3-030-81973-6_5> accessed 25 February 2023. An additional concern for the EU is that US businesses with a "substantial interest" in Canada may use this system as a way around the failed TTIP negotiations, thus leaving the door open for large business to challenge EU public policy.

[422] Scott Sinclair and Stuart Trew, 'Why Progressives Oppose Canada-EU Trade Deal' <https://policyalternatives.ca/publications/commentary/why-progressives-oppose-canada-eu-trade-deal> accessed 10 April 2023.

[423] In a review of NAFTA Chapter 11 Investor-State Disputes for the Canadian Centre for Policy Alternatives, Sinclair details how among the 77 known cases prior to 2015, 20 directly involved natural resources and 18 challenged government's environmental protection measures (Scott Sinclair, 'NAFTA Chapter 11 Investor-State Disputes to January 1, 2015' (Canadian Centre for Policy Alternatives 2015) <https://policyalternatives.ca/publications/reports/nafta-chapter-11-investor-state-disputes-january-1-2015> accessed 10 April 2023).

environmental assessment that recommended against a massive quarry in an environmentally sensitive area of Nova Scotia.[424] But Canada is not alone in this experience. ISDS claims have proliferated since its beginnings in 1987 (see Figure iv above). The Netherlands recently faced its first-ever ISDS claim. The claim was brought on the basis of the Energy Charter Treaty, a multilateral treaty for cross-border cooperation in the energy sector. The German owners of coal power plants based in the Netherlands – RWE and Uniper – sought compensation (€2.4 billion in total) for future losses caused by the government's mandatory phase-out of coal-fired electricity production by 2030 (a measure taken to comply with the country's Paris Agreement commitments). Though the Netherlands were "successful" in this instance, success didn't come without a fight. RWE and Uniper sought compensation in national courts and via ICSID, as well as appealing an anti-arbitral injunction handed down by German courts. The Netherlands has so far spent €5.4 billion on legal costs, and the arbitral decision in *RWE v The Netherlands* is still pending.[425]

Second, CETA institutionalises ongoing commitments in the form of a "living agreement", so creating a set of institutions and processes for foreign governments (and their corporate lobbyists) to have a say in the creation of new domestic regulations. This may delay or halt the introduction of public interest legislation and undermine the precautionary principle. The range of regulatory areas covered by these rules is extensive, including not just goods and services, but also investment and other areas only loosely connected to trade. In addition, CETA's regulatory cooperation institutions (and ICS mechanisms) would be open to Canadian subsidiaries of major US chemical, biotech, and energy firms.

Any attempt to harmonise regulations between the EU and Canada threatens to push standards down to the lowest common denominator. Moreover, business lobbyists could use this process to push for regulatory changes that are too controversial to be included in the text of CETA itself. For example, CETA raises concerns about processing and production standards, particularly in Europe. There are a number of agricultural practices, for example, that are considered safe in Canada but which are avoided in the EU because of the precautionary

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[424] Jennifer Huizen, 'Global Trade 101: How NAFTA's Chapter 11 Overrides Environmental Laws' <https://news.mongabay.com/2016/11/global-trade-101-how-naftas-chapter-11-overrides-environmental-laws/> accessed 10 April 2023; and more recently Paul Withers, 'Canada Ordered to Pay U.S. Concrete Company $7M in NAFTA Case' <https://www.cbc.ca/news/canada/nova-scotia/nafta-bilcon-digby-neck-quarry-environmental-sovereignty-1.5032727> accessed 10 April 2023.

[425] Bart-Jaap Verbeek, 'RWE's Arbitration Case Against Dutch State Inadmissible Under EU Law' <https://www.somo.nl/rwes-arbitration-case-against-dutch-state-over-coal-ban-inadmissible-under-eu-law/> accessed 29 December 2023.

principle. These include the surface treatment of poultry with acetic acid, the use of hormones and antibiotics in beef production, and the wide use of genetically modified organisms (GMOs) in agriculture. Under CETA, those precautions could be attacked on the basis of the "aftercare principle" (under which it is up to the complainant to show harm).[426]

Finally, the treaty is to come into provisional effect immediately upon signature by Canada and the EU, rather than awaiting the ratification of the 28 (or 27 post-Brexit) state parties and their relevant federal sub-units. This aspect was raised before the Federal Constitutional Court in Germany, which has given the government the right to go ahead and sign but at the same time has ordered the German government to notify the parties that Germany reserves the right to terminate provisional application of the agreement should it conflict with the German constitution. (Of particular concern is the ICS mechanism.)

Despite these potential drawbacks to CETA for Europeans, the EU forged ahead. In order to speed up the signing process, the EU Commission agreed to classify CETA as a "mixed agreement" (thereby acknowledging that the agreement exceeded EU competence) despite its misgivings. This meant that all EU member states and some regions would have to ratify the agreement alongside the EU Commission and Parliament. (Some – like the Belgian regions – would also be involved at the signing stage.)

Belgium is a federal constitutional monarchy whose parliamentary system requires that the federal state have the assent of its regions and communities to sign (within the European Council) and ratify an international trade agreement.[427] Ironically, it was Flanders who pushed for the increased powers over international trade, since they are the source of 83% of Belgium's exports.[428] Flanders is the rich part of Belgium while Wallonia is agricultural and has suffered

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[426] Mertins-Kirkwood and others (n 418).

[427] Belgium is made up of three language Communities and three Regions, each with considerable autonomy. One of these is the French-speaking Walloon Region, which is governed by the Walloon parliament and the executive Walloon government.
This institutional organisation arose out of tensions between the Dutch-speaking and the French-speaking communities fuelled by differences in language and culture and the unequal economic development of Flanders and Wallonia in the second half of the 20th century. Institutional reforms took place during the period from 1970 to 1993, when Belgium moved from a unitary system to a federal system. More competences were handed over to the Regions and Communities in 2001 and 2011. The considerable autonomy of the Belgian
Communities and Regions comprises authority in international affairs, including the *ius tractati* (the right to conclude treaties). In many domains then, the Belgian federal government is not able to sign an international treaty without the agreement of the five parliaments.

[428] The Flemish nationalist party is in power in Flanders and, as recently as July 2016, pushed for more regional power at the federal level.

recently from the closure of its big industries. The former is led by the Flemish nationalist party, while the Walloon government is a centre-left coalition (Socialists and Christian democrats), whose current Minister-President, Paul Magnette, is a former political science professor from the Université Libre de Bruxelles (ULB) and a committed Europhile.[429]

Under Magnette's leadership then, the Walloon parliament held extensive debates and expert hearings over a period of 18 months, reviewing the CETA documents in depth. Wallonia raised its concerns in writing in October 2015 pointing out the potential negative impact of CETA on public services, agriculture, food standards, and the EU's precautionary principle. After hearing and questioning numerous EU officials, including Cecilia Malmström (the EU Trade Commissioner) herself, the Walloon parliament voted a resolution in April 2016 refusing to ratify CETA as it stood. Nobody took Wallonia seriously and the region did not get the answers they were seeking to the questions and concerns they had set out in writing. When the EU, realising that Wallonia would actually put up a fight, finally put together some more thorough answers a few days before CETA was meant to be signed, they came in the form of a supposedly-legal interpretative document, in which the meaning of various CETA provisions was restated. Wallonia was then given an ultimatum by the EU to come to a new decision by Monday before the scheduled signature. At this point, Paul Magnette refused to negotiate under any further deadline pressure. "We have received three ultimatums already and we are not going to tolerate a fourth one, from anybody," said Mr Magnette. "If there is a fourth one, we will walk away from negotiations."[430]

[429] Interestingly, he obtained his PhD in 1999 with a dissertation on "Citizenship and the construction of the EU" and his research interests include institutional policy and theories of democracy.
[430] Associated Press, 'Talks Continue on Wallonia Block over EU-Canada Deal' <https://www.independent.ie/world-news/talks-continue-on-wallonia-block-over-eu-canada-deal-35160857.html> accessed 10 April 2023.

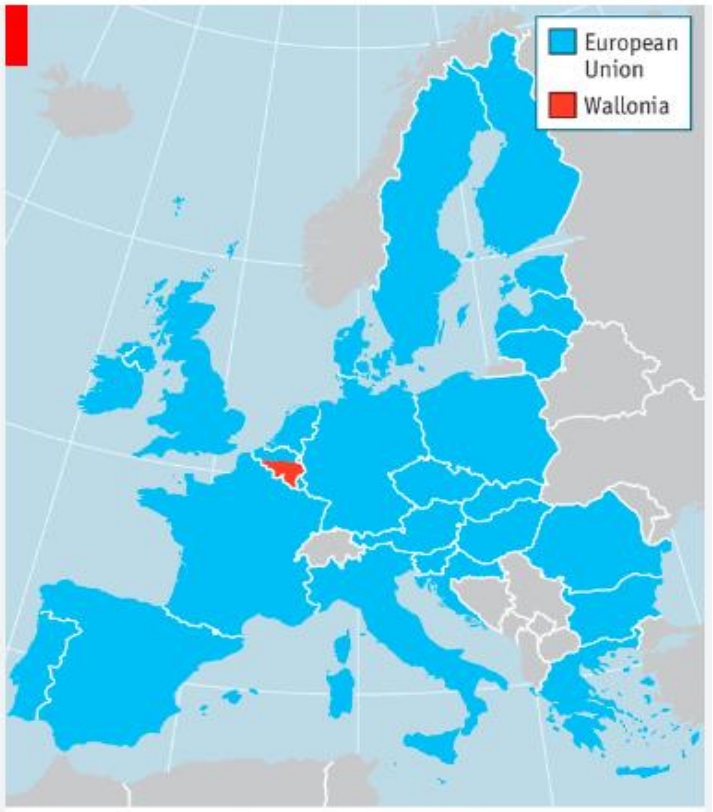

Image iv: Map of Wallonia in the EU (source: The Economist)

Paul Magnette and the regional government were under significant pressure from Canada, from the EU, from the Belgian federal government, from other EU member-states, and from media pushing the liberal "common sense" line. In the media, Wallonia's minority status was underlined, it was characterised as "little" Wallonia against the big wide world, and its actions were mostly condemned or ridiculed. The press spoke of the "less than 1%"[431] "block[ing] progress" for the rest of the EU.[432] Peter Mandelson, a former EU trade commissioner, suggested it was time to put an end to the scrutiny of such treaties by national parliaments; surely the EU should no longer accept such "dagger[s] at the heart of European trade policy". In a speech at a business gala dinner, EU Commissioner for Digital Economy & Society, Günther Oettinger, lambasted the anti-CETA stance, calling Wallonia a "micro-region, run by communists, that is blocking all of Europe".[433] The president of the Flemish liberal party said,

[431] The Walloons number 3.6 million Walloons amongst 500 million Europeans. This is though an interesting reversal of fortunes compared to the more common use of "the 1%"!
[432] Ian Wishart and Josh Wingrove, 'EU-Canada Trade Deal in Limbo as Belgium Withholds Consent' [2016] Bloomberg.com <https://www.bloomberg.com/news/articles/2016-10-24/eu-canada-trade-deal-in-disarray-after-belgium-withholds-consent> accessed 29 December 2023.
[433] Martine Dubuisson, 'Ceta: «La Wallonie, Une Micro-Région Gérée Par Des Communistes Qui Bloque l'Europe»' [2016] Le Soir <https://www.lesoir.be/art/1355492/article/actualite/union-europeenne/2016-10-

"Can Belgium really afford to be blackmailed, and blocked, while the whole EU and the rest of the world watches?"[434] One of the Flemish region's most powerful business lobbies urged the Belgian prime minister to simply sign the deal. "If it leads to an institutional crisis, or some fighting, so be it. We're making a fool of ourselves".[435] And Guy Verhofstadt – previously Belgian prime minister and now MEP – said that if necessary the EU would just reclassify the agreement as a non-mixed agreement and so avoid any national/regional say in the matter.[436] Canada's trade minister seemed to take it personally, walking out of talks with Wallonia and declaring that the EU was apparently not capable of securing an international trade agreement, "even with a country with European values such as Canada, even with a country as nice and as patient as Canada".[437]

Yet, at the same time, there was (and still is) quite a bit of subaltern (and not so subaltern) support for Wallonia's move: in particular, 3.3 million individuals signed a citizen's petition against the EU's signature of TTIP and CETA,[438] over 2000 municipalities and local authorities (including Amsterdam, Cologne, Edinburgh, Grenoble, Barcelona, Milan and Vienna) have voted to remain TTIP/CETA/TiSA-free zones,[439] and the German constitutional court itself has expressed serious reserves.[440]

30/ceta-wallonie-une-micro-region-geree-par-des-communistes-qui-bloque-l-euro> accessed 29 December 2023.

[434] Laurens Cerulus, 'Flemish Nationalists Hamstrung by Belgium's Trade Fiasco' <https://www.politico.eu/article/flemish-nationalists-hamstrung-by-belgiums-trade-fiasco/> accessed 29 December 2023.

[435] ibid.

[436] 'Le Conseil Peut Décider Que Le CETA Est de La Compétence Exclusive de l'UE' <http://www.rtl.be/art/info/monde/europe/le-conseil-peut-decider-que-le-ceta-est-de-la-competence-exclusive-de-l-ue-862051.aspx> accessed 29 December 2023.

[437] Steven Chase, 'Canadian Trade Minister Walks Out of EU Trade Talks, Says Deal Is "Impossible"' [2016] The Globe and Mail <https://www.theglobeandmail.com/news/politics/freeland-walks-out-on-talks-with-belgian-holdouts-on-canada-eu-trade-deal/article32468347/> accessed 29 December 2023.

[438] Sam Morgan (tr), 'Anti-TTIP Petition Signed by 3 Million People' <https://www.euractiv.com/section/agriculture-food/news/anti-ttip-petition-signed-by-3-million-people/> accessed 29 December 2023. The European Commission refused (in July 2014) to register this as a European Citizens' Initiative against TTIP and CETA. In May 2017, however, the General Court of the EU annulled the Commission's decision, thus requiring it to review its position and hold a hearing in the European Parliament.

[439] Martin Banks, ''TTIP-Free Zones' Spread Across Europe' <https://www.theparliamentmagazine.eu/news/article/ttipfree-zones-spread-across-europe> accessed 29 December 2023.

[440] Three German activist groups handed in 125,000 signatures to the court in August 2016 in opposition to CETA, which they fear will undermine workers' rights and worsen standards for consumers. They argued that CETA breaches Germany's constitution because parts of it can come into force even before national parliaments have ratified the agreement. The court rejected their bid to stop the government from signing, but nevertheless stated that provisional application could only apply to areas of EU-competence and, further, it reserved the right to refuse provisional application of the agreement if measures were found to

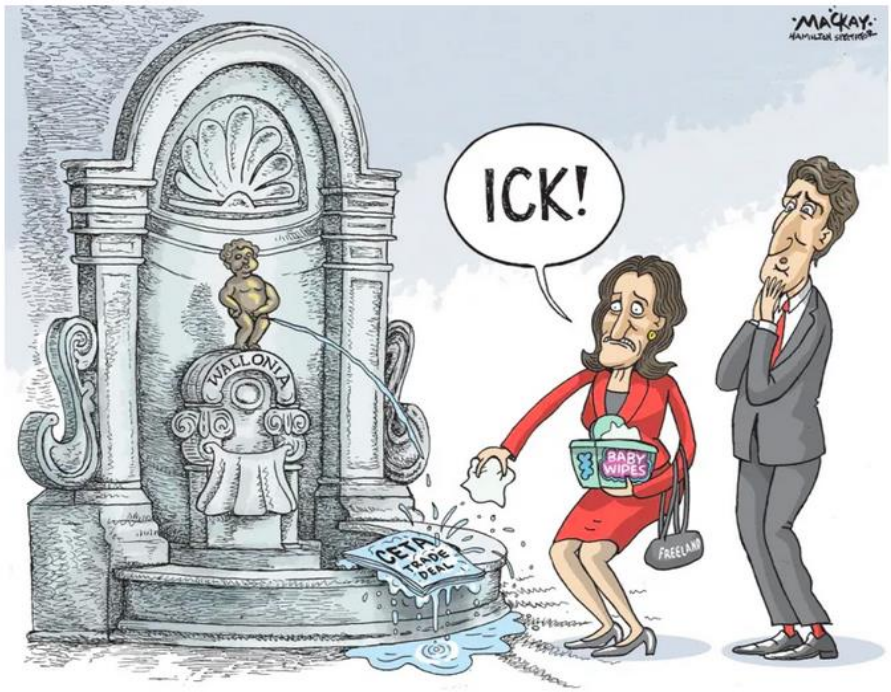

Image v: The Hamilton Spectator editorial cartoon by Graeme MacKay (20 October 2016)

On 28 October 2016, just after the time scheduled for signature, the Walloon parliament accepted a compromise deal with the federal government and the deal was agreed to by all the Belgian regions and annexed to the treaty. The Walloons' principled stand resulted in a revised "joint interpretive instrument". This legal document clarified that there would be no provisional application of the ICS clauses, that Wallonia would be able to apply the hardship clause if negative effects on agriculture (due to trade) were serious, and that the European Court of Justice would be asked to review the legality of ICS.[441] The accord also included assurances that if any Belgian regional government were subsequently to refuse to ratify CETA—which Wallonia has promised to do if the ICS provisions remain unchanged—the federal government would be obliged to give notice to the EU that Belgium could not ratify. This would potentially trigger the end of CETA's provisional application in all European member states.

CETA was signed by Canada, the European Council and EU Commission on 30 October 2016 and ratified by the EU Parliament on 15 February 2017. A large part of the agreement is now

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conflict with the German constitution (see further Dániel Fehér, 'German Court on CETA: Important Success for Our Democratic Rights !' <https://www.bilaterals.org/?german-court-on-ceta-important> accessed 29 December 2023)

[441] Many problems remain unsolved, however, particularly in respect to ICS (see further Gus Van Harten, 'The EU-Canada Joint Interpretive Declaration/Instrument on the CETA' <https://papers.ssrn.com/abstract=2850281> accessed 29 December 2023)

provisionally in force (following the provisions of CETA Article 30.7), while the text itself awaits ratification by all EU member states and signatory regions. Ten EU countries have yet to ratify CETA, including some (France, Italy, Cyprus, Ireland, and Belgium, in particular) in which progress seems to be stalled.[442] Provisionally applied in part, the agreement "just sort of sits in this limbo".[443] To date, no country has outright refused to ratify CETA, though a number have come close.[444] Should this happen, it would not only mean that CETA has "permanently and definitely" failed, but it would also terminate provisional application of the agreement.[445] This open possibility—which is now widely advertised—is perhaps the essence of the Walloon achievement; a small Belgian region has put local democracy back on the map.[446]

[442] See further the ratification tracker available at https://carleton.ca/tradenetwork/research-publications/ceta-ratification-tracker/.
[443] As noted by Jason Langrish, head of the Canada Europe Roundtable for Business (Dylan Robertson, 'Five Years into Canada-Europe Trade Deal, Full Ratification Not Guaranteed' <https://www.ctvnews.ca/business/five-years-into-canada-europe-trade-deal-full-ratification-not-guaranteed-1.6077078> accessed 29 December 2023).
[444] The Cyprus parliament voted against ratification, but the decision was not notified to the EU (see further https://carleton.ca/tradenetwork/cyprus/).
[445] Guillaume Van der Loo, 'CETA's Signature: 38 Statements, a Joint Interpretative Instrument and an Uncertain Future' <https://www.ceps.eu/ceps-publications/cetas-signature-38-statements-joint-interpretative-instrument-and-uncertain-future/> accessed 29 December 2023.
[446] Alternatively, this "achievement" might be seen as "the Achilles heel of European external action [involving] political blackmail, rent-seeking, and self-interested opposition of small political fractions" (David Kleimann and Gesa Kübek, 'The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15' (2018) 45 Legal Issues of Economic Integration 13, 42 <https://kluwerlawonline.com/journalarticle/Legal+Issues+of+Economic+Integration/45.1/LEIE2018002> accessed 29 December 2023). But instead of encouraging the possibilities of ruptural events, this type of interpretation shuts down such possibilities. I have purposefully chosen another ending for my story…

Chapter 4 — Intersectingness: Stitching up commitments

And so the outside, it bashes us in
Bashes us about a bit
Feel it tugging you, ploughing you flat
Then feel it filling your sails
And warm on your back
— lyrics from 'Bashed Out' by This is the Kit

In Chapter 3, we looked at the second assumption behind the concept of interlegality: the assumption that there is something specifically *legal* about a given "legal" order. I referred to this as the "legalness" assumption. The aim of the chapter was to articulate the conceptual problem of "legalness" and provide some suggestions as to how we might go about qualifying an order as "legal". To do this, I focused on responding to Schlag's dedifferentiation plague. As a consequence, much of the discussion was limited to the concrete entity of the legal map, or *idem*-identity. I wanted to determine if the "legal" edges of the map could be defined at all and, if so, on what basis. My answer was that where we place the edges is a decision without warrant, which inevitably depends on what we want to study. I proposed certain edges with this in mind. Reimagining the map of legality, I argued that law may take a variety of forms, from the predominantly by-design type to the predominantly interactive-practice type. These legal forms are given meaning by law's narrative – a distinctly multidisciplinary story – that may bind members/parts more or less densely. I also suggested that where meaning is clearly intelligible to those who are bound by a narrative and to concerned-others, there is a high degree of legality; where meaning is less obviously intelligible, there is a lower degree of legality.

This mapping of legality left to one side the second aspect of legality: *ipse*-identity. To recall, *ipse*-identity refers to that part of identity that embodies a self-reflexive orientation to the material world. It is the part of identity that involves both recognising and reaffirming an existing character (through one's conduct). In Ricoeur's account, this was the "who?" of identity. I suggested, in Chapter 2 (Tweaking the "we-perspective"), that for composite individuals, the more appropriate identity question was "how?": *How* do these parts strive together to persist? *How* do they behave such that their relations and the attendant effects are preserved? In both cases, however, it is important to note that the referent is the *doing* (through

which one affirms "I will hold firm") rather than specifically the *doer*.[447] The narrative vision calls for concrete translation.

In this chapter, I will consider the doings that concretise legal order(s). I have, until now, called these doings "legal ordering" to insist on the ongoing nature of this process, but this term does not portray the individual nature of such doings. Yesterday's "I will hold firm" must be constantly reaffirmed – today, tomorrow and beyond – to hold traction. It is not reaffirmed, however, by a legal order as a whole, but by "a thousand real integrations",[448] the work of many small hands over time. Cover calls these "interpretive commitments", and I have tried to keep things simple by following his terminology.[449]

These individual commitments are the way in which we breathe life into legal precepts by *acting* on the basis of our shared narrative. Importantly, in so doing, two things are achieved: first, we affirm the meaning of a given precept (and so participate in the drawing or redrawing of the boundaries of legality) and, second, through our actions, we affirm our narrative *as* law (so bringing law into existence by insisting on the intelligibility of a particular narrative to a particular concrete situation).

But these commitments are also the medium of "intersectingness".

In this chapter, I return to the third and final assumption that seems to underlie the concept of interlegality: the assumption that two (or more) legal orders can *intersect*. Though "intersectingness" is a particularly clunky term, I have chosen it for a reason. It will stand in for this fuzzy assumption until we have a more robust tool with which to construct the concept of interlegality. Its clunkiness is a feature in this instance because it points to our lack of a map at the point of intersection.

After briefly defining Cover's notion of "interpretive commitments", I use licences as an example of an "intersecting" interpretive commitment, a commitment that creates a point of intersection. Licences are an interesting example because those we are most familiar with are

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[447] As Nietzsche insists: "'the doer' is invented as an afterthought—the doing is everything" (Friedrich Wilhelm Nietzsche, *On the Genealogy of Morality* (Carol Diethe tr, Cambridge University Press 1994) 28). Llewellyn echoes this sentiment: "Before rules, were facts: in the beginning was not a Word, but a Doing" (Karl N Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44 Harvard Law Review 1222, 1222 <https://www.jstor.org/stable/1332182> accessed 3 March 2023).
[448] Cover (n 2) 15.
[449] ibid 7: "The normative universe is held together by the force of interpretive commitments – some small and private, others immense and public. These commitments – of officials and of others – do determine what law means and what law shall be.".

legal, but licences also exist beyond the strictly legal (eg social licences). They therefore show multidisciplinary narratives at work. They are also interesting because they provide a way of rendering something illegal or unacceptable, legal or acceptable. They are acceptable exceptions. And finally, they are interesting because they point to the essence of the intersection: an act of trespassing and a dialogue that ensues.

It is this act of trespassing – a commitment that approaches a particular map with an unusual narrative – that feeds into my final discussion of interlegality. In the last two sections, I consider the existing accounts of the concept of interlegality. Drawing on my earlier discussions of "distinctness", "legalness", and now "intersectingness", I try to improve a little on the existing accounts. My conclusion is that interlegality, insofar as it is a "space", is a space for creative work on legality itself. The space itself, however, is inevitably opened up by the interpretive commitments of a trespasser.

Interpretive commitments

The story of Wallonia's resistance to the Goliaths that are the EU and Canada speaks to the importance of interpretive commitments in accounting for interlegality. The legal map gives way to concrete doings; and in the same fashion, theory gives way to practical examples.

Often commitments will be "small and private" as Cover suggests.[450] Lindahl discusses these everyday commitments as cases of neat overlap between "is" and "ought". I like to think of them as commitments that reinforce the normative force field, acts that involve putting one's shoulder into the narrative. These are the everyday actions that I take (generally without much conscious thought) and which conform both to the possibilities of the French[451] narrative and the actual precepts that structure the French legal map (eg donning a mask when I enter a shop during Covid-times; paying for my shopping at the checkout of a supermarket; packing my kids off to school each morning; etc). Legal officials (where they exist) also engage in interpretive commitments: handing down a judicial decision; deciding whether to give parole; deciding whether to request ID of a suspect individual; signing off on someone's rights to unemployment benefits; granting refugee status; etc. Often the commitments of officials are as "small and private" as those of other subparts, simply reinforcing the recognised and generally followed legal map.

[450] ibid 7.
[451] To take one example among many.

All these commitments are homeodynamic insofar as they preserve the organisation of subparts within an acceptable narrative range. While commitments fall within this acceptable narrative range, they mostly go unnoticed. But the accumulated pile of commitments is what holds a legal order together, just as the accumulated pile of self-reflexive "I will hold firm"s are what hold together an individual self. In both cases, through my actions in the world, I reaffirm the existence of a legal order (or a self) and acknowledge my continued participation in the legal order's (or the self's) narrative. These "small and private" commitments are the stuff of *ipse*-identity.

As an aside, it is worth noting that these "small and private" commitments are the everyday stuff of "policing" as Rancière defines it:

> "Policing", as I understand it, does not refer to repression or the disciplining of bodies. Nor is it solely the affair of the state apparatus. Policing involves configuring the common world as a stable distribution of places, identities, functions and competencies […] defin[ing] which places are inside and which are outside, which bodies are in the right place and which in the wrong one, which names fit those places and bodies and which do not.[452]

Surprisingly, given the similarities in their accounts of ordering, Lindahl and Rancière seem not to have crossed intellectual paths.[453] Yet, but for the term "policing", the above paragraph might almost have been written by Lindahl. Rancière is adamant about the importance of inclusion and exclusion,[454] as is Lindahl. Lindahl insists that the origins of legal order are to be found in the strange domain of a-legality; Rancière insists on the origin of politics in the unqualified outside. Rancière sees the "distribution of the sensible" as *emplacing* identities,

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[452] Rancière, 'What Does It Mean to Be Un?' (n 189) 561.

[453] I have found only two references to Rancière in Lindahl's work and both are to other aspects of Rancière's thinking (see Hans Lindahl, 'Julius Stone Address: Inside and Outside Global Law' (2019) 41 Sydney Law Review 1, 15, 17 <https://heinonline.org/HOL/P?h=hein.journals/sydney41&i=3> accessed 25 November 2019 (where Lindahl takes issue with Rancière's discussion of representative democracy); Hans Lindahl, 'Intentionality, Representation, Recognition: Phenomenology and the Politics of A-Legality' in Thomas Bedorf and Steffen Herrmann (eds), *Political Phenomenology* (Routledge 2019) 263 (where, on a similar point, Lindahl criticises Rancière's distinction between participation and representation)). I believe this is partly based on a misunderstanding, and that Lindahl's discussion of representation (in Lindahl, 'Julius Stone Address' (ibid)) is very close to Rancière's discussion of politics (in Rancière, 'What Does It Mean to Be Un?' (n 189)).

[454] Davide Panagia, '*"Partage Du Sensible"*: The Distribution of the Sensible' in Jean-Philippe Deranty (ed), *Jacques Rancière: Key Concepts* (Routledge 2014) 96 (quoting Rancière): "A *partage du sensible* is thus the vulnerable dividing line that creates the perceptual conditions for a political community and its dissensus. 'This dividing line', Jacques Rancière tells us, 'has been the object of my constant study' (PP 225)."

while Lindahl sees all legal orders as bounded configurations of ought-*places*.[455] As Lindahl says in his own words this time:

> [C]ollective action necessarily includes and excludes. The point of joint action determines what is important to joint action and what is not, hence what kinds of places, times, subjectivities, and act-types are included therein, such that other practical possibilities – other possible combinations of these four dimensions of behaviour – are marginalised as inconsequential.[456]

Both Lindahl and Rancière have very similar accounts of the "small and private" commitments that drive the emergence of a "pragmatic order"[457] (in Lindahl's words) or a "sensible order"[458] (in Rancière's words).

Illegal or deviant commitments, while not necessarily "small" or "private" in a literal sense nevertheless belong to this same domain of commitments. Why? Illegal or deviant commitments explicitly ignore (a part of) the legal map. In most cases, the reasons for ignoring the map will come down to real or perceived personal or material necessity; a quirky cost-benefit analysis; ignorance of the rules; or idiosyncratic stories (perhaps even to the point of mental illness). Whatever the reasons given, in most cases no alternative narrative is appealed to. Lindahl gives the example of a group of campers behaving raucously in a campsite that requires quiet after 10PM.[459] Importantly, whoever steps in to qualify their behaviour as disrespectful/deviant/illegal is thereby reaffirming the mutual expectations that arise from the common legal map and narrative. Thus, like "small and private" commitments, illegal or deviant commitments and the response(s) they provoke also reinforce a legal order's usual narrative(s) by reaffirming its ongoing existence and the boundaries drawn between the acceptable and the unacceptable, the legal/illegal.

Sometimes, though, commitments become "immense and public".[460] "Immense and public" commitments necessarily go beyond the actual event by appealing to an alternative narrative, whether or not they are in fact classified by the legal order as illegal or deviant (sometimes they may appear unclassifiable). Often this will occur when the "is" and "ought" come undone:

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[455] Lindahl, 'Julius Stone Address' (n 453) 5: "I surmise that all legal orders, global or otherwise, are spatially limited, in the sense of a bounded configuration of ought-places that excludes other possible ways of organising ought- places into a spatial unity."
[456] ibid 8.
[457] Lindahl, 'Julius Stone Address' (n 453) 7.
[458] Rancière, 'What Does It Mean to Be Un?' (n 189) 560.
[459] Lindahl, 'Intentionality, Representation, Recognition' (n 453) 259.
[460] Cover (n 2) 7.

that is, there is a disconnect between the narrative embodied by the doing or the commitment (the "is") and the legal order's acceptable range of narratives (the "ought"). The commitment's "immense and public" nature is driven by its unintelligibility in terms of the usual narratives. A hole is pierced in the legal map, at the particular point where the commitment stages an alternative narrative. A legal order may be torn asunder by the force of such actions.

It is perhaps worth noting here how "immense and public" commitments differ from "hard cases",[461] as it might be surmised that these are no more than commitments that ask difficult questions of the law. But there are difficult questions… and there are incommensurable difficulties. "Hard cases" fall into the former category; "immense and public" commitments belong to the second category. First, "immense and public" commitments do not map onto the two types of "hard cases" Dworkin is said to have recognised, namely: cases in which there is no applicable rule; and cases in which there is a rule, but the rule gives only "incomplete, ambiguous or conflicting guidance".[462] Both of these types of cases refer to a gap or an imperfection in the legal map. These holes can be filled in by appealing to context (ie the rest of the map) and/or to narrative. Indeed, Dworkin seems to suggest just this[463] in arguing that the judge should look first for "fit" (ie existing rules that may help resolve the issue) and then for "justification" (ie reasons – of principle – to privilege certain rules over others, which are likely to be found in the afferent narratives). "Immense and public" commitments, on the other hand, do not rely upon gaps or imperfections in the legal map. Instead, they involve unintelligible commitments (ie commitments that can't be linked to the legal map on the basis of usual narratives) that trouble the legal map itself. Contrary to "hard cases", then, such commitments do not generally fill gaps in incomplete or indeterminate legal maps. Rather, they question the meaning of an existing part of the map by acting out or appealing to alternative and unintelligible narratives.

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[461] Ronald Dworkin, 'Hard Cases' (1974) 88 Harvard Law Review 1057 <https://heinonline.org/HOL/P?h=hein.journals/hlr88&i=1077> accessed 5 March 2023.
[462] HLA Hart, 'Law in the Perspective of Philosophy: 1776-1976' (1976) 51 New York University Law Review 538 <https://heinonline.org/HOL/P?h=hein.journals/nylr51&i=562> accessed 5 March 2023, p. 547, as cited in Allan C Hutchinson and John N Wakefield, 'A Hard Look at Hard Cases: The Nightmare of a Noble Dreamer' (1982) 2 Oxford Journal of Legal Studies 86 <https://heinonline.org/HOL/P?h=hein.journals/oxfjls2&i=94> accessed 5 March 2023, p. 91
[463] The parallel is weak, since Dworkin explicitly relies on principles for the "justification" part of his Herculean adjudicatory process. Nevertheless, there is a vague gesturing to something akin to legal precepts and legal narratives.

Second, "immense and public" commitments are *not* limited to judicial decisions. While they may involve judicial commitments,[464] they may also involve commitments by other legal officials or by simple legal subjects, such as the refugees' mutilated fingertips considered in Chapter 1. Perhaps this superficial difference may be remedied by simply expanding the definition of "hard cases" to encompass non-judicial "hard cases"? But the differences run deeper. For even if Dworkin were to admit the existence of non-judicial "hard cases", he would no doubt maintain that there is a Herculean right answer even in these cases. A Herculean right answer is only available within the context of a given legal system composed of a cohesive and coherent network of rules, principles and institutional history. Hard cases then do not stray. Traditionally they do not stray from the fold of the judicial, but nor do they stray from the legal map and the resources available to interpret that map. For crises that appeal to Lindahl's a-legal outside or Rancière's unqualified outside, but concretising an illegible alternative narrative, the appeal to Herculean integrity no longer holds. Hercules is beyond his remit.

The Walloon parliament's commitments in 2016 were of the "immense and public" variety. As a subpart of the EU imperial legality, Wallonia was expected to act on the basis of a clear legal map (governing the formal procedures of international treaty signing by the EU) and specific narratives which fix the EU's "character" and derive from its structural development over time and its projected values. In this particular context, the EU was fixated on its own legal map with Wallonia drawn in as a reasonably unimportant subpart (and a very small one at that). From the Walloon perspective, however, things looked slightly different. While effectively a subpart of two wider legalities (the Belgian state and the European Union), Wallonia also had its own legality and its own specific narrative concerns. The Walloon parliament clearly felt obligated towards both encompassing legalities, but in this particular context, its domestic narrative seemed at odds with the Belgian and the EU narratives. The Walloon parliament had to commit to something. At the junction of conflicting legalities, it had to decide which

[464] See, for eg, the *Kadi* case discussed in Samantha Besson, 'European Legal Pluralism After Kadi' (2009) 5 European Constitutional Law Review 237 <https://www.cambridge.org/core/journals/european-constitutional-law-review/article/european-legal-pluralism-after-kadi/5125331D9E9B16F979DDCFC02D1C9D42> accessed 5 March 2023; Grainne de Burca, 'The European Court of Justice and the International Legal Order After Kadi' (2010) 51 Harvard International Law Journal 1 <https://heinonline.org/HOL/P?h=hein.journals/hilj51&i=3> accessed 5 March 2023; Juliane Kokott and Christoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23 European Journal of International Law 1015 <https://doi.org/10.1093/ejil/chs063> accessed 5 March 2023; Koen Lenaerts, 'The Kadi Saga and the Rule of Law Within the EU Rule of Law Symposium in Honor of John Attanasio' (2014) 67 SMU Law Review 707 <https://heinonline.org/HOL/P?h=hein.journals/smulr67&i=755> accessed 5 March 2023.

narrative would shape its commitment. Wallonia chose to act on the basis of its domestic narrative, one which conflicted with the EU's own story and which was largely unintelligible to the institutions involved in the treaty process. What was this domestic narrative? And how did it differ from the narrative adopted by the EU institutions? Where the EU saw free trade as the harbinger of economic growth and progress for the EU, the Wallonian narrative introduces an irruptive "democratic" lever into the discussion, reminding the EU of the erased EU citizens and the EU's constitutional commitments in terms of legal protections. Wallonia questioned the EU's inability to provide access key documents (eg Wallonia was unable to secure full access to the Interpretive Declaration right up until the date set for signing), the imposed timelines that allowed no room for democratic discussion, the lack of engagement with their concerns about the privatisation of justice, and the secrecy of the negotiation process as a whole. In his 16 January speech, Paul Magnette noted:

> If we have nothing to hide in those trade agreements, if CETA is genuinely good for small and medium-sized enterprises, if CETA is good for farmers, if CETA is good for public services, if CETA is good for growth, then why is it necessary to negotiate in secret? Why don't we have the confidence to do it before citizens?

If we reconsider the definition of a ruptural event given in Chapter 1, these events seem to fit the bill. Wallonia exposed an alternative EU narrative that was irruptive (in the sense that it was both unexpected and it temporarily upset the balance of power); that made dramatic transformation visible (in terms of what it meant to negotiate a free trade treaty for the EU); that could not be ignored; and that required a response.

This story comes into direct conflict with the "we-world" projected by Lindahl and discussed in section The "we-perspective" and interlegality. There I suggested that no one horizonal "we-world" could exist. On the contrary, the horizonal "worlds" of subparts, insofar as they are all interlegal (but from a variety of different interlegal junctions), inevitably differ from one another. This is not to say that there are a thousand legal maps for any given legal order. The legal map / legal order itself is a standalone unity, it is the organisational glue that holds the subparts together. But it remains a projected unity and no more. The projection of a map is only realised through ongoing map-usage. However, each and every subpart (whether individuals or composite individuals), *acts* in the world on the basis of multiple maps and their pertinent narratives. This is the perilous aspect of *ipse*-identity. This is where things may fall apart. For if subparts refuse to "hold firm", to self-recognise as participants in and promoters of a particular legal map, the map itself becomes imperilled.

The EU "we-world" is a projected "we-world", inevitably unperfected because of the imperial nature of the EU. As a result, the EU map and afferent narrative is bashed about a bit as it is brought to fruition by the many EU subparts. Each and every EU subpart is a subpart of multiple legalities, just like the Walloon parliament. When different maps and narratives are within a homeodynamic range as between these legalities, commitments may remain "small and private". But where subparts are torn between mutually unintelligible narratives, commitments become "immense and public" as happened during the Wallonia saga.

What can we say of commitments then? First, commitments are individual doings. The subparts of a legal order (whether individuals or composite individuals) act in the world, in interaction with other things and beings, to reassert the existence of the legal order in time–space.[465] Similarly, within a legal order, subparts repeatedly cite the legal map (precepts and apposite narrative(s)) through their actions and so concretise the bonds between subparts, breathing life into the apposite narrative(s) and affirming the ongoing existence of the map.

Second, insofar as commitments are inevitably individual, they derive their intelligibility from a multitude of potential (interlegal) sources. Each individual finds itself at a particular interlegal junction. As a result, each individual's commitments are given meaning by a multitude of legalities. Where these legalities exist within a homeodynamic range, commitments will generally be "small and private". On issues where legalities are in conflict or mutually unintelligible, the individual faces a "choose your own adventure"[466] predicament.

Third, "small and private" commitments are homeodynamic both for individuals, but also for legal maps.[467] They are the "thousand real integrations"[468] that ensure minute adaptations to destabilising situations while maintaining the coherence and unity of the relevant narratives for any one individual. By acting on the world, the individual affirms the ongoing existence of a particular legal map for that individual and thus its ongoing commitment to the existence of the legal map as a whole. The accumulated nature of the "small and private" commitments

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[465] This term is used by Lindahl (Lindahl (n 210) 70: "each legal order is a distinct time-space, hence that there are as many time-spaces as there are legal orders") with reference to Santos' "time-space" (Santos (n 89) 418) and Valverde's "chronotopes" (Valverde (n 53)).

[466] For those who are too young to understand, this is a reference to a series of books published in the 1980s/1990s, where the reader is the protagonist and is obliged to choose between different story-paths at different points in the book.

[467] In another context altogether, Hertz says of the notion of order in Wallace Stevens' poems (particularly 'Connoisseur of Chaos') that "order does not imply a fixed state of things, but is a continuous and inescapable *effort*, which can never be fully realized, for regulating disorder or chaos" (Hertz (n 305) 12 (emphasis in original)). Hertz might just as well have been referring to homeodynamism.

[468] Cover (n 2) 15.

reinforce the normative charge of any given narrative, providing increasing normative pull over the commitments of subparts. Thus, the sum of all such subpart-commitments protects the ongoing existence of the legal map. As such, they represent a legal order's concrete strivings to self-preserve.

Most importantly though, for this dissertation, is the fact that sometimes commitments undo legal order rather than buttressing it. That is, there are doings that are "immense and public" through their unintelligibility to a particular legal order. They are unintelligible because they involve an appeal to a strange and unfamiliar narrative, a narrative other than the usual narrative(s), and in so doing they unravel the meaning of a particular legal map.

"Intersecting" commitments

Before we consider how and why a legal map might come undone, I would like to consider the counterfactual: How is it that some legal maps are able to survive the encounter with commitments that appeal to alternative narratives? There are insights to be garnered here from what might seem a surprising source: the literature on social licence to operate (or "SLO" as it is commonly referred to) traditionally produced by and for the extractive industries.

In the following sections I will discuss how licences are a concrete example of interlegality in action, why social licences are a particularly interesting subcategory of licences, and what happens when licensing is unsuccessful.

Licences as "intersecting" commitments

A *legal* licence involves the lawful granting of permission to do something that would otherwise be considered illegal or proscribed: it permits a "doing" that would otherwise not be permitted.[469] Who permits such a doing? The legal order in which the doing is emplaced does, whether through a particular legal authority or, for example, by payment of a licensing duty. Whose doings are so licensed? An individual or a group who wishes to do something potentially counter to the legal map (eg use a work of art that is not theirs to use; open a market stand on property that is not theirs to occupy; etc). Legal licences clearly involve interpretive commitments insofar as they are produced by "doings". But these interpretive commitments have a distinctively quirky flavour. As I said in the introduction to this chapter, interpretive commitments are the way in which we breathe life into legal precepts by acting on the basis of our shared narrative. In the field of licences, however, the interpretive commitment is anarchic.

[469] 'License' <https://www.law.cornell.edu/wex/license> accessed 9 March 2023.

Instead of acting on the basis of a shared narrative, the interpretive commitment cites shared legal precepts while simultaneously appealing to strange (and potentially unintelligible) narratives. The interpretive commitment explicitly refuses the (intelligible) interpretation(s) provided by the shared narrative(s). It is a destabilising force, with the potential to cause legality to falter by undermining a legal order's legibility.

This makes interpretive commitments in the field of licences interlegal by nature. The doer straddles two legalities: an *idem*-legality (law-as-object) which gestures to a particular range of shared narratives and the doer's own *ipse*-legality (law-in-use) which gestures towards a strange narrative. The doer's interpretive commitment falls within the terrain of a particular *idem*-legality,[470] but appeals to another *idem*-legality (whether such a legality exists or is only imagined) by referencing a strange afferent narrative.

Thus, in requesting a legal licence, the doer suggests that the illegal activity be characterised in such a way that it becomes legal, that an alternative narrative be used to determine its meaning and that the current map evolve to reflect this. In providing a licence, the legal order renders the illegal commitment legal, integrating it narratively into the legal map as an acceptable exception. Often, in doing so, it will attach conditions to the licence. The incorporated "strange" narrative is partly domesticated by these conditions. In a sense, then, a (strange) narrative stitch is incorporated into the usual narratives such that a particular commitment comes to be seen in a new light, indeed comes to be seen as "small and private" rather than a commitment that might threaten the legal map. Legality is preserved by this narrative interweaving.

I think an example may be helpful to point out these aspects of the legal licence. If a US filmmaker wishes to produce a film and decides to include one of John Rutter's compositions in the soundtrack to the film, a synchronisation licence is required (under UK law, since John Rutter is a living composer based in the UK). This licence allows for the use in a film of a creative work (here, a musical score) owned by another. If the filmmaker decides to use an existing recording of John Rutter's work, a second synchronisation licence is required from the record company (who owns the copyright over the particular recording). Without these licences, the use of John Rutter's music would be an infringement of copyright (that is, it would

[470] In the case of a foreign mining company requesting a licence in Canada, it is worth noting that despite being established in a foreign jurisdiction, the mining company's extractive activities take place within the licensor's jurisdiction. The (proposed) extractive activities therefore emplace the interpretive commitment within the legal order of the licensor.

contravene the ownership rights of creators over their creative works) and thus illegal in the UK (and in most other countries too). The granting of a legal licence (or two) in this case renders the use of someone else's creative work legal.

This example shows how a legal order engages in narrative interweaving. A commitment that seems prima facie illegal is rendered legal within a particular legal order through some narrative tweaking. Use of someone else's creative work would generally be considered stealing (and as such illegal).[471] But here it is considered a good thing to encourage the use of creative work by others insofar as it facilitates wider distribution. This alternative narrative is used to render legal the illegal. The alternative narrative carries conditions of course: that the original creator be acknowledged and/or financially compensated.

The example also shows that the narrative interweaving produced by legal licences necessarily involves an interlegal commitment, one that straddles two legalities. The straddled legalities are less obvious in cases such as this one where licensing procedures have become mainstream. Here the licence itself does the straddling work. However, the mainly harmonious narrative weaving that goes on in such cases was not so harmonious when the issue first arose. To understand the initial interlegal straddling, we need to go back in time. When licensing requirements for creative works were first introduced in England (in the 1500s), the relevant narratives were quite different. Surprisingly, creators (authors in this case) were conspicuously absent from the picture as their subsistence was usually secured by benefactors rather than revenues from the sale of their works. Two alternative narratives were at loggerheads: the printers' desire to capitalise on new technologies of word-spreading (namely, the printing press) and the Church/State's desire to have the final say on what types of words their subjects were accessing. Licensing certain printers to print certain materials was one way of ensuring that only the appropriate Church/State narratives prevailed in the flurry of printing that followed the invention of the printing press in the mid-1400s. In England, the Tudors issued a proclamation in 1538 against "naughty printed books",[472] which made it necessary to secure a licence from the Privy Council or other royal nominees for the printing or distribution of any

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[471] As Stearns explains, "The word 'plagiarize' comes from the Latin *plagiarius*, originally meaning a kidnapper and then used to refer to a literary thief." (Laurie Stearns, 'Copy Wrong: Plagiarism, Process, Property, and the Law' (1992) 80 California Law Review 513, 517 <https://heinonline.org/HOL/P?h=hein.journals/cpyrgt41&i=71> accessed 10 April 2023).

[472] See David Scott Kastan, 'Naughty Printed Books' in James Simpson and Brian Cummings (eds), *Cultural Reformations: Medieval and Renaissance in Literary History* (Oxford University Press 2010) <https://doi.org/10.1093/oxfordhb/9780199212484.013.0016> accessed 11 May 2023.

book in English. In 1557, the Stationers' Company (a guild of printers) was granted a royal charter to oversee printing activities—and ensure censorship where necessary. Book licences were thenceforth registered with the company for a fee, which entitled the Company member to perpetual copyright, as well as the right to lease, sell or bequeath the copyright. This was the beginning of (Anglo-Saxon) property rights in words.[473]

The author's part in all this was only really recognised in the latter part of the 17th century, when publishing (and the accompanying readership) expanded rapidly with the development of periodicals. Successful books, too, became big money-earners. Now authors wanted their fair share of the earnings and pressure rose to wrest back control from the "private" copyright *nomos* of the Stationers' Company. The Copyright Act 1710, otherwise known as the Statute of Anne, was the first of its kind to give authors such rights, for a limited period (of 14 years, renewable once). The Stationers' Company narrative had been focused on the word-owner's (ie the publishers') property rights, alongside control over the actual words. For the first time, in 1710, licensing power was handed over to authors. And the right to access the author's words was returned to the public, after a 14-year period of authorial earnings. The alternative narrative, that had been on the rise for some time, focused on the benefits to the wider public that derived from being able to access these creative works (with access evidently facilitated by wider reproduction of the original) and the need to compensate authors for their contributions to knowledge or art. With the Copyright Act 1710, this alternative narrative got stitched into the legal map. While the interlegal origins of such licences are mostly forgotten today, they do reveal themselves occasionally when interpretive commitments related to copyright become "immense and public".[474]

Licences may be obtained by direct application or under blanket provisions. As the filmmaker's application for a synchronisation licence above suggests, the direct licensing system only really

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[473] Information in this paragraph sourced from David H Tucker, Philip Soundy Unwin and George Unwin, 'History of Publishing' <https://www.britannica.com/topic/publishing> accessed 8 March 2023.

[474] Creative works created by generative AI programs throw up precisely such issues. For example, the US Copyright Office recently decided to (partially) revoke copyright on the images in a graphic novel (Zarya of the Dawn by Kris Kashtanova) that had been created by the generative AI program MidJourney (see further Matt Ford and others, 'Artificial Intelligence Meets Its Worst Enemy: The U.S. Copyright Office' [2023] The New Republic <https://newrepublic.com/article/170898/ai-midjourney-art-copyright-office> accessed 11 May 2023). In a similar vein, various artists have filed a copyright suit *against* use of their creative works to feed generative AI programs (see James Vincent, 'AI Art Tools Stable Diffusion and Midjourney Targeted with Copyright Lawsuit' <https://www.theverge.com/2023/1/16/23557098/generative-ai-art-copyright-legal-lawsuit-stable-diffusion-midjourney-deviantart> accessed 11 May 2023).

works when licence application numbers are limited. Otherwise, John Rutter would surely be running a licensing business, rather than composing music. Where the value of the individual copyright is small relative to the transaction costs for administering a licensing system, blanket licences may be developed. Blanket licences are available to services such as Spotify, which pays fees to use both recordings and compositions managed by large copyright societies such the American Society of Composers, Authors and Publishers (ASCAP). The "fair use" exception to copyright laws may also be seen as a blanket licence of sorts. It views certain types of reproductions of words, which would normally be considered copyright infringements, as protected (or licensed) based on their minimal impact on revenue streams or their transformational use or their import for the general public. Examples of fair use under US copyright law include commentary, search engines, criticism, parody, news reporting, research, and scholarship. The case law on fair use has often been decried as ad hoc.[475] But it could also be seen as a prime example of the US legal map working to maintain the appropriateness of the alternative-narrative stitch in its usual (copyright) narrative. As narratives on the public utility of wide access to words have evolved, so too has the courts' reasoning. The way in which the case law on fair use has shifted over time from a market-based paradigm to a transformative use paradigm[476] might be seen as an example of the interlegal shaping of the US legal map by subpart commitments promoting evolving alternative narratives.[477]

Licences may also be granted by public or private bodies. Public bodies, such as municipalities, may grant licences to private bodies to stand in for the public monopoly over (for example) water provision services. These licences come with conditions of course. The municipal authorities require that their private stand-ins ensure an uninterrupted service, along with some level of resource conservation and affordable prices. Many such licences have been granted throughout France for what was once primarily a municipal service.[478] Similarly, licences have

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[475] Neil Weinstock Netanel, 'Making Sense of Fair Use' (2011) 15 Lewis & Clark Law Review 715, 715 <https://heinonline.org/HOL/P?h=hein.journals/lewclr15&i=731> accessed 8 March 2023.
[476] See Netanel (n 475).
[477] In a fascinating article on plagiarism, Stearns makes the case that a property-based understanding of copyright is insufficiently capacious. She argues that paying attention to the creative process through a contract-based approach to copyright would enable courts to better deal with both copyright and plagiarism. The US decision to sign the Berne Convention (which refers to "moral rights" in creative works rather than property) may suggest a move in this direction (Stearns (n 471)).
[478] Though there has more recently been a trend to terminate such licences and recover public control of water provision. In 2009, the newly elected mayor of Paris made this choice and she has been followed by a number of other municipalities, such as Grenoble, Rennes, Nice and Montpellier (see Antoine Hasday and Clara Paradas, 'Comment Paris a Repris Le Contrôle de La Gestion de l'eau' [2019] Reporterre <https://reporterre.net/Comment-Paris-a-repris-le-controle-de-la-gestion-de-l-eau> accessed 10 March 2023). This "remunicipalisation" is not an exclusively French phenomenon (see Jean-Michel Gradt,

been granted to private companies to manage maintenance and toll-charges for different public highways in France.[479] Public bodies may also grant licences for activities such as fishing, hunting, vaccine-use, building or renovating a home, providing health services,[480] selling alcohol, practicing particular professions,[481] etc.

But private bodies are just as regularly concerned by licences as state bodies. We have already discussed copyright and synchronisation licences, but other sorts of private licences abound. When a homeowner allows a person to carry out work on the owned property, the visitor has a licence to enter the property. As a licence of the interactional-practice type, this particular licence need not be signed or formalised: it may be oral or simply implied by the relationship or actions of the parties. For example, a public utility inspector has a licence to enter private property for the purposes of maintaining the utility and gauging consumption. Other examples of private licences involve work "made for hire" (where the employer, not the employee, is considered the legal author), licensing of code, licensing by private guilds, unions or professional associations,[482] etc.

If a licensor may be public or private, so too may a licensee. For example, under Belgian law, all five regional governments must approve trade deals (like CETA) before the federal government can give its consent. In licensing terms, the federal government requires a licence from its five regions to act as a federal signatory on trade deals.

'Gestion de l'eau : Le Secteur Public Gagne Du Terrain' [2014] Les Echos <https://www.lesechos.fr/2014/11/gestion-de-leau-le-secteur-public-gagne-du-terrain-314430> accessed 10 March 2023).

[479] Guillaume Jacquot, 'Vente Des Autoroutes : Gilles de Robien Raconte Ses Réunions à Bercy' <https://www.publicsenat.fr/article/parlementaire/privatisation-des-autoroutes-au-senat-l-ex-ministre-gilles-de-robien-raconte> accessed 10 March 2023.

[480] For eg, government certification for herbalists was abolished in France in 1941. Despite growing interest in the profession, there are currently no provisions for the licensing of herbalists. As a result, this "profession" has no recognition and no status within the "official" medical community (see further Joël Labbé, 'Les Plantes Médicinales Et l'herboristerie : À La Croisée de Savoirs Ancestraux Et d'enjeux d'avenir' (Sénat français 2018) Rapport d'information n° 727 <https://www.senat.fr/rap/r17-727/r17-727.html> accessed 10 March 2023).

[481] Bernstein has shown how some licensing provisions were central to discriminatory practices, by ensuring the exclusion of blacks from certain skilled trades throughout the 20th century, see David Bernstein, 'Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African Americans' (1994) 31 San Diego Law Review 89 <https://digital.sandiego.edu/sdlr/vol31/iss1/5>.

[482] For eg, the UK Madhouses Act 1774 (14 Geo. 3 c.49) required that London "madhouses" be licensed by a committee of the Royal College of Physicians. See further William Ll Parry-Jones, *The Trade in Lunacy: A Study of Private Madhouses in England in the Eighteenth and Nineteenth Centuries* (Routledge 2013) 620.

Licences may also be social (or at least non-legal in the traditional sense of the term). For example, social licences may be granted to inebriated individuals for normally unacceptable behaviour:

> Drunks are accorded great social license in Oaxacan villages. They may shout insults, intrude uninvited into social gatherings, and behave in other normally unacceptable ways. […] [A]pparent inebriation serves to define a crucial role in village life: the licensed drunk pierces the elaborate information control devices of the community and provides the barefaced facts and opinions which normally go unspoken. Like the fool in a Shakespearian play, the Oaxacan drunk is accorded the special privilege of speaking the truth.[483]

In this particular legal map (which may well be generalisable – at the very least to sidewalks outside UK pubs and perhaps also university campuses), an acceptable exception is made for the socially unacceptable behaviour produced by a drunk. The fact that the drunk's commitments are quite easily distinguishable (by "stumbling gait and slurred speech") from the commitments of other non-drunk subparts helps frame the contours of this social licence. The conditions of the licence are easily bounded. Similar acceptable exceptions may be made for the unconventional, and potentially unacceptable, commitments of children.[484] Much like the Shakespearean fool, both may serve a particular social purpose in reinforcing the existing legal map by allowing socially unacceptable commentary to nevertheless find an outlet.[485]

It is important to note that use of the term licence suggests something quite distinct from contract. On one side of the relationship is a granting body that receives a licence request; on the other, is the requestor. This is not a horizontal playing field. Drunks do not negotiate the terms of their social licence; they receive them as a privilege of sorts.

The point, then, is that commitments – that are narratively intelligible as illegal under an existing legal map – may, by a licensing process (whether direct or blanket, public or private, legal or social),[486] be rendered legal or acceptable by the same map. This act of licensing

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[483] Philip A Dennis, 'The Role of the Drunk in a Oaxacan Village' (1975) 77 American Anthropologist 856, 856, 862 <https://onlinelibrary.wiley.com/doi/abs/10.1525/aa.1975.77.4.02a00080> accessed 10 March 2023.

[484] ibid 857, citing Hotchkiss, mentions the social licence accorded to children's spying in Chiapas, Mexico.

[485] As is suggested in ibid.

[486] Or even economic (see Robert A Kagan, Neil Gunningham and Dorothy Thornton, *Shades of Green: Business, Regulation, and Environment* (Stanford University Press 2022) <https://www.degruyter.com/document/doi/10.1515/9781503624191/html> accessed 25 February 2023 on social *and* economic licences in paper mills). Indeed, since licensing is intimately linked to narratives, it is

involves an interweaving of narratives. It is a prime example of interlegal commitments. The multifarious nature of licences makes them a useful case study when discussing the interlegal. The direct and blanket types suggest that interlegality may involve an officially regulated one-off procedure or may require an ongoing adaptive relationship. The public and private nature of licensing acknowledges the fact that acts of licensing are not exclusive to state bodies and that other legalities may be – and indeed are – involved in such interlegal commitments. And the broadening of the licensing literature to incorporate social licences (and even economic licences)[487] suggests that there is potential here to recognise the multidisciplinary nature of the narratives that give meaning to legal maps. Finally, the unbalanced nature of the licensing relationship is a fitting reminder of the unilateral nature of interlegal commitments.

Taking this case study a step further, how might the literature on social licences and the specific case of the Walloon social licensing failure further our understanding of interlegal commitments?

The case of social licences

The term "social licence" was originally coined by James Cooney in 1997. Cooney was not a legal theorist playing with the concept of law, but was in charge of evaluating political risk exposure in developing countries for Placer Dome Inc (the third-largest gold-mining company in the world). At the time, many mining companies (including Placer Dome) were losing money because of community resistance, especially as they sought to start up new projects or expand existing ones. Insisting on the importance of this business risk, Cooney drew a parallel between community antagonism and government refusals to issue permits.[488] He later used the analogy of the "social licence" in discussion with World Bank officials,[489] who applied it in

inevitable that licences will be strictly multidisciplinary. As such, I can see no obvious reason to separate out legal from social from economic licences to act or operate.

[487] See ibid, on economic licences with regard to paper mills.

[488] Robert G Boutilier, 'Frequently Asked Questions about the Social Licence to Operate' (2014) 32 Impact Assessment and Project Appraisal 263, 263 <https://doi.org/10.1080/14615517.2014.941141> accessed 7 March 2023.

[489] Jim Cooney, 'Reflections on the 20th Anniversary of the Term "Social Licence"' (2017) 35 Journal of Energy & Natural Resources Law 197 <https://doi.org/10.1080/02646811.2016.1269472> accessed 29 December 2023.

1998 to mining controversies in Quito, Ecuador.[490] Despite its apparently nebulous quality, the term was quickly adopted by the mining industry.[491]

The concept has since been much discussed from a theoretical angle and, increasingly, operationalised. Joyce and Thomson were the first to propose that gaining a social licence to operate required an implanted industry to be perceived as legitimate.[492] They linked social licence to the idea of social risk and company reputation. Later, Joyce and Thomson added credibility and trustworthiness to the list of required perceptions and introduced the idea that there was a cumulative, step-like hierarchy among the perceptions – a pyramid of acceptance – with the highest level involving perceptions of trust.[493] Thomson and Boutilier went on to propose a cumulative hierarchical model, in which trust was treated as a boundary criterion that, once achieved, permitted the emergence of the highest level of social licence (see Figure v below).[494]

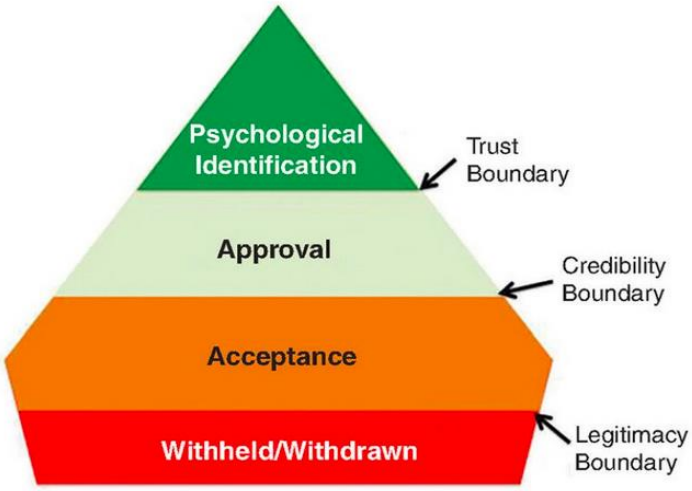

Figure v: Measuring social licence to operate (source: Thomson and Boutilier 2011)

[490] Boutilier (n 488) 264.
[491] Jacqueline L Nelsen, 'Social License to Operate' (2006) 20 International Journal of Mining, Reclamation and Environment 161 <https://doi.org/10.1080/17480930600804182> accessed 10 March 2023.
[492] Susan Joyce and Ian Thomson, 'Earning a Social Licence to Operate: Social Acceptability and Resource Development in Latin America' (2000) 93 CIM Bulletin 49.
[493] Ian Thomson and Robert G Boutilier, 'Social License to Operate' in Peter Darling (ed), *SME Mining Engineering Handbook* (3rd edn, SME 2011) 1790.
[494] Thomson and Boutilier (n 493). Originally the highest level was called "co-ownership" (ibid 1784) but this label was later changed to "psychological identification".

In a survey of 16 key leaders in the mining industry about their perceptions of the social licence (carried out by Parsons et al)[495] there was general agreement that "social licence" signified acceptance or approval of mining projects and that it was impermanent and intangible. The authors also found that obtaining a social licence involved going beyond the requirements of a legal licence: it meant being seen as legitimate and trustworthy, primarily by local communities, though other stakeholders were sometimes included. More tellingly perhaps, Harvey considered the social licence to involve a process of industry "fitting in and adapting to the prevailing social norms".[496]

In the past decade, in particular, the use of the social licence concept has spread beyond mining. Perhaps the earliest use outside of mining was Gunningham, Kagan and Thornton's study of pulp and paper mills and the adaptations engaged by these mills when faced with environmental issues.[497] They noted that the motivation for going beyond legal compliance and working to acquire a social licence included fear of losing reputational capital, and consequent consumer boycotts and regulatory tightening. Upstream in the same industry, Wang discussed "the social licence to cut timber".[498] The phrase has also been invoked in discussions of oil and gas,[499]

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[495] See Richard Parsons, Justine Lacey and Kieren Moffat, 'Maintaining Legitimacy of a Contested Practice: How the Minerals Industry Understands Its "Social Licence to Operate"' (2014) 41 Resources Policy 83 <https://www.sciencedirect.com/science/article/pii/S0301420714000336> accessed 10 March 2023.

[496] B Harvey, 'Social Licence to Operate Is Good Business' [2011] Achieve, the Sinclair Knight Merz Magazine.

[497] Neil Gunningham, Robert A Kagan and Dorothy Thornton, 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance' (2004) 29 Law & Social Inquiry 307 <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1747-4469.2004.tb00338.x> accessed 10 March 2023; see more recently Kagan, Gunningham and Thornton (n 486).

[498] Sen Wang, 'Managing Canada's Forests Under a New Social Contract' (2005) 81 The Forestry Chronicle 486 <https://pubs.cif.ifc.org/doi/abs/10.5558/tfc81486-4> accessed 10 March 2023; see also Justine Lacey, Peter Edwards and Julian Lamont, 'Social Licence as Social Contract: Procedural Fairness and Forest Agreement-Making in Australia' (2016) 89 Forestry: An International Journal of Forest Research 489 <https://doi.org/10.1093/forestry/cpw027> accessed 10 March 2023.

[499] eg Mary Hogan, 'Securing A Social License To Operate Is More Important Than Ever' <https://www.hartenergy.com/exclusives/securing-social-license-operate-more-important-ever-26324> accessed 7 March 2023; Emma Wilson, 'What Is the Social Licence to Operate? Local Perceptions of Oil and Gas Projects in Russia's Komi Republic and Sakhalin Island' (2016) 3 The Extractive Industries and Society 73 <https://www.sciencedirect.com/science/article/pii/S2214790X15001318> accessed 7 March 2023.

pipelines,[500] renewable energy,[501] water use,[502] financial markets,[503] etc. In each of these cases, the businesses involved sought acceptance by another legality of activities (or commitments) that were emplaced in a "strange" (ie not one's own) legal map.

I would like to suggest that the term "social licence" potentially applies much more broadly still. Businesses use their "social licence" card to ensure that their activities and, more specifically, flows of profit may be pursued uninterrupted. In this sense, it is clearly something to be cultivated, planned, mapped, invested in, etc. The better this is done, the more likely it is that "social licence" will serve as a buffer when environmental (or other) mishaps occur. But businesses are not the only actors interested in ensuring acceptance of their activities in a "strange" context. In the following section, I will return to the story told in the Interlude. The Wallonia saga does not concern an extractive industry directly.[504] Instead, what was at issue was the EU Commission's "licence"[505] to negotiate the Comprehensive Economic Trade Agreement (CETA) between the EU and Canada. The EU required a legal licence of sorts to negotiate in the form of a Council mandate. But since CETA was classified as a "mixed agreement" (covering more than the basics of trade), the EU also had to secure a social licence from individual member states in the form of a signature. Much like a pipeline, the impact of this agreement would stretch from one end of the EU to the other. It was the region of Wallonia in Belgium that interrupted the flow of signatures (much as it might have interrupted the flow

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[500] eg Paul Bowles and Fiona MacPhail, 'The Town That Said "No" to the Enbridge Northern Gateway Pipeline: The Kitimat Plebiscite of 2014' (2017) 4 The Extractive Industries and Society 15 <https://www.sciencedirect.com/science/article/pii/S2214790X1630226X> accessed 25 February 2023; Shane Gunster and Robert J Neubauer, '(De)legitimating Extractivism: The Shifting Politics of Social Licence' (2019) 28 Environmental Politics 707 <https://doi.org/10.1080/09644016.2018.1507290> accessed 7 March 2023.

[501] eg Marie-José Fortin and Yann Fournis, 'Vers Une Définition Ascendante de l'acceptabilité Sociale : Les Dynamiques Territoriales Face Aux Projets Énergétiques Au Québec' (2014) 22 Natures Sciences Sociétés 231 <https://www.cairn.info/revue-natures-sciences-societes-2014-3-page-231.htm> accessed 7 March 2023.

[502] eg Paul Martin and Jacqueline Williams, *Defending the Social Licence of Farming: Issues, Challenges and New Directions for Agriculture* (Csiro Publishing 2011).

[503] eg David Rouch, *The Social Licence for Financial Markets: Reaching for the End and Why It Counts* (1st edition 2020, Palgrave Macmillan 2020).

[504] This said, CETA indirectly affects the EU and all its local communities in terms of the environmental deregulation it enables. The anti-fracking activists (among others) are well aware of this threat (see further Pia Eberhardt and others, 'The Right to Say No: EU–Canada Trade Agreement Threatens Fracking Bans' (Transnational Institute 2013) Issue brief <https://www.tni.org/en/publication/the-right-to-say-no> accessed 29 December 2023; see also frackfree_eu, 'CETA: EU Council Signs Away Democracy but We, the People, Have the Last Say' (*Medium*, 12 December 2020) <https://medium.com/@frackfree_eu/ceta-eu-council-signs-away-democracy-but-we-the-people-have-the-last-say-9f289792cefc> accessed 29 December 2023).

[505] The EU Commission has a mandate to negotiate such trade deals from the European Council (composed of heads of government from each of the member states).

of oil, gas, or profits) and showed up the cracks in the EU's credibility and reputational capital (as a trade partner).

Interpreting the Walloon "social licence"

Is a *social* licence so different from a legal licence? I would argue that it is not. A social licence is the granting of permission to do something that would otherwise be socially unacceptable or proscribed, that presents an initial misfit with local social norms. But we have seen that the fuzzy line between the legal and the social is subject to dedifferentiating collapse, and the social licence is no exception. This is a fundamentally fuzzy, hybrid concept that draws on legal vocabulary to broaden the necessary sphere of permission to include the many legalities that crop up when we accept the concrete existence of legal pluralism. After all, some doings are not just potentially illegal from the point of view of a state legality, they may also be "illegal" (or unacceptable) from the point of view of other sub-state or trans-state legalities. The term "social licence" is an attempt to take into account these other legalities when obtaining permission to do something.

The two types of legal licence discussed in the section Licences as "intersecting" commitments – direct and blanket licences – may also be at work where social licences are concerned. In some spaces, social licensing has been deemed so important that certain procedures (similar to the administrative procedures required to apply directly for a synchronisation licence for example) must obligatorily be followed for the licence to be deemed valid. Article 32(2) of UNDRIP recognises the obligation for any state wishing to authorise activities on indigenous land or related to indigenous resources to obtain the community's "free, prior and informed consent". In a recent ICSID case, a Canadian mining company awarded a permit to exploit a silver mine on the Peru-Bolivia border saw its permit withdrawn in the face of significant social unrest in the area. This was the first case to discuss the SLO in a judicial setting. The majority Award held that, without indigenous consent, an investor could not be deemed to have acquired a social licence.[506] Further, in the absence of a social licence, the mining company could be

[506] *Bear Creek Mining Corporation v Republic of Peru* ICSID Case No ARB/14/21, Award (30 November 2017), para 406: "Even though the concept of '*social license*' is not clearly defined in international law, all relevant international instruments are clear that consultations with indigenous communities are to be made with the purpose of obtaining consent from all the relevant communities". The Award cited the United Nations Declaration on the Rights of Indigenous Peoples (see further Josh Paine, '*Bear Creek Mining Corporation v Republic of Peru*: Judging the Social License of Foreign Investments and Applying New Style Investment Treaties' (2018) 33 ICSID Review - Foreign Investment Law Journal 340).

held partially responsible for the social unrest (as argued in the Sands' dissent)[507] and thus the compensation for indirect expropriation might be partially reduced. While the majority Award held that Peruvian state had continuously approved and supported the mining companies' efforts to negotiate with local communities and could not therefore use this as a defence, the case seems to suggest that a state must ensure that certain consent-seeking procedures are followed with regard to indigenous communities if the state wishes to rely on a lack of social licence to rescind a previously-granted legal licence. Much as with copyright licences or synchronisation licences, when these explicit procedures are deemed not to have been followed – or not followed in good faith – a state-granted licence may legitimately be suspended or revoked.

In some instances, no such procedures are imposed, though similar sorts of commitments may be widely expected. These cases, often referred to in the SLO literature, parallel in some sense the blanket legal licences above. They reveal implicit acceptance, by industries implanted in narratively "strange" communities, that the future of the industry's activities depends on their compliance with the community's legal map as much as with the state or provincial licensor's legal map. The interaction between the locally-illegal commitments and the relevant legal map is uncharted territory, and inevitably will require ongoing adaptations by both parties. On the one hand, the licensee's commitments must be adapted over time to show respect for the local licensor's legal map. On the other hand, the local legal map must gradually weave new (licensee) narratives into its own legal mapping. If the licence is to be upheld, each must be cognisant of the other's narratives and so adapt its commitments or its legal map over time.

I also noted in the section on legal licences that licences could be granted both by (and to) public or private authorities. Social licences, too, may concern interlegal commitments that bridge the domains of the public and the private. After all, the variety of legalities (public to private and even public-private mixes) are innumerable. The Walloon saga shows that often the public and private may be so intertwined that the two are difficult to prise apart.[508] In the case of extractive industries, a private business is granted a licence by a public institution (ie an environmental agency, a licensing body, provincial government, etc). In the case of CETA, the EU Commission was officially given a mandate to negotiate by EU member state governments (via the European Council), but in a circuitous way this mandate was also (and

[507] *Bear Creek Mining Corporation v Republic of Peru* ICSID Case No ARB/14/21, Partial Dissenting Opinion of Philippe Sands (30 November 2017), paras 4–6, 38–39.
[508] Dedifferentiation is at work even here.

continues to be) granted by European business. In 2014, the Commission agreed to hold an online public consultation on the investor–state dispute mechanism in regard to TTIP. This resulted in 150,000 submissions from around Europe, more than ever received for such a consultation. An overwhelming 97% of these responses were against the inclusion of ISDS in TTIP and in treaties similar to CETA.[509] In response, the European Trade Commissioner Cecilia Malmström recognised that, "The consultation clearly shows […] a big amount of scepticism against the ISDS instrument," but noted that it was a consultation and "not a referendum".[510] In a similar fashion, in January 2014, the European Commission had set up a group of 14 experts to advise it on the EU–US trade talks around TTIP: in the Commission's consultation, all seven of the group's non-corporate members rejected ISDS in TTIP (ie all trade unions, environmental, health, and consumer groups). Meanwhile the majority of corporate contributors to the consultation were fervent supporters of ISDS. The Commission chose not to drop ISDS from their trade negotiations.

At this most basic level then, it is clear that the concerns of the corporate and public sector are intricately intertwined. Both wish to ensure their credibility is preserved, whether with regard to citizens/consumers or other governments/competitors. Both also wish to protect their financial standing with regard to creditors, whether in terms of profitability or fiscal stability.[511] In order to achieve this, both hope to avoid having to deal with flashpoints,[512] driven by those materially and narratively affected by their activities or decisions. This is a difficult ask, but

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[509] Corporate Europe Observatory, 'TTIP Investor Rights: The Many Voices Ignored by the Commission' <https://www.corporateeurope.org/international-trade/2015/02/ttip-investor-rights-many-voices-ignored-commission> accessed 12 June 2017.

[510] James Crisp, 'ISDS Decision Delayed to End of TTIP Talks' <https://www.euractiv.com/section/trade-society/news/isds-decision-delayed-to-end-of-ttip-talks/> accessed 13 March 2023.

[511] Writing about extractive industries, Boutilier states: "Each year more empirical evidence is published demonstrating how stakeholder discontent can translate into several categories of costs for businesses (Franks et al. 2014). Davis and Franks (2011), for instance, examined perceptions of what categories of costs were most affected by social conflicts in mining. The biggest cost category by far was 'staff time spent on risk and conflict management'. Studies of extractive industries more broadly (Goldman Sachs Global Investment Research 2009) have found that sustainability issues are implicated in 70% of project delays on the largest capital investment projects. This exceeds the delays owing to commercial (63%) and technical (21%) factors. […] Stakeholders do not need to completely close down an operation to have an impact on the financial value of a company. A reduction in the level of social licence is sufficient." (Boutilier (n 488) 267).

[512] This term has been used in the literature to describe sites at which resistance becomes unmanageable or uncontained (eg Fiona MacPhail and Paul Bowles, 'Toward a Typology of Fossil Fuel Flashpoints: The Potential for Coalition Building' in William Carroll (ed), *Regimes of Obstruction: How corporate power blocks energy democracy* (AU Press 2021)). Despite the suddenness of such flare-ups, they are often the concretisation of longstanding grievances or sustained organising (see Peter H Russell, 'Oka to Ipperwash: The Necessity of Flashpoint Events' in Kiera L Ladner and Leanne Betasamosake Simpson (eds), *This is an honour song: Twenty years since the blockades* (Arbeiter Ring 2010)).

business in particular has risen to the challenge. Increasingly, extractive industries seek to go beyond the obligatory corporate–political relations and invest instead in "citizen advocacy".[513] This tactic takes attention away from the money, the boardrooms, the obscure legal documents, the structural domination, etc and instead works to contaminate neighbourly conversation, social media, community events and local advocacy groups, all places where corporate power is more discreet. Localised advertising is used to target specific markets with this aim in mind. These "subsidized publics"[514] are forged by corporate networks, who use social media campaigns to collect data and create "supporter progression models", designed to move pro-industry individuals from "supporters" to "activists" to "champions".[515] This is a model which seems to align closely with the higher levels of "social licence" theory (namely, "approval/support" and "psychological identification"). As Boutilier says, "The unspoken implication is that, properly managed, communities cannot stop projects, which is diametrically contrary to the original intention of the concept."[516] The original intention of the concept was a bottom-up social licence, where acceptance would be proffered by the licensor itself (as it is for legal licences), rather than bought through corporate benefits or devised in top-down fashion through advertising campaigns and corporate support for local events. The Kitimat plebiscite[517] on the Enbridge Northern Gateway pipeline – designed to transport bitumen from Canada's oil sands to the west coast for export to Asia – served as a reminder that the original intention of the concept of social licence was not dead; Wallonia did the same.

Two things are remarkable about these cases of suspended or revoked social licence. First, in both cases the local community co-opted the legal format to make a point that could have only symbolic (rather than strictly legal) implications.[518] In the Kitimat case, a plebiscite was held,

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[513] Carol Linnitt, 'Corporate Hegemony and the Battle for Hearts and Minds (Roundtable)'.
[514] Term used by Adam Harmes and mentioned by Shane Gunster, 'Corporate Hegemony and the Battle for Hearts and Minds (Roundtable)'; see further Christopher Adams, 'Here's a Look Inside Big Oil's "Ground War" to Change How You Think' [2016] Canada's National Observer <https://www.nationalobserver.com/2016/06/02/news/heres-look-inside-big-oils-ground-war-change-how-you-think> accessed 13 March 2023.
[515] Linnitt (n 513). Note that this kind of active "supporter progression model" was used by Enbridge in Kitimat, when they flew in canvassers to carry out door-to-door advocacy (see Bowles and MacPhail (n 500) 19).
[516] Boutilier (n 488) 266.
[517] See Bowles and MacPhail (n 500).
[518] Interestingly, this was also the format opted for by Bertrand Russell and Jean-Paul Sartre when, in 1966, they staged a Nuremberg-inspired "International War Crimes Tribunal" to adjudge the US military intervention in Vietnam (see discussion in Cover (n 250) 199–202). The format of the "Russells Tribunal" – as it is also known – has been used time and time again to "challenge power with law" (ibid 200), eg the World Tribunal on Iraq in 2004 in Brussels.

which led to a majority vote against the Enbridge project and, subsequently, a Council vote against the same project, despite the fact that the District of Kitimat had no jurisdiction on the matter. In the Wallonia case, in addition to the "joint interpretative instrument", an intra-Belgian declaration was annexed to CETA. In it, the regional parliaments reminded signatories that they could refuse to give their consent to the federal government to ratify CETA. And, more importantly, all regional governments with the exception of the Flemish government declared that they did "not intend to ratify CETA" on the basis of its ICS "as it stands on the day on which CETA is signed", unless their respective parliaments decide otherwise. Both the plebiscite and the Belgian statement were symbolic stands from small communities within a larger decision-making process.

Second, both opted out of the "jumping scale" tactics traditionally promoted by environmental NGOs.[519] Organisationally, in particular, both communities relied on their own resources and their own personnel to counter the "Goliath" licensee. This is not to say that communication was limited to the local. Paul Magnette was interviewed on radio, television and in the written press. He even took the time to write his own articles explaining the Walloon position.[520] And Douglas Channel Watch (a local environmental NGO in Kitimat) scaled up messaging throughout the plebiscite campaign and immediately afterwards when it forwarded the results to federal government. For those inclined to look to localism as the future of politics, these two instances of social licence revocation are striking. In a time in which elites are increasingly disconnected from a sense of place, this might be one way of drawing attention to their potential lack of interest in the material and narratival futures of local communities.

To summarise then, "social licence" seems:

1. to apply to commitments that straddle two legalities: they are emplaced in one legal map while appealing to a "strange" and locally unintelligible narrative;
2. to involve an asymmetrical relationship, which makes the doing a risky enterprise;

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[519] Bowles and MacPhail (n 500) 21: "It has been argued that 'jumping scale' is critical to the success of environmental NGOs. Urkidi and Walter argue that 'movements scale-up or jump scales when they successfully engage in networks with social actors from different geographical locations and/or appeal to supra-local regulatory institutions' (Urkindi and Walter, 2011: 685)."

[520] See, for eg, Paul Magnette, 'Wallonia Blocked a Harmful EU Trade Deal – but We Don't Share Trump's Dreams' [2016] The Guardian <https://www.theguardian.com/commentisfree/2016/nov/14/wallonia-ceta-ttip-eu-trade-belgium> accessed 13 March 2023.

3. to require something beyond the granting of a formal legal licence and notably to require ongoing adaptive commitments; and
4. to connote acceptance of the activity by the local community (in particular), in a variety of forms from passive tolerance to full-on "psychological identification".

On this basis, Wallonia's actions seem to fit the "social licence" bill. The signing of CETA (a commitment) by the EU and Canada was in this case emplaced in Wallonia – a "strange" legal map for both the EU institutions and Canada – insofar as the EU–Canada negotiations particularly affected the Walloon local context.[521] This emplacement was initiated by the European Commission's decision to classify CETA as a "mixed agreement"[522] requiring the signature of all EU member states. This was a move – an interpretive commitment – designed to assuage member state fears that the EU might be overstepping its competencies. It was also recognition that CETA's subject matter (straying as it did into the field of justice, for example, with the proposed ISDS mechanism) went beyond the remit of traditional trade agreements. Inevitably, the move was politically risky.[523] Any one of the member states or of the Belgian regions could have chosen to interrupt the signing process. As it turned out, only Wallonia stepped up. From this point on, the Walloon reaction was considered a political risk to be managed by the EU (and later even by Canada), as both took extreme measures to try and appease the Walloon parliament. The hearings and negotiations engaged in by EU officials and Belgian federal politicians went well beyond what was required by legal compliance.

Only the last of the characteristics of a "social licence" is missing in this particular case. Rather than *granting* a social licence, the social licence for the activity (the signing) was refused—or at least suspended—by a regional community. Where social licences are successfully obtained, one legality accepts the relevance of (part of) another legality for its ongoing narrative. Over time, this relevance is woven into the host legality's narrative. Sometimes, however, social licences are suspended or refused. In these cases, the host legality fails to see the relevance of

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[521] Wallonia's agricultural base – and particularly its large dairy farming sector – makes it especially susceptible to agricultural deregulation and competition in the context of trade agreements.
[522] Treaty on the Functioning of the European Union [2016] OJ C 202/47 (TFEU), Art 207 governs the EU's trade policy. If the subject matter of a trade agreement does not fall under the exclusive competence of the EU, EU countries also have to sign the agreement. These are known as "mixed agreements". Art 4 TFEU sets out which competences are shared. These include, for eg, consumer protection, environmental issues, agricultural policy and justice.
[523] See Paola Conconi, Cristina Herghelegiu and Laura Puccio, 'EU Trade Agreements: To Mix or Not to Mix, That Is the Question' (2021) 55 Journal of World Trade <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\TRAD\TRAD2021009.pdf> accessed 14 May 2023.

another legality for its ongoing narrative. The intelligibility of the intervening legality is rejected or temporarily suspended.

Interlegality: A stitch in time (and place)

In the previous section, I discussed licences as an example of interlegal commitments. We saw that legal licences are one way of doing narrative interweaving, such that two legalities find themselves stitched together at a particular point in time and place. This stitch may not hold for all times and places, but it gains mapped depth[524] the more it is used over time and in space. A single stitch is weak and unlikely to hold. But interlegal dialogue is often ongoing. Through the process of repeated interlegal commitments (stitches), the produced interlegality is gradually reinforced.

I went on to explain how legal licences are just a specific case of licences more generally, which include social licences. By broadening my perspective to discuss social licences in more depth, I wanted to show that interlegal commitments may (and do) take place beyond the traditional legal sphere. In the earliest literature on social licences, extractive industries were shown to straddle narratives in an attempt to ensure the accepted emplacement of their project within a local community. In so doing, they typically strive to render their own particular narratives intelligible to a "strange" map through an ongoing exchange of interlegal commitments. The extractive industries that successfully implant themselves pay a lot of attention to this narrative weaving. I noted that the more homeodynamic the straddled narratives, the easier it is to achieve narrative weaving.

Finally, I returned to the story recounted in the Interlude. I presented the Walloon saga as a particular instance of a suspended "social licence". Wallonia refused to accept the EU's attempt at narrative weaving and proposed instead a variation on the original stitch. This was a case of contested interlegality.

I return now to the notion of interlegality itself in the hope that these examples may help better explain what we mean when we talk of interlegality. Interlegality has been defined as many things, the most common of which is the idea of overlapping legal orders. Indeed, I started out with this very metaphor when I spoke of the overlap between sister orders in Chapter 1. In doing so, I intended to follow in Santos' footsteps. After all, he spoke of his own concept in much these terms:

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[524] I refer to mapped depth as "sedimentation". This will be discussed further in Chapter 5.

> We live in a time of porous legality or legal porosity, multiple networks of legal orders forcing us to constant transitions and trespassings. Our legal life is constituted by an **intersection of different legal orders**, that is, by interlegality.[525]

Overlapping legal orders seemed to fit well with the map metaphor: two maps representing the same social terrain but in different, perhaps even contradictory, terms. But how do we get at the fact that interlegality is not about parallel legal orders – two separate maps – but about the smudging that happens at particular places in the map, when two maps proposing different narratives try and weave their stories together? The map metaphor seems strangely deficient. For maps as *idem*-identity, as objects, do not mingle. And yet, a review of the literature on the relations between legal orders suggests that most authors who have referred in their writings to interlegality have indeed accepted this metaphor at face value: either in the form of a master map (integration) or as a series of parallel maps that are essentially distinct (separation).[526] In the publications that deal explicitly with interlegality, there is a strong reliance on the idea of

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[525] Santos (n 42) 299 (my emphasis).

[526] The literature on legal pluralism is far more abundant than the literature dealing with the actual intertwinement of legal orders. In international law – where intertwinement is a common feature – the map-like approach runs particularly deep. Most scholars fall into one of two camps: the integrated (one-map) universalist camp (see for eg Dupuy, 'L'unité de l'ordre Juridique International (Volume 297)' (n 279); Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law' (2013) 20 Indiana Journal of Global Legal Studies 605 <https://www.jstor.org/stable/10.2979/indjglolegstu.20.2.605> accessed 8 April 2023) or the (parallel maps) fragmentation camp (see for eg Berman (n 264); Mireille Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Naomi Norberg tr, Hart Publishing 2009)). These two camps seem to follow in Hart's footsteps. He assumed that legal orders were either hierarchically integrated or existed in parallel (see HLA Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 340–342). And he had little to say of the interaction between parallel legal orders. In his account, it was up to the domestic legal order alone to determine whether and how it would recognise and apply parallel norms. Michaels expounds on this positivist vision of interlegality by introducing "tertiary norms", which (like secondary norms within the legal order) serve to recognise the validity of other legalities for one's own legal order (see, for eg, Ralf Michaels, 'Law and Recognition — Towards a Relational Concept of Law' in Nicole Roughan and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press 2017) <https://papers.ssrn.com/abstract=2808451> accessed 21 November 2019). I reject Michaels' interlegal proposal insofar as it deals exclusively in the recognition of other orders *as a whole*. I believe that interlegality rarely occurs at the level of a legal order as a whole. It is far more piecemeal, considering each outside narrative that finds expression within its own legal map as a new occasion to determine the prioritisation of particular aspects of different legal maps. Of course, not all of the literature falls into these two camps. See, in particular, Jan Klabbers and Gianluigi Palombella (eds), *The Challenge of Inter-Legality* (Cambridge University Press 2019); Nico Krisch (ed), *Entangled Legalities Beyond the State* (Cambridge University Press 2021) <https://www.cambridge.org/core/books/entangled-legalities-beyond-the-state/04306155350E1A8D300AFFABF4A3A58A> accessed 17 October 2022; and André J Hoekema, 'European Legal Encounters Between Minority and Majority Cultures: Cases of Interlegality' (2005) 37 The Journal of Legal Pluralism and Unofficial Law 1 <https://doi.org/10.1080/07329113.2005.10756585> accessed 23 March 2023, discussed further below.

distinct legal orders or systems that intersect on particular subjects.[527] Often, the interlegal aspect of these discussions is reduced to a multitude of norms from different legal orders that might potentially apply to a particular set of facts. And indeed, the particular set of facts at issue is inevitably a set of facts before a court. This approach to interlegality has two consequences. First, since we are talking about discrete legal systems, what happens at the interface of these systems must inevitably be something other-than-legal[528]: a subject for politics perhaps?[529] Second, as with much of the legal pluralism literature, interlegality too seems to suffer from a flattening tendency.[530] It is hard to see asymmetries in overlapping maps. If all we have is an overlapping of two maps, how can we get at the relations between those maps or distinguish between the differing normative pull of the maps themselves?

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[527] See, in particular, the two recent accounts of interlegality discussed below: Klabbers and Palombella (n 526); Krisch (n 526). Other less recent publications that touch on interlegality include Culver and Giudice (n 159); Nicole Roughan and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press 2017); but these books are more focused on legal pluralism than the actual mechanisms of interlegality. In addition there are a number of articles that use the concept of interlegality (eg Marc Amstutz, 'In-Between Worlds: *Marleasing* and the Emergence of Interlegality in Legal Reasoning' (2005) 11 European Law Journal 766 <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-0386.2005.00286.x> accessed 24 March 2023; Tom G Svensson, 'Interlegality, a Process for Strengthening Indigenous Peoples' Autonomy: The Case of the Sámi in Norway' (2005) 37 The Journal of Legal Pluralism and Unofficial Law 51 <https://doi.org/10.1080/07329113.2005.10756587> accessed 20 March 2023; Robert Wai, 'The Interlegality of Transnational Private Law' (2008) 71 Law and Contemporary Problems 107 <https://www.jstor.org/stable/27654667> accessed 24 March 2023), but none of these analyse the meaning of interlegality itself at any length. A notable exception is Hoekema (n 526), which is also discussed below.

[528] Neil Walker, 'Legalising Inter-Legality' (2022) 1 European Law Open 216 <https://www.cambridge.org/core/journals/european-law-open/article/legalising-interlegality/6B5CCA457B678D8E6FC8152EAEC170F7> accessed 19 September 2022, p. 220: "what happens at the interface of different systems, cannot, or at least cannot clearly, be granted the character of law".

[529] Those who accept legal pluralism typically fall into three camps: monist-pluralists (eg MacCormick's "pluralism under international law" with overarching unity provided by international law, see Neil MacCormick, 'Risking Constitutional Collision in Europe?' (1998) 18 Oxford Journal of Legal Studies 517 <https://www.jstor.org/stable/764677> accessed 24 March 2023, p. 528-529), dualist-pluralists (or Griffiths' "weak pluralism" where non-state legal orders exist only insofar as they are recognised by the state legal order) or radical-pluralists (Griffiths' "strong pluralism" where the existence of non-state legal orders does not depend on state recognition). Proponents of radical pluralism suggest that there is no clear hierarchy of legal orders, nor any overarching framework within which disputes between legal orders can be resolved. The domain of interlegal relations is therefore extra-legal; it is the realm of pure politics. As Krisch says, "radical pluralism—which leaves the relationships between sub-orders legally and institutionally undefined—is typically seen to invite instability and conflict" (Nico Krisch, 'Who Is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space*' (2011) 24 Ratio Juris 386, 407 <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-9337.2011.00492.x> accessed 24 March 2023).

[530] On the flattening tendency of legal pluralism, see Gad Barzilai, 'Beyond Relativism: Where Is Political Power in Legal Pluralism?' (2008) 9 Theoretical Inquiries in Law 395 <https://www.degruyter.com/document/doi/10.2202/1565-3404.1191/html> accessed 24 March 2023.

Two recent accounts have tried to take the "capsule idea"[531] of interlegality beyond the flattening idea of overlap. The first of these is an edited collection by Klabbers and Palombella. Klabbers and Palombella describe interlegality as a number of norms emanating from different legal systems and applicable in principle to a particular situation or set of facts. A number of things stand out about their version of "inter-legality" (besides the newly-introduced hyphen):

First, Klabbers and Palombella take Santos' interlegality as their starting point, but consider his "sociological" version of interlegality to amount to nothing more than the legal-forum-shopper's prerogative: "the porosity of legal orders would allow people to pick and choose which legal order to employ, and typically, they would employ the one most attuned to their claims or grievances".[532]

Second, in rejecting Santos' forum-shopping, Klabbers and Palombella argue for a "composite" legality, a sort of collage made up of multiple legal sources that shows "the relevance of – and the caring for – all the relevant normativities actually controlling the case".[533]

Third, this "composite legality" is put together by judges in the judicial context. As such, interlegality is described as decidedly legal in its own right. As Palombella puts it, "pluralism arrives at the recognition of multiple legalities, but beyond that threshold the *legal* perspective is mute or impossible to be taken at all. […] But from the perspective of inter-legality, *interconnectedness* is itself *a legal* situation".[534]

This particular definition of interlegality has a number of drawbacks. First, reducing Santos' interlegality to forum-shopping[535] seems unwarranted. Admittedly, Santos did not provide much guidance on the precise meaning of his concept and thus perhaps opened himself up to this kind of misunderstanding. But I would argue that a more charitable interpretation (and one that fits better with the rest of his work) goes well beyond forum-shopping (though it may certainly include strategic interlegal commitments). If we pay attention to Santos' language,

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[531] Walker (n 528) 217.
[532] Klabbers and Palombella (n 48) 9.
[533] ibid 3.
[534] Gianluigi Palombella, 'Theory, Realities, and Promises of Inter-Legality: A Manifesto' in Jan Klabbers and Gianluigi Palombella (eds), *The Challenge of Inter-legality* (Cambridge University Press 2019) 378 (emphasis in original).
[535] See, for eg, Klabbers (n 130) 510: Santos "felt that the overlap between legal orders that he had observed created space for the disenfranchised to exploit: they could go 'forum-shopping,' strategically identify the legal order most receptive to their plight." Klabbers suggests that Teubner too took this approach to interlegality (ibid).

there are clues as to where his account might be taken. Santos himself speaks of "transitions and trespassings"[536] as if to suggest that one is constantly required to navigate legal orders that are not one's own. He describes interlegality as a "highly dynamic process",[537] thus intimating that interlegality is ongoing and not a one-off shopping expedition. He claims that legal orders exist in networks and are "mixed in our minds as much as in our actions", "the phenomenological counterpart of legal pluralism".[538] This appeal to phenomenology is suggestive of a particular approach to interlegality, one that goes beyond overlapping maps. For maps themselves are hardly phenomenological! Rather, one imagines individuals making use of a variety of maps, appropriating them for a particular navigational objective, at a particular point in time, not simply for the purposes of a more successful appeal to legal authorities, but also "in the dull routine of eventless everyday life".[539] This is not simple forum-shopping so much as everyday legal-collaging accomplished by the legal subject him/herself.

The Walloon saga helps highlight the fact that interlegality cannot be reduced to a group of norms from diverse legal systems that apply to a particular set of facts in the context of a court case. In this particular interlegal saga, the Walloon parliament was not engaged in forum-shopping. Instead, Paul Magnette considered the prerogative of Belgian regions to have their say on the signing of international treaties to weigh more heavily in the balance than the prerogative of the EU to engage in multilateral trade deals. The EU, Canada and the federal Belgian government were not of the same opinion. Interlegality involved a process (in this case a conflictual process) over how to interweave different phenomenological renderings of the relevant importance of oughts embodied by different legal orders. Both parties acted on their own prioritising of the different legal oughts.

Second, the distinction between legal "compositions" by the court and forum-shopping by parties may itself be artificial. After all, are the courts not themselves "forum-shopping" in some sense for the appropriate legal sources to justify what they consider to be the proper outcome in any given case? And even if judges themselves do not actively seek out new legal sources to buttress their arguments,[540] they nevertheless rely on the "forum-shopping"

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[536] Santos (n 42) 299.
[537] ibid 298.
[538] ibid.
[539] ibid.
[540] And this must surely be questioned when one considers cases such as the District Court of the Hague's 2021 decision in *Milieudefensie v Royal Dutch Shell,* discussed in Ioannis Kampourakis, 'The Power of Open Norms: *Milieudefensie Et. Al. V Royal Dutch Shell*' <https://verfassungsblog.de/the-power-of-open-norms/> accessed 17 October 2022.

accomplished prior to the hearing by the parties to the case. Indeed, this would seem to bolster the idea that the "highly dynamic process" begins well before the case comes to court. The parties that end up in court have themselves already acted in the world on the basis of their own prioritising of oughts (whether from one or from multiple legal orders). If the defendant's conduct is questioned by another party, presumably this is so because the claimant considers there to be an error in the ought-prioritising engaged by the defendant. And once the case comes before a court, the prioritising may again be questioned and/or re-prioritised by different judges in different courts of appeal. Each of the parties, and indeed the judges too, are engaging in interlegal commitments. Interlegality is an ongoing process which surely does not start or (necessarily) finish[541] with the hearing of a case before a court.

The Walloon saga shows that some interlegal commitments never end up before the court. They may – indeed often will – play out through diplomatic or more conflictual processes of one interlegal commitment being met with a consensual or dissensual interlegal response, until an acceptable interlegality can be mutually affirmed or joint endeavours collapse.

Third, Klabbers and Palombella suggest that the "most just" solution to a case is one that carefully accounts for all the norms relevant to the case whatever their legal origin. This definition overlooks the fact that (a) the judges may not recognise all the relevant norms/normativities and, even if they do, (b) they may not be in a position to respectfully apply or prioritise the relevant norms/normativities. Indeed, it is not difficult to imagine that there might be cases where it is simply impossible to "care for" all the relevant normativities at the same time.[542] Even assuming that judges are up to the task, the social licence literature is a useful reminder that they are not alone in the interlegal dialogue. The judge is just one (potential) actor in the phenomenological process.

The limits underlined with respect to judges also apply more widely. Just as perfectly bilingual individuals are exceedingly rare, so too are individuals that can navigate multiple legal orders with the same ease and fluency. Individuals engaged in interlegal commitments are necessarily limited by their knowledge of and fluency in the different legal orders. The processual nature of the interlegal is an important safety valve insofar as it leaves space for misunderstandings

[541] See, for eg, the cases in which Vergès was involved in ch 1, where the actual outcome was determined not in court but by subsequent outpourings of public outrage.
[542] It is cases such as these – cases involving incompossible normativities – that provoke legal rupture. As such, ch 1 provides some examples of cases where it is simply impossible for the judge to simultaneously "care for" all the relevant normativities.

to be ironed out over time. Nevertheless, the differing navigational capacities also leaves the door open to asymmetries of power. An account of interlegality must be alert to the inevitable potential for alienation within the space of interlegality.

The Walloon saga encapsulates such asymmetries, with the EU Goliath pitted against the "less than 1%", the "little" Wallonia, "blocking progress" for the rest of Europe. Wallonia had very few resources to draw on in comparison to the EU (much as Kitimat with hand-made signs had staked itself against the flown-in Enbridge canvassers[543]). It would have been much easier for the Walloon parliament to simply accept its fate. And indeed the EU was convinced that if they applied enough pressure, Wallonia would do precisely this. Wallonia wanted certain assurances, though, that its concerns would be taken into account in the EU–Canada interlegal weaving that was ongoing. It refused the local emplacement of EU commitments without the appropriate recognition of the relevance of local narratives. It refused to countenance an interlegal weaving in which it could play no part. The EU had a number of options that it might have drawn on to circumnavigate the Walloon problem, but given the popular support for the Walloon position the EU knew that this circumnavigation would prove difficult politically. Again, we see how the multi-sourced narratives impact on the content of interlegal commitments.

The second recent account to engage with interlegality is a collection on "entangled legalities" edited by Krisch.[544] While the term interlegality is dropped in favour of entanglement, the themes dealt with in this collection are interlegal through and through. Krisch describes legal entanglement as "a situation in which law is constituted by the ways in which norms from different origins are linked with one another without being integrated into a common order".[545]

Krisch adds two elements to his account that, I believe, improve on Klabbers and Palombella's description. First, he opens up legality to encompass both law-by-design and law-as-interactional-practice.[546] As such, he acknowledges the importance of both the map-as-object and the map-in-use.[547] This helpfully brings back the phenomenological aspect of interlegality that was overlooked in Klabbers and Palombella's discussion of Santos' work. Further, he considers a wide range of "legal" actors,[548] going well beyond the judge-focused interlegality

[543] Bowles and MacPhail (n 500) 19.
[544] Krisch (n 526).
[545] Krisch, 'Entangled Legalities in the Postnational Space' (n 43) 487.
[546] ibid 489.
[547] Without using these precise terms.
[548] Krisch, 'Entangled Legalities in the Postnational Space' (n 43) 488–489.

discussed above. As a consequence, Krisch does not focus exclusively on overlapping norms (though bodies of norms are central to his account), he also mentions actors. These actors make claims about the relative weights of norms from different legal orders through their ongoing (discursive) commitments:

> bodies of norms become 'entangled' not only as a matter of fact, but also in discursive construction. […] Actors – litigants, judges, dispute settlers, observers, addressees – make claims about the relation of norms from different backgrounds, and they thus define and redefine the relative weights and interconnection between the norms at play.[549]

Since actors may view the relation between different norms differently, Krisch acknowledges that entanglement is "relative" and thus that the forms and intensity of entanglement may be "in flux".

The insistence on the *discursive* nature[550] of entanglements is difficult to decipher. It seems to be a passing reference to an autopoietic-like theory of law, though I found no explicit mention of Luhmann or Teubner. I prefer the Coverian language of commitments to that of discourse. Interlegal commitments are not just about interlegal "statements" or the discursive classification of something as legal/illegal. Interlegal "claims" are also made by those who act in the world. Think back to Banksy's self-shredding artwork: there is no discourse here; nevertheless an interlegal (or at least inter-normative) claim is clearly made. Interlegal commitments involve acting in the world on the basis of a variety of legal maps/narratives. These legal maps/narratives are prioritised through the behaviour itself. The broader term "commitments" recognises the potential for this type of (inter)legal activity in everyday life.

Second, and importantly, Krisch acknowledges that interlegality is an ongoing process, rather than a one-off court decision.[551] In discussing the interweaving process, Krisch talks at length of "interface norms", that is, the norms that serve as weaving tools between two or more legal maps. These interface norms include inter-order conflict of laws norms and intra-order (or constitution-like) overarching norms. But importantly, Krisch adds a third type of weaving tool: "straddling practices".[552] These practices bridge the gap between the two types of interface norms and allow for true intertwinement. While many scholars of legal pluralism have

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[549] Krisch, 'Framing Entangled Legalities Beyond the State' (n 43) 5.
[550] ibid 19: "When we focus on legal entanglement here, we mean such discursive entanglement: the universe of statements that link different bodies of norms with one another."
[551] ibid 22: "The production of interface norms is then the result not so much of a one-off determination, but of a process of law".
[552] Krisch, 'Entangled Legalities in the Postnational Space' (n 43) 491.

discussed the two types of interface norms – both of which take a hierarchical approach[553] to overlapping norms – Krisch spends much more time developing the contribution of these "straddling practices". Straddling practices, like interlegal commitments, are situational moves made by legal actors that serve to gradually interweave bodies of norms sourced from different legal orders. Krisch is insistent that the linkages between norms from different legal orders are as much a part of law as the integrated norms of a legal system; they are legal linkages. "If we understand law as ultimately socially constructed, a shift in the ways in which actors relate different parts of the legal order to one another reshapes the law itself."[554]

While the insistence on the *process* of interlegality is a welcome development, Krisch's focus on institutionally embedded *norms* is disappointing. His book does not insist enough on the importance of doings. Despite broadening the discussion to encompass actors, the heart of his account focuses on norms. Krisch fails to note that the first two categories of interface norms (conflict of laws and overarching norms) depend for their existence on the very real choices legal actors make to rely on them or not.[555] Thus they require "practices" or interlegal commitments for their concretisation. Further, he assimilates "straddling practices" to these first two categories of norms, discounting the fact that their most interesting characteristic is that they are not norms at all (or not yet). These "straddling practices" are the heart of the interlegal process: they are the law-as-interactional-practice of interlegal spaces. And as practices, they are inevitably engaged in by a variety of legal actors. None of the recent works on interlegality insist on this point:[556] the individual (or composite individual) is the source of interlegal commitments and the motor behind interlegal weaving.

Where is interlegality?

Interlegality is not then a mere overlapping of maps or of norms. Maps and norms may overlap without any interlegality ever occurring if there is no "doing", no interpretive commitment, that brings the two into conversation by straddling two legalities at once. Interlegality is driven then by the *ipse*-side of the identity coin. While it may produce a transient stitch in time (and place), suggesting a particular adaptation of the legal map (*idem*-identity), it cannot come about

[553] By this I mean an institutionalised authority approach, where an overriding norm (whether it be a conflict of laws norm or an overarching constitutional norm) determines the hierarchical priority of the competing (and potentially incompatible) norms at issue.
[554] Krisch, 'Framing Entangled Legalities Beyond the State' (n 43) 6.
[555] See the District Court of the Hague's 2021 decision in *Milieudefensie v Royal Dutch Shell,* discussed in Kampourakis (n 540), where the Dutch court appealed to interface norms while the EU court ignored them.
[556] A possible exception in this regard is Hoekema, see Hoekema (n 526).

without a series of interlegal commitments, nor can it be maintained without ongoing interlegal citation. I cannot insist enough on the fact that without an individual (or composite individual) motivated, or unintentionally driven, to engage in this interlegal dialogue, there can be no interlegality.

Nor is interlegality stricto sensu *inter*-legal in the sense of being *between* two instances of the legal. Many authors have discussed interlegality in precisely these terms, as occurring *between* legalities and therefore as belonging, for instance, to the domain of the political rather than the legal.[557] Indeed, Lindahl refers to this as "a politics of the in-between".[558] I refuse this categorisation for two reasons. First, we saw in the chapter on dedifferentiation that these silos (the political, the legal, the religious, the economic…) are artificial constructs, drawn up to help us map what would otherwise be undifferentiated chaos. In this instance, the artificial separation between politics and law seems unhelpful. In straddling narratives, we inevitably appeal to a panoply of tools to help bridge the gap. But the "gap" is not an a-legal space (as Lindahl calls it); it is an excessively legal space. The "gap" is an individual in a situation that requires him or her to render intelligible two simultaneously espoused narratives that point in different directions on the same terrain. Since legality – as defined in this dissertation – refers to the legibility of legal precepts for the members of a legal order (or concerned-others) with regard to particular narratives, interlegality is a space for creative work on legality itself. It is the space in which legality may gradually shift from the shaky ground of ultimate unintelligibility to a more solid foundation of improved intelligibility. It is the work of clarifying the meaning of espoused narratives. We may call on political tools to help clarify meaning, just as we may draw on folklore, ritual, art, statistics, spirits, economic modelling, physical violence, etc. In none of these cases though is there a strictly a-legal *between* to go to. Perhaps we should instead call it the becoming-legal, the space of absolute legal potential.

Second, it is helpful, I think, to realise that interlegality is the way all (composite) individuals emplace themselves in the world. This explains – at an even more fundamental level – why interlegality cannot refer to something beyond legality. As individuals, we are all constantly straddling narratives. Some of these straddled narratives are more homeodynamic than others and, in these cases, the straddling is fluid, easy… we hardly recognise it as interlegal. For many

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[557] See, for eg, Neil Walker, 'Reconciling MacCormick: Constitutional Pluralism and the Unity of Practical Reason' (2011) 24 Ratio Juris 369 <http://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-9337.2011.00491.x> accessed 27 September 2022.
[558] Lindahl (n 210) 285.

kids, for example, a majority perhaps, the precepts and narratives at school and the precepts and narratives at home are close enough for straddling to go on without too much fuss. But sometimes, we are forced to straddle worlds that are strangers to each other, mutually unintelligible. The only intelligibility link is the individual doing the straddling, who is able to make sense of both narratives – to some (perhaps very limited) extent. In these cases, where narratives are less homeodynamic, contested interlegality is the more likely outcome (think: Kitimat and Wallonia). In everyday terms, this may occur when a gay grandson faces impossible straddling coming out to his staunchly Catholic 99-year-old grandmother; when a Jehovah's witness faces impossible straddling while trying to refuse a blood transfusion or allegiance to a flag; when a Muslim student wishes to wear a veil to school in France; when an unvaccinated individual tries to travel to the US for a family wedding;[559] etc. Where allegiances are balanced, the individual is torn. Since narratives delineate the *character* of the self, the feeling of straddling strange narratives is something akin to temporary schizophrenia[560] (from Greek *skhizein* 'to split' + *phrēn* 'mind').

All this to say that one need not seek an overlap between the norms of official jurisdictions to encounter interlegality; an interpretive commitment that straddles strange narratives is sufficient. This individual narrative straddling suggests that interlegality is part and parcel of inhabiting *nomoi* (or normative universes). All individuals inescapably inhabit *nomoi*;[561] we all are trespassers, we are all interlegal actors.

Finally, interlegality is not – or, at least, not necessarily – an equitable weighing of narratives. It is instead a dialogue between interpretive commitments which may embody differing experiences of normative pull. Canadian representatives experienced very little normative pull

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[559] This unfathomably unjust and discriminatory rule was revoked with effect 11 May 2023, months (or even years) after other countries reversed such rules. Needless to say, this is just one among many interlegal dilemmas that unvaccinated individuals had to straddle during the Covid-19 pandemic.

[560] It is interesting to note that schizophrenia has been linked to a deficient "sense of self" (see Aubrey M Moe and Nancy M Docherty, 'Schizophrenia and the Sense of Self' (2014) 40 Schizophrenia Bulletin 161 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3885303/> accessed 14 May 2023) and that developing a personal narrative is considered one promising means of treatment for those suffering from schizophrenia (see Paul H Lysaker and others, 'Personal Narratives and Recovery from Schizophrenia' (2010) 121 Schizophrenia Research 271).

[561] It has been suggested that only the brain dead or mentally ill can be considered beyond such normative universes. Even this, though, is debatable. After all, our hospitals and mental institutions maintain these individuals in a *nomos* specifically created to deal with such situations. The legal precepts and narratives adopted by such institutions are upheld by the personnel and inpatient visitors, despite the fact that many of the rules would be unacceptable to the vast majority of individuals in good mental health. The legality of such institutions is lacking for the inpatients themselves (for whom the precepts and narrative have no, or little, meaning). But the legality of such institutions for concerned-others is clearly present.

from Walloon narratives during the Walloon saga. As a result, the interlegal commitments proposed by Canada were so wide of the mark as to be sometimes counterproductive (see Image v in Interlude — A story of suspended social licence). The EU Commission also found it difficult (though less so) to grasp the Walloon narrative and as a result was slow to broker an acceptable deal (eg by accepting that democracy requires time to wade through the pages of preparatory paperwork produced by CETA). Wallonia itself straddled the strange narratives more evenly, but refused the asymmetric narrative weaving that was taking place without allowances for democratic participation. The notion of interlegality must take into account the intensity of each narrative's normative pull and the resulting asymmetries that emerge.

Conclusion: A trespassing

The preceding Interlude and this chapter have started to unravel this metaphor of interlegality as overlapping maps. In some sense, Santos' reference to "trespassing" is perhaps the term that should have attracted our attention.

Based on the Wallonia saga, we can deduce that a social licence generally involves two steps. The first step involves an interlegal commitment (or series of commitments). This commitment tentatively suggests the relevance of alternative narratives to a particular legal map. In some sense, it is a "trespassing" or a tentative borderline crossing, with one legality suggesting its relevance to another. The legal actor responsible for the initial interlegal commitment finds itself both inside and outside the host legality's particular legal map. They are "inside" insofar as the commitment takes place within the ought-mappings of the host legality's legal map, just as the vagrant finds himself within the "restaurant" legality in the Introduction to Lindahl's *Fault Lines*.[562] It is for this reason that the commitment is, on the face of it, characterised as illegal or unacceptable. They are "outside" the host legality's legal map, however, insofar as the interlegal commitment appeals to a strange (and potentially unintelligible) narrative. This "strange" narrative is beyond the realm of the host legality's legal map. It is a narrative that reads the proposed interlegal commitment as legal/acceptable rather than illegal/unacceptable.

The second step, like two separate threads brought together by a sewing machine, involves a first attempt at narrative weaving. The host legal order recognises the relevance of an alternative narrative for a particular corner of their legal map. Gradually, then, it finds a way to weave the "strange" narrative into its own. This weaving, accomplished through a series of

[562] Lindahl, *Fault Lines of Globalization* (n 98) 1–4.

ongoing mutual commitments, is always aspirational. In time, however, the original narrative incorporates these interlegal stitches and they come to be a part of the legal map itself.

Interlegality is a *process* (as Santos suggested) that begins with a tentative borderline-crossing commitment (*ipse*-identity), through an interlegal weaving involving narrative (*idem/ipse*-overlap) and is concretised in changes to the legal map itself (*idem*-identity).

Chapter 5 — Sedimentation: The heaviness of law

> *[C]haracters are not born like people, of woman; they are born of a situation, a sentence, a metaphor containing in a nutshell a basic human possibility that the author thinks no one else has discovered or said something essential about. […] The characters in my novels are my own unrealized possibilities. That is why I am equally fond of them all and equally horrified by them. Each one has crossed a border that I myself have circumvented. It is that crossed border (the border beyond which my own "I" ends) which attracts me most. For beyond that border begins the secret the novel asks about. The novel is not the author's confession; it is an investigation of human life in the trap the world has become.*
>
> — Milan Kundera, The Unbearable Lightness of Being[563]

The last chapter took up the *ipse*-identity of law by focusing on legal doings, "interpretive commitments", that concretise the meaning of the legal map in everyday life. I tried to show that many of these commitments are interlegal: they involve a trespassing of sorts. What is a trespassing in this context? It involves an individual (or composite individual) using another's map (or mapped world) without narrative permission (or without the narrative keys to successfully navigate the strange terrain).

Often trespassing of this sort is innocuous. The trespasser enters unknown territory/map, all the while relying on his or her own slightly exotic narrative. The narrative is exotic insofar as it has not been tweaked and adapted to this particular terrain. But slight exoticism attracts fascination and curiosity, rather than panic. In such circumstances, the trespasser will likely be able to render his or her slightly exotic narrative(s) comprehensible to the regular map-user. Some common ground is quickly negotiated; the exotic narrative is corrected for the terrain. In time, the trespasser becomes a simple passer-by.

Sometimes though, an interlegal trespassing rips the map apart. Perhaps this is more appropriately what Lindahl refers to as the domain of the a-legal? Perhaps here is where the *inter* of interlegality finds its full expression? Straddling the two worlds or two narratives seems impossible: simply perceiving the unintelligible narrative is like stepping into the void. The footing of legality is entirely removed. This is the realm of ruptural events.

In this final chapter, then, I would like to return full circle to the concept of legal rupture outlined in Chapter 1. What is it that turns an instance of interlegality into a case of legal

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[563] Kundera (n 81) 218.

rupture? Which parts of the legal map are most at risk of rupture? And which (composite) individuals are most likely to trigger rupture? What does legal rupture mean for legality itself? I attempt to answer these questions with the help of one of Kundera's metaphors: heaviness and lightness. The first section sets out this metaphor. In the second section I discuss sedimentation within the four quadrants, trying to understand how heaviness and lightness may play out across the different types of legal maps. I call on Cover's insights on jurisgenesis and jurispathy here, but suggest that Cover may have unintentionally limited their usefulness by limiting his analysis to the imperial and paideic types of order. In the last two sections, I consider when and how sedimentation may become "unbearable"… these are the situations where ruptural events are most likely to appear.

Lightness and heaviness

In Chapter 4, I insisted that the shape of a legal order could not be reduced to its *idem*-identity. While precepts and narrative clearly play a role in pinpointing law as we know it, they are nothing without the embodied law that comes in the form of interpretive commitments, those doings that imprint the law over time. Just like norms (or precedents) that are repeatedly cited by the courts gain increasing weight over time, so too narratives that are repeatedly appealed to in everyday doings accumulate more persuasive (or predictive) sway over time. There is a layering of doings across time and across a network of social relationships that sediments the (legal) self, forging its character. The map itself is of course reinforced by these layers, becoming three-dimensional in those areas that are most important, with relative value disclosed by intense use. Inspired by M'Gonigle's engagement with these ideas, I call these areas of sedimentation.[564]

In metaphorical terms, these sedimented doings might be likened to the evolution of neural connections over time. A human baby is born with a set number of neurons (approximately 100 billion), close to the number he or she will have as an adult.[565] The extraordinary brain growth that occurs throughout early childhood involves the development of trillions of neural

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[564] This idea clearly takes as its inspiration M'Gonigle's "animationist paradigm" as set out in M'Gonigle, 'Logics as Law' (n 14) 9. Inspired as I am by this paradigm, I feel that the imagery of sedimentation is more helpful here. I also take issue with the legal/non-legal lines drawn by M'Gonigle. While he insists that legal theorists should pay attention to animations, he accepts that they belong to the realm of social regulation rather than the law since they are "largely outside law's purview" (ibid 10). As noted in earlier chapters, I reject this distinction as unhelpful. My use of "sedimentation" does not map precisely onto M'Gonigle's "animations". Nevertheless, this work has greatly inspired me.

[565] Sandra Ackerman, *Discovering the Brain* (National Academies Press (US) 1992) 86 <http://www.ncbi.nlm.nih.gov/books/NBK234151/> accessed 3 June 2023.

connections – at a rate of about one million new neural connections (synapses) every second during the first three years – far more than at any other time in life.[566] The child is building his or her map. The map has crazy detail; this gives the child great adaptability as there are so many potential pathways that might be used to process his or her experience. But this massive detail is also relatively inefficient. With so many connections, processing is energy-intensive and the risk of taking an ineffective pathway is high. Over time, some of these connections get used intensively, while others get little mileage. The brain onboards this information around adolescence, when extensive synaptic pruning occurs. This time the brain unwires! Connections that are the most useful are preserved; those that are underused get pruned. As a result, grey matter is significantly reduced during this period, as is synaptic density.[567] The "useful" (or most used) connections also gradually get myelinated, in a process that will continue on into adulthood. The brain lays down a kind of fatty insulating coat, which ensures that signals can travel down these prioritised axons (or pathways) much faster. Not only that, but the laying down of myelin imposes structure, preventing interference (myelinated axons cannot receive chemical messages) but also reducing the capacity for axons to branch out willy nilly.[568] The map that was excessively detailed – and as a consequence sometimes unhelpfully crude and unreliable – becomes simplified and zippy. The myelinated pathways are, metaphorically speaking, where layers have been put down over time. Of course some plasticity or adaptability remains even in adulthood, but far less. Adolescence is the period in which layers of use become sedimented as preferred pathways and unused pathways get pruned. In some sense, individual creativity and extraordinary adaptability wanes and the weight of social mores is physically imprinted on the brain.

Kundera's opening discussion of the schemata of lightness and weight in *The Unbearable Lightness of Being* also helps illustrate the meaning of sedimentation:[569]

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[566] Center on the Developing Child, 'InBrief: The Science of Early Childhood Development' <https://developingchild.harvard.edu/resources/inbrief-science-of-ecd/> accessed 3 June 2023.
[567] Jay N Giedd, 'The Teen Brain: Insights from Neuroimaging' (2008) 42 Journal of Adolescent Health 335, 338 <https://www.sciencedirect.com/science/article/pii/S1054139X0800075X> accessed 3 June 2023.
[568] See Fields' insistence that myelin serves as more than an insulating sheath: R Douglas Fields, 'Myelin—More Than Insulation' (2014) 344 Science 264 <https://www.science.org/doi/full/10.1126/science.1253851> accessed 3 June 2023.
[569] I should note here that Michael McCann, 'The Unbearable Lightness of Rights: On Sociolegal Inquiry in the Global Era' (2014) 48 Law & Society Review 245 <https://onlinelibrary.wiley.com/doi/abs/10.1111/lasr.12075> accessed 1 June 2023 has also used Kundera's schemata of lightness and weight in the legal context, though his article focuses exclusively on rights. He defines them as follows: "weight, or heaviness, refers to our subjection to enforced social convention—to the myths and routines that promote conformity and restrict freedom. […] By contrast,

> The heaviest of burdens crushes us, we sink beneath it, it pins us to the ground. But in the love poetry of every age, the woman longs to be weighed down by the man's body. The heaviest of burdens is therefore simultaneously an image of life's most intense fulfillment. The heavier the burden, the closer our lives come to the earth, the more real and truthful they become.
>
> Conversely, the absolute absence of a burden causes man to be lighter than air, to soar into the heights, take leave of the earth and his earthly being, and become only half real, his movements as free as they are insignificant.[570]

Kundera's lightness relies on the imagery of freedom, spontaneity and detachment, where his heaviness evokes responsibility, routine and commitment. Thus, as something becomes heavier, it becomes clunkier and more constraining of one's movements (freedom is reduced), but it is also more solid and reliable. Something that is lighter is freer, can move about more freely, but is also less dependable and may suggest a certain superficiality ("half real"). There may be a fleetingness to it, a one-offness, much as the pruning of underused synapses suggests. Heaviness, on the other hand, signals a burden, a sensation of being pinned down. Indeed, Kundera's narrator seems to read Nietzsche's "eternal return"[571] as embodying just this sort of Sisyphean burden, an endless repeating. Sedimented "doings" also achieve this kind of repetitive layering, and with it a certain gravitas over time. The more precepts and narratives are relied upon in everyday doings the more they become integrated into the character of the legal self. But this character carries with it a certain rigidity.

The early philosophising by Kundera's narrator in *The Unbearable Lightness of Being* seems to suggest that heaviness is not all it's cut out to be. The reader might get the impression that Kundera wants to defend the creativity and freedom of lightness against the tropes of responsibility and commitment. I believe this would be a misreading of his work. All of Kundera's oeuvre uses the variation form,[572] not to drive home a point, but instead to instil a

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lightness is freedom and flight from such weighty obligations, conventions, and delusionary myths." (ibid 247) He insists, as I do here, that "lightness and heaviness are not entirely discrete, antithetical forces; rather, they are interdependent and connected in paradoxical ways" (ibid). Interestingly, McCann also draws briefly on Cover (n 2) in his argument (McCann (n 569) 250).

[570] Kundera (n 81) ch 2.

[571] Nietzsche's "eternal return" is a kind of thought experiment in which one's life (and thus all the doings that make up that life) repeats eternally. It may be considered as a way of determining whether one is willing to take ultimate responsibility for one's actions. Since "God is dead", and the remaining extremes of nihilism and totalitarian ideologies are to be avoided, it seems the only ethical stance is for the individual to face up to his or her own particular eternal return.

[572] The variation form is most commonly associated with music and denotes a self-contained theme that is repeated and changed in some way with each successive use. This tool has also been used elsewhere in

sense of profound doubt.[573] And this particularly applies to the aphoristic philosophising done by the narrator.[574] With this in mind, it is worth considering the idea that Kundera is not making an argument for the "lightness of being" (whether unbearable to the reader/protagonist or not), but is instead at pains to show that however attached one might be to heaviness or to lightness, one cannot escape the recurring counterpoint of its contrary. I believe then that the adoption of the term "unbearable" in the title belies a double meaning. A superficial reading suggests that Being is unbearably light, fleeting, one-off and that we need to contend with this lack of heaviness:

> We can never know what to want, because, living only one life, we can neither compare it with our previous lives nor perfect it in our lives to come. […]
>
> There is no means of testing which decision is better, because there is no basis for comparison. We live everything as it comes, without warning, like an actor going on cold. And what can life be worth if the first rehearsal for life is life itself?[575]

The fleetingness of doings seems to put them beyond ethical judgment. But what then is the term "unbearable" but an outright ethical judgment? A more careful reading suggests that Kundera is instead underlining the heaviness of lightness itself. The term "unbearable" invokes a burden that is hard, almost impossible, to bear. And the early chapters of the book tend to paint heaviness rather than lightness in "unbearable" terms:

> In the world of eternal return the weight of unbearable responsibility lies heavy on every move we make. That is why Nietzsche called the idea of eternal return the heaviest of burdens (*das schwerste Gewicht*).
>
> If eternal return is the heaviest of burdens, then our lives can stand out against it in all their splendid lightness.[576]

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literature: in Cervantes' novel *Don Quixote* for example (see discussion in Calvin S Brown, 'Theme and Variations as a Literary Form' [1978] Yearbook of Comparative and General Literature 35).

[573] See Tim Jones, 'Slowness, Identity and Ignorance: Milan Kundera's French Variations' (doctoral, University of East Anglia 2012) <https://ueaeprints.uea.ac.uk/id/eprint/50555/> accessed 5 June 2023, who does a wonderful job of detailing Kundera's use of the variation form.

[574] See ibid 2, for a discussion of Kundera's later novel *Slowness*, whose narrator seems to suggest that Kundera favours "slowness", but whose narrative then proceeds to unravel this evidence; contrary to what is suggested in a rather damning review by Baranczak, see Stanislaw Baranczak, 'The Incredible Lightness' (1996) 215 New Republic 42 <http://ezproxy.library.uvic.ca/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=mth&AN=9608277924&site=ehost-live&scope=site> accessed 4 June 2023.

[575] Kundera (n 81) ch 3.

[576] ibid 2.

The whole of the novel then goes on to show – through short glimpses into each character's fleeting life – that the addition of many layers of "splendid lightness" may still crush us, foreboding an unbearable burden. Lightness is no escape from heaviness; neat categories of positive and negative (or binaries more generally) no escape from the complexity of Being itself. And indeed the final section of the book "Karenin's Smile" confirms this. The repetitive cycling of life is everywhere writ large (epitomised by the circling of the nocturnal butterfly with which the novel closes… above "two beds pushed together", the binary again). This cycling of Being seems to repeatedly return. Despite the narrator's incessant assurances that human life is like a "line",[577] the final chapters question this "line" in every way possible, unravelling the binaries of life and death; strength and weakness; past and future; exile and homecoming; estrangement and reuniting; day and night; dreams and reality; body and soul; human and machine; light and dark; free will and fate; faith and doubt. Like Kafka, Kundera uses the literary form as a way of layering meaning: the choppy narrativising, the innumerable chapters, the disrespect of chronology, the changing viewpoints and literary styles, the lack of a true plot, and the repeatedly revised (and contradictory) versions of central themes. In itself, Kundera's novel is just one more ephemeral story. Nevertheless, there is a weightiness of content in this particular novel and in his oeuvre more generally that is at odds with the flighty form used to convey it. As he notes at the outset:

> The heaviest of burdens is therefore simultaneously an image of life's most intense fulfillment. The heavier the burden, the closer our lives come to the earth, the more real and truthful they become.[578]

Achieving weightiness then is also to find meaning in one's life, to move closer to the most heavily layered parts of one's "true" self. This corresponds well to the sedimented pathways in the brain, where the pruning process reveals the brain's central highways (and thus the self's preferred modes and means of experiential processing). With this in mind, I would like to suggest that sedimentation is a process of increasing weightiness, with sedimented doings representing the most referred to – and thus most revered – parts of the legal order's narrative.

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[577] See ibid 7: "Now we are longtime outcasts [from Paradise], flying through the emptiness of time in a straight line"; "Human time does not turn in a circle; it runs ahead in a straight line"; "Our lives may be separate, but they run in the same direction, like parallel lines."
[578] ibid 1.

Kundera's novel is a useful reminder of how the most layered parts of the narrative subliminally communicate his central message.[579]

There is no doubt that the idea of sedimentation also strongly echoes Butler's concept of "citational performativity". A key aspect of her gender theory, "citational performativity" refers to the ongoing process by which gender norms are produced and reinforced through repetitive acts of citation.[580] According to Butler, this serves to maintain an illusion of stable gender identities, where in fact it is the repeated acts themselves that are producing or perpetuating particular categories. The citations are not the expression of identity then, but the forging of identity. Of course, "citational performativity" applies far more widely than just to gender norms. In a similar way, people are uncomfortable with non-normed use of body parts. The breast, for example, has become idealised as a sexual body part and many are uncomfortable seeing it in places where "sexual activity" is considered inappropriate. Many women are themselves "subjectivated" into this sexual aura around the breast and so feel ambivalent about breastfeeding. Breastfeeding mothers in the public space are denaturalised insofar as they don't conform to the norm of adult independence and freedom (in particular of the body).[581] The place of the caregiver in the private sphere is thus reinforced. These Foucauldian webs of meaning, in which we participate, impose a mould to which we must conform, a grid of disciplinary coercions through which we are normalised.[582] Hospitals, paediatricians, nutritionists, supermarkets, advertising, conceptions of modesty and sexuality, childcare protocols, etc all contribute to this disciplinary grid in which certain "truths" on breastfeeding have become normalised.

Butler suggests that "citational performativity" forges categories rather than expressing a pre-existing identity. Having discussed *idem*- and *ipse*-identity in earlier chapters, I can't help but wonder if it is even possible to separate once and for all the pre-existing identity from the being-forged identity. (As a reminder, *idem*-identity represents the unitary or identifiable (ie

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[579] I don't mean by this to deny Kundera's explicit undoing of binaries (much as Schlag pointed out in a different format). But I would like to delay treating Kundera's insistence on doubt and complexity until later in this chapter.

[580] More specifically, Butler refers to "citational performativity" as "the reiterative and citational practice by which discourse [or doings more generally] produces the effects that it names" (Butler (n 183) xii).

[581] See Johnson, 'Blurred Boundaries' (n 66). On a recent visit to MoMA in New York, I was surprised to find a "lactation pod" in the lobby. This sealed-off cabin (out of view, out of mind?) is supposed to provide breastfeeding Mums with the required privacy. This seems to be another way of gently suggesting that breastfeeding Mums should (ideally) be feeding their kids in the privacy of their own homes.

[582] See Michel Foucault, 'Society Must Be Defended' in Colin Gordon (ed), Colin Gordon and others (trs), *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Pantheon Books 1980).

mapped) self at any particular point in time; while *ipse*-identity represents the ongoing mapping process that occurs through doings.) In a certain obvious sense, what we do every day (or repeatedly) forges our identity, it points the self towards certain categories and away from others. If I write every day, for example, I am forging for myself an identity as a writer, even if this only transpires quite a few days, months or years later. But at the same time, once those years of writing every day are behind me, something of them has surely imprinted on my character. More than that, it is likely that my identity as a writer will now dictate in some sense what I do with my time. How easy is it to choose the non-writing pathway after treading down the writing pathway for 10 years or more?[583] Sedimentation is just this: the forging of the self over time, but also the recognition that the most layered parts of the self's narrative (those that integrate the map) will inevitably guide one's choice of future pathways. If this is true, perhaps Butler is only half right. She is absolutely right to insist that much of identity is forged through repetitive citation. And no doubt that this is particularly important to insist upon, since we saw in earlier chapters that the active "mapping" aspect of legal order (this citational aspect or *ipse*-identity) tends to be under-discussed. Nevertheless, the appeal to "citational performativity" should not blind us to the fact that ongoing citation forges categories or identities (integrated within the map) that subsequently guide our choices with regard to future doings. If this is true, we cannot entirely escape the notion of "pre-existing identities" whether around gender or in other domains. Indeed the *idem*-identity of legal order is, at any point in time, precisely this: an existing map (of the acceptable/unacceptable) that steers future doings.

I hope that the metaphorical imagery of the adolescent neural pruning and Kundera's concepts of lightness and heaviness help give body to the idea of "citational performativity" used by Butler. This is a particularly important aspect of *ipse*-identity because it is what gives identity not just its unicity (*idem*-ness), but its shape or character (*idem/ipse*-overlap). In one sense, individual doings are unimportant, irrelevant, impossibly "light". They are like chalk sketches on the sidewalk: they attract momentary attention, but will most likely be washed away in the next downpour. What counts is the individual doings that pile up: the things you do every day; the relationships you cultivate over time. These things become "heavy" and must subsequently

[583] I should note that I am disinclined to see the relationship between *idem*-identity and *ipse*-identity as unidirectional. What got me started writing? How did I maintain that habit over so many years? Is it possible that there was nothing of the writer in me to start with and that this identity was entirely created by the habit? Can anyone adopt the identity of a writer just by repeatedly citing a writing habit? Or is the writing habit itself selective, selected in some sense by those who already have a predisposition (a glimmer of an identity) to this kind of expression?

be carried. They shape identity. The three ideas referenced above all seem to get at the importance of such layering over time and in space, the concrete affirmation of one's "holding firm".

Sedimentation in the quadrants

The metaphorical forays into sedimentation in the first section suggest that both heaviness and lightness are integral parts of the forging of identity. Heavily: something must hold firm else there is nothing to identify. And that which holds firmest is sedimentation (the parts of the map that are deeply imprinted). Lightly: something must take flight else identity cannot adapt to evolving circumstances. And that which is ephemeral rather than layered (ie individual interpretive commitments) is always a potential opening onto other identities, other possibilities.

The concept of sedimentation insists on the necessary interplay between heaviness and lightness; between multiplying neuronal connections and intermittent pruning; between citational performativity and "performative contradiction".[584] Sedimentation is what brings us full circle from *ipse*-identity (ie everyday interpretive commitments) that are individually "light" back to the *idem*-/*ipse*-overlap of character where commitments take on weight. When the two are in appropriate balance, narrative legibility is ensured. But an imbalance swings us towards "unbearable" lightness or "unbearable" heaviness. This may signal legality's undoing.

In this section, I want to consider how sedimentation applies to each of the quadrants discussed in Chapter 3. I will start by reviewing Cover's own treatment of sedimentation. Cover used the concepts of jurispathy and jurisgenesis. These are different types of interpretive commitment. The former involves killing off excess law, while the latter creates new law. In so doing, sedimentation is either preserved (world maintenance) or questioned (world creation). Using Cover's insights as my point of departure, I then go on to nuance his account by considering the balance between world-creating lightness and world-maintaining heaviness in the four quadrants mapped in Chapter 3.

Cover's approach: jurispathy and jurisgenesis

In Chapter 3, I used one of Cover's most powerful insights – the distinction he drew between the paideic and the imperial nomoi – as a diving board to develop my own schematic mapping

[584] Judith Butler, 'Universality in Culture' in Joshua Cohen and Martha Nussbaum (eds), *For Love of Country: Debating the Limits of Patriotism* (Beacon Press 1996) 48.

of legality. I argued in that chapter that the mapping needed to be completed with two further quadrants representing the hegemonic and the apocryphal. But Cover's article abounds with further insights that are helpful in understanding the importance of interpretive commitments when talking about law and, more specifically, legal rupture. I would like to insist here on two insights in particular.

First, Cover explicitly pointed out the excess of law.[585] He saw the jurisgenerative potential that lies all about us if we are only willing to accept that there is no convincing way of drawing a bright line between black letter law and the technicoloured varieties of law that populate our social (and inevitably normative) worlds. Jurisgenesis was the term he came up with to describe the birthing of law. He didn't see this creative work as happening primarily in law courts and legislatures, however. His argument was that nomic communities situated at the substate level were constantly feeding the national narrative with their wild and divergent stories, attempting by all the means available to them to put forward their own particular take on the law. The excess of law was of the bottom-up variety.

Second, Cover saw that much of what passes for "making" law (most especially in the form of judicial decisions) is in fact a violence-backed version of everyday legal commitments through which judges affirm one narrative and in so doing reject other narrative possibilities. He called this jurispathy and considered the State's jurispathic role an inevitable response to the excess of law. As he says:

> Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.[586]

Jurispathy is not the sole preserve of the state of course. All interpretive commitments are jurispathic in some sense because they shun certain understandings of the map or the narrative and espouse others. However, the fact that state jurispathy may be backed with the threat of violence, of "execution", means that it has clout many other jurispaths do not. With this clout

[585] Cover (n 2) 40: "It is the multiplicity of laws, the fecundity of the jurisgenerative principle, that creates the problem to which the court and the state are the solution.".
[586] ibid 53 (emphasis in original).

comes responsibility, Cover argues. One cannot definitively "kill off law" (in the way that judges and legislators may indeed do) without taking the full measure of one's actions.[587]

Both jurisgenesis and jurispathy are terms that describe our interpretive commitments. Just as I have tried to show in this thesis, Cover was adamant that the doings of judges and the doings of everyday people going about their lives are qualitatively the same as far as the law is concerned. Through their interpretive commitments, both are doing their bit to "hold firm" in relation to the legal narratives that have valence for them. What sets judicial doings apart is the force they may access to ensure their commitment is reflected in the developing narrative and so embodied by future doings. The jurispathy of institutions designed to provide a legal order with structure is definitionally more potent than any individual jurispathic doing. For it holds the ability to protect and direct sedimentation. The force of institutional jurispathy should not be disregarded. Nevertheless, one should not conclude from this, as Cover seems to do, that imperial (or hegemonic) sedimentation[588] *requires* institutional jurispathy. A jurispathic decision that is refused at the level of everyday interpretive commitments will not protect sedimentation and may even provoke undesired sedimentation elsewhere. Similarly, an everyday jurispathic doing that is convincing to other subparts may reinforce existing sedimentation or create new spaces for sedimentation without any institutional pronouncement. Violence then is not a necessary attribute of jurispathy, nor is it sufficient to ensure jurispathic ends. The "violence" of institutional executional power is simply one tool among others, though admittedly one that may have serious persuasive power.

Jurisgenerative potential is captured with the metaphor of the young brain powering away, producing millions of synaptic connections. The infant brain embodies absolute (unrealised) potential… and ever-pending chaos.[589] The creative potential of jurisgenesis is unlimited. This explains why Cover links jurisgenesis to the "world-creating" paideic *nomos*. The flurry of creative jurisgenerative doings is what makes possible new worlds of meaning. It is also unable to bear excessive sedimentation, for this shuts down alternative pathways, blinds us to alternative ways of viewing the map. A jurisgenerative doing is the epitome of lightness. There

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[587] Cover (n 2), n. 195: "The invasion of the *nomos* of the insular community ought to be based on more than the passing will of the state. It ought to be grounded on an interpretive commitment that is as fundamental as that of the insular community."

[588] Cover does not talk of sedimentation of course; he refers instead to the Constitution (or more broadly the "domain of constitutional meaning") as providing this kind of sedimentation (see ibid 28).

[589] Presumably, if we had this many potential neural pathways in our adult brains, we would also be subject to outrageously inappropriate tantrums that seem disproportionate with regard to the actual context!

are no limits to the tangents that might be taken, and these include tangents that might undo sedimentation.

The power of jurispathy, on the other hand, is portrayed through the image of drastic synaptic pruning which takes place in the adolescent brain: legibility is improved, the map is cleaner and more user-friendly… it may be lacking a little spontaneity and adaptability, however. Cover links jurispathy primarily to the "world-maintaining" imperial *nomos*. Cover saw "world maintenance" as a way of dealing with the "problem of the *coexistence* of different worlds and […] regulating the splitting of worlds".[590] In this sense, jurispathic doings are the wardens of heaviness, protecting and directing sedimentation; they leave little place for lightness.

There are limits, however, to the jurispathic-world-maintenance vs jurisgenerative-world-creation binary that Cover sets out and some of these must be noted here before we move on.

Even accepting the fact that jurispathic-world-maintenance and jurisgenerative-world-creation are ideal-types rather than black and white categories in which to place legal orders, I do not see jurispathy as primarily attached to the judiciary or the State. Jurispathy takes many forms, many of which are quite distinct from the judicial: sometimes it may be administrative (eg the threatened dissolution of a movement such as *Les Soulèvements de la Terre*[591] or the "jurisdictional commotion" which Pasternak describes as applying to Algonquin territory);[592] sometimes it may be technical (eg the use of section 223 of the Native Title Act 1993 to impose settler-styled burdens of proof on indigenous jurisdiction in Australia);[593] sometimes it may be personal (eg the excommunication of Spinoza from the Jewish community for his "evil

[590] Cover (n 2) 13 (emphasis in original).
[591] The actual dissolution of the movement was decided by the French Council of Ministers on 21 June 2023. The legal basis for this dissolution is still to be determined, likely before the *Conseil d'Etat.* See further 'Les Soulèvements de La Terre, Une Dissolution Problématique' [2023] Le Monde <https://www.lemonde.fr/idees/article/2023/06/23/les-soulevements-de-la-terre-une-dissolution-problematique_6178900_3232.html> accessed 1 July 2023.
[592] Pasternak (n 82) 18. She goes on to describe this "jurisdictional commotion" as "a process of colonization where the effect of dispossession is not removal but the perpetuation of a set of exhaustive administrative regimes that undermine, erase and choke out the exercise of Indigenous jurisdiction, rendering Indigenous people peripheral to effective participation in land governance" (ibid 55).
[593] See the imposition of settler mapping techniques and settler understandings of title with respect to indigenous land claims, as described in Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge 2012) 107–111 <https://www.routledge.com/Jurisdiction/Dorsett-McVeigh/p/book/9780415471657> accessed 3 March 2023.

opinions and acts")[594] or social (eg social ostracism of witches)[595] or medical (eg the shamanic ceremonies for those provoking disharmony in Akawaio society)[596] or physical even (eg punishment by death for those who question or undermine the precepts of a given community).[597] Nor can jurispathy be considered the exclusive prerogative of the State. On the contrary, all legalities inevitably employ jurispathy to some extent in order to preserve their legality (ie the legibility of their specific narrative identity). This applies as much to the Marylebone Cricket Club, as to Roma communities, terrorist groups, the EU, the Rojava, indigenous peoples, ecological movements, etc. In addition, the State itself is often a subpart of other legal orders. As such, it may also find itself the subject of higher-level jurispathy visited upon it by trans-state, supra-state or super-state legal orders.[598]

Further, Cover's insistence on the State should not be read as suggesting that jurispathy is necessarily top-down as Cover seems to suggest, with the violence of the State inevitably visited on the subunits of a particular legality. The Walloon saga suggests that jurispathic threats may also bubble up from below… sometimes from the smallest of subunits (as in this particular case).

Finally, it is difficult to set the State apart as the purveyor of "world maintenance" as if it were in some sense a neutral arbiter between a series of distinct and clear-cut narratives or narrative interpretations. While the State is no doubt inspired by the narrative jurisgenerativity of its subpart populations (much as sub-state and supra-state orders may be driven by the narrative jurisgenerativity of particular individuals or states), the process of sedimentation suggests that

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[594] These were the terms used in his sentence of excommunication according to Benedictus de Spinoza, *A Spinoza Reader: The Ethics and Other Works* (Edwin Curley ed & tran, Princeton University Press 1994) xii. His excommunication took place in 1656. Curley says of the sentence: "Excommunication was a common method of discipline in the community, often imposed for relatively trivial offences and lifted when the individual mended his ways. Because the rabbis and elders of the community were engaged in a constant struggle to reintroduce the ex-Marronos into the religious traditions of Judaism, and to restore a pattern of Jewish life which had been disrupted by the period of Christian practice and education, 'the issue of unity was … more crucial than any other … acts like Spinoza's, which challenged tradition in the name of freedom of thought and sabotaged the endeavour to repair the torn fabric of Jewish life, could not be tolerated." (ibid).

[595] See Mona Chollet, *Sorcières: La Puissance Invaincue Des Femmes* (La Découverte 2018).

[596] See Butt (n 272).

[597] See the treatment of Clarke's father (Jake Griffin) on The Ark in the popular post-apocalyptic series *The 100*. Under Ark law, anyone over 18 convicted of a crime, regardless of its nature or severity, is executed by "floatation" (ie placed into an airlock chamber which is then opened, with the condemned individual sucked into open space and killed by lack of oxygen and negative pressure (Jason Rothenberg, 'The 100' <https://www.cwtv.com/shows/the-100/>).

[598] See, for eg, the decision in Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, where the ECJ held that EU law overrode national law, even where constitutional provisions were concerned.

the State also has its own historically layered narrative to contend with. As a result, it is likely no more "neutral" than any other order. The State's commitments (whether judicial, administrative, or other) are a means of "holding firm" to its own sedimented narrative identity, forged over time.

Turning now to Cover's analysis of jurisgenesis, while "world-creating" orders are likely to harbour more jurisgenerative potential insofar as they accord more place to interactional practice, the "world-maintaining" orders are not juris-impotent and thus shorn of all creative power. As I have shown in this dissertation, all legal orders rely in part on a mapped *idem*-identity and in part on an active mapping (*ipse*-identity). Thus, all legal orders rely on interpretive commitments (*ipse*) to constantly reaffirm the valence of the map (*idem*). Some subset of these interpretive commitments are inevitably jurisgenerative, reflecting the potential of subunits to adapt to unfamiliar situations and – as I have tried to show in this dissertation – situations of interlegality (which are just unfamiliar situations writ large). A legality without jurisgenerative potential cannot survive, for it implies a situation of absolute sedimentation and an inability to adapt to novel circumstances. No legal order can rigidify to this extent and prosper, unless the context in which it evolves is static. As long as an order is composed of subparts – as all inevitably are being a collection of composite individuals – there is always the possibility that one of these subparts will dispute the map, will question the desirability of "holding firm" in a particular context. This is the essence of *ipse*-identity: for all its "holding firm", sometimes identity must mutate. And this *ipse*-initiated process produces *idem*-imprinted consequences.

I would like to take Cover's insights on the excess of law produced by jurisgenesis and the jurispathic ability to kill off law institutionally (backed in some real sense by the threat of force or violence) and excise them from the strict links he draws with the imperial and the paideic. Jurispathy and jurisgenesis are the two extremes of interpretive commitment. The first is a last-ditch commitment to protect *idem*-identity from fragmentation. The second is a last-ditch commitment to save *idem*-identity from fossilisation. The first aims to protect a minimal level of sedimentation, standing as a bulwark against the excess of law. The second chips away at excessive sedimentation, ensuring that the legal order does not stultify. Very much as Kundera's work suggests, both are latent in all individuals and in all legal orders. The excess of law (excess lightness) is a reaction to an excess of sedimentation (excess heaviness). The more rigid the map-imposed constraints, the less adaptive freedom left to travellers. In an immutable context, this may work. But nothing about the context in which we actually evolve

is immutable. And Kundera's novel repeatedly shows us how an evolving context pushes those characters who have the strongest allegiance to heaviness to develop creative (and surprisingly light) alternatives when the circumstances demand it, and vice versa.[599] As a result, excessive heaviness always drives a search for creative alternatives. So too in the other direction: jurispathy is simply a tool to preserve some heaviness in the face of excessive lightness.

With this in mind, I would like now to return to the mapping of legality across four quadrants that I set out in Chapter 3. In the next section, I will consider how excessive heaviness (over-sedimentation) and excessive lightness (under-sedimentation) help concretise the nature of legality in each of the quadrants. This final step will help us understand how it is that legal rupture may become not just a possibility, but an inevitability.

A more nuanced suggestion

The previous sections described sedimentation as the "heavy" part of legal order, that is, those aspects of a particular narrative that acquire weight over time through repeated citation and thus come to be heavily imprinted on the legal map. Kundera insists on the double-edged nature of heaviness: it is at once ultimate meaning and achievement ("life's most intense fulfillment"[600]), concretising earthly worth, and at the same time it is un unbearable Sisyphean burden, one that can only end with death. (Indeed heaviness seems to cry out for death as the only escape from, and end to, eternal recurrence!) The double-edged nature of heaviness is also true of sedimentation.

Sedimentation is the embodiment of what is most dear to a legal order. It is in some sense the legal order's roots, like a family photo album or memorabilia passed down the generations. It is a collective mythology. In addition, sedimentation gives to the legal order a depth of meaning that it would not otherwise have: the map is given greater consistency (contours are drawn in 3-D) in those areas that are most intensely used. These are the "hubs" of the legal order in some sense. As in the adolescent brain, expediency is optimised through the use of such hubs. Most importantly perhaps, as a source of meaning, and thus intelligibility, sedimentation is tightly tied to the degree of legality. The greater the sedimentation, the higher the degree of legality. Which suggests, in some basic sense at least, that beneath the requirement of intelligibility,

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[599] See, for eg, discussion Tereza's decision to return to Prague alone despite the weight of her commitment to Tomas. And Tomas' decision to follow her, despite the momentary elation of his refound (and much cherished) lightness (see further Jones (n 573) 124).
[600] Kundera (n 81) pt 1.

legality requires a certain amount of layering. Too little sedimentation makes the legal order hard to read, undermining legality itself.

But sedimentation also carries with it the Sisyphean burden: the same hill, the same boulder, the same movements, *ad nauseam*. This burden can lead to the stifling of the subparts' creative energy. Doings may become stuck in a rut, conforming unthinkingly to the weight of historical precedent. Burdened by the boulder, flightiness becomes increasingly difficult. Precepts are effective and enforced, but the narrative may be lacking soul. Excessive sedimentation makes a narrative rigid and incapable of adaptation to evolving circumstances. A map engraved in stone is more difficult to adapt when the terrain itself is evolving. Too much sedimentation defeats the purpose of the legal order itself, making the map essentially useless. This too affects legality, for a map is intelligible only insofar as it corresponds to the actual terrain. A map that cannot be updated to changes in the contextual terrain serves no purpose and becomes unintelligibility through this very lack of correspondence. Strategic defence of identity requires both heaviness and lightness: the ability to deeply embed practices which are important and the ability to creatively adapt those parts of the map that have become obsolete.

In Chapter 3, I tried to map in a very schematic fashion the contours of *idem*-legality. The idea of sedimentation brings us full circle by relating the layered nature of *ipse*-legality back to the map itself. This is space of the *idem/ipse*-overlap. Returning to my schematic mapping of legality (see Figure vi below), I would like to consider briefly how sedimentation gets expressed in each of the hegemonic, imperial, apocryphal and paideic quadrants.[601]

[601] Just to reiterate, there are no strict lines to divide the quadrants; each fades gradually into the next. This is simply a schematic space in which different types of legal order might usefully be mapped.

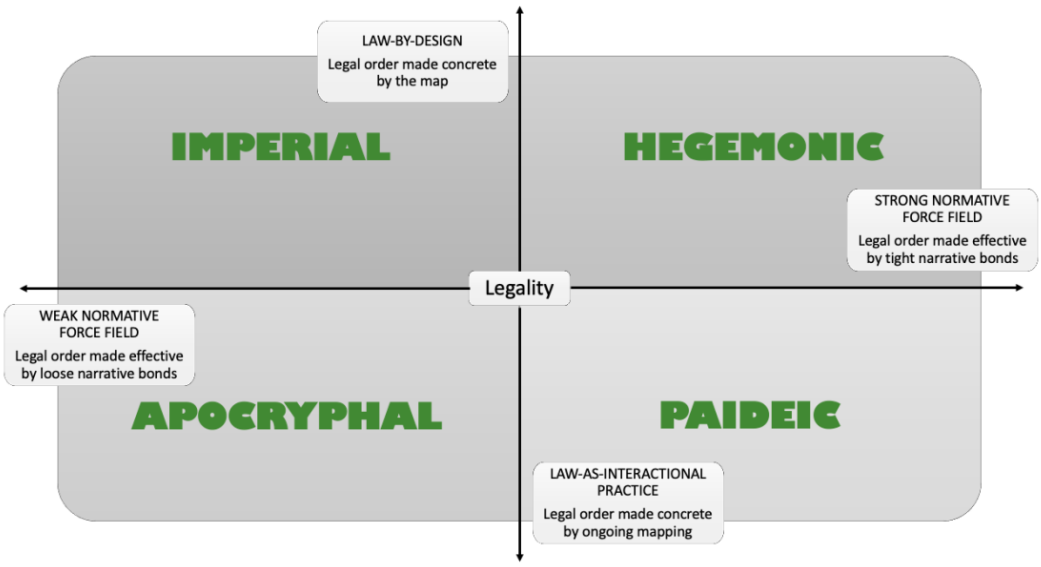

Figure vi: Returning to the quadrants

Hegemonic quadrant

In the first quadrant, I suggested that the legal narrative was primarily top-down and that it exerted strong normative pull over the doings of its subjects. I called this the realm of hegemonic legal order. In the first quadrant, the legal narrative is almost theological in its power over the individual. In the extreme corner of the quadrant, the hegemonic narrative may be extraordinarily heavy, stifling even. In all cases of hegemonic legality, though, the sedimented realm makes up a significant part of the map and many (perhaps most) doings take these sedimented pathways. Those who do not are strongly encouraged to translate their doings into sedimented terms or face the social consequences. The choice not to comply with the sedimented narrative may carry high social risk. I spoke of the Catholic Church and the centralised French State as belonging to this quadrant.

A current example of this type of legal culture might be the ideological sedimentation that is becoming common in US universities, so much so that speakers (or even university employees) wishing to challenge the sedimented narratives are socially lambasted, boycotted or forced into retreat by a sample of outraged students.[602] Such behaviour is also common within the

[602] For example, former US Secretary of State, Condoleezza Rice, faced protests and objections when invited to speak at Rutgers University in 2014, ultimately resulting in her withdrawal from the event. This is an instance of what has been referred to since the 2010s as "cancel culture" (or, more positively, "call-out culture") (see 'Cancel Culture' <https://en.wikipedia.org/w/index.php?title=Cancel_culture&oldid=1155463632> accessed 5 June 2023). This type of cancellation or calling out of views considered inappropriate was decried in 2020 by a host of writers deeply concerned about its impact on free speech (see 'A Letter on Justice and Open Debate' [2020] Harper's Magazine <https://harpers.org/a-letter-on-justice-and-open-debate/> accessed 5 June

hegemonic bubbles of social media platforms. At the US government's insistence, Twitter, for example, technically supported the public discrediting of individuals who questioned either vaccination or lockdown policies adopted during the Covid-19 pandemic by specifically blocking the "trending" possibilities of accounts associated with these individuals.[603] In the hegemonic quadrant then, there is plenty of sedimentation. Oftentimes, this will have occurred over a long period of time, as in the case of religious orders or centralised states. It may also be descriptive however of strongly ideological orders that have developed overly sedimented maps through intensive local use, such as religious sects, terrorist groups, totalitarian regimes, etc.

These examples should not be read as evincing a negative connotation. I don't wish to suggest that the hegemonic legality is characteristically objectionable. On the contrary, any legality that has a strong culture and effective structural means to preserve that culture (most usually with the consent of those concerned) is likely to fall in this quadrant. This means that a great number of our social organisations fall within this quadrant. Greenpeace, for example, is probably closer to the hegemonic legality today than to its paideic beginnings. This shift has helped further the causes it promotes (enabling it to carry out increasingly awe-inspiring publicity stunts)[604] while ensuring the physical safety and legal protection of its members. Armies too are likely to fall within the hegemonic legality quadrant, for very much the same reasons. Greenpeace and armies are two spaces in which it is important that excessive flightiness or creativity be avoided so that things don't fall apart. Political parties too often rely on strong hegemonic legalities, particularly those that have heavy ideological baggage, such as the Communist Party in France.

2023). Cancel culture is not specific to the US of course (cf Laure Murat, *Qui Annule Quoi ?: Sur La Cancel Culture* (Seuil 2022)).

[603] See Twitter Safety, 'Updates to Our Work on COVID-19 Vaccine Misinformation' <https://blog.twitter.com/en_us/topics/company/2021/updates-to-our-work-on-covid-19-vaccine-misinformation> accessed 5 June 2023; Bari Weiss and others, 'Twitter's Secret Blacklists' <https://www.thefp.com/p/twitters-secret-blacklists> accessed 19 June 2023; David Zweig, 'How Twitter Rigged the Covid Debate' <https://www.thefp.com/p/how-twitter-rigged-the-covid-debate> accessed 19 June 2023.

[604] Euronews with AFP, 'Plane Painted Green in Protest over France's Climate Crisis Response' (*euronews*, 5 March 2021) <https://www.euronews.com/2021/03/05/greenpeace-stunt-as-aircraft-painted-green-in-protest-over-france-s-climate-crisis-respons> accessed 14 June 2023.

Closer to the paideic boundary, some businesses may develop their own hegemonic company culture to inspire (and ensure) employee loyalty and productivity.[605] Patagonia, for example, has set itself apart among its employees and among customers as possessing an "irreverent, unconventional, one-of-a-kind culture":[606] it has an employee handbook entitled *Let My People Go Surfing*, gives employees a long weekend every two weeks and offers three different onsite childcare centres; it allows employees to take 2 months paid leave to do environmental work and it pays bail for employees who are arrested for climate activism; it took out a full-page ad in the New York Times on Black Friday in 2011 stating "Don't buy this jacket",[607] provides a lifelong guarantee for its products and encourages repairing over replacing whenever possible; it pays for breastfeeding Mums to be accompanied by their baby and a nanny on business trips; and it has an ongoing commitment to give 1% of sales to environmental groups.[608] In September 2022, Patagonia took its "un-company" culture a step further by handing over ownership to a trust and to a new non-profit, the Holdfast Collective, focused on climate activism and environmental advocacy.[609] Strongly mapped identities such as these have played important roles historically in forging some level of cohesion and understanding among members of large groups.

Imperial quadrant

The second quadrant, the imperial, is also characterised by a heavily sedimented narrative. In this quadrant, however, the sedimentation is objectivised or naturalised as if we were observing something that historically has always been (or at least has always been valued by the dominant groups in society). Here too the sedimented narratives are heavily influent on doings. The difference between the hegemonic and the imperial quadrants lies in the origin of their

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[605] See Benjamin Laker, 'Culture Is A Company's Single Most Powerful Advantage. Here's Why' <https://www.forbes.com/sites/benjaminlaker/2021/04/23/culture-is-a-companys-single-most-powerful-advantage-heres-why/> accessed 13 June 2023.

[606] Bruce M Anderson, '5 "Ridiculous" Ways Patagonia Has Built a Culture That Does Well and Does Good' (*LinkedIn*, 27 October 2019) <https://www.linkedin.com/business/talent/blog/talent-connect/ways-patagonia-built-ridiculous-culture> accessed 13 June 2023.

[607] Patagonia, 'Don't Buy This Jacket, Black Friday and the New York Times - Patagonia Stories' (*Patagonia*, 25 November 2011) <https://www.patagonia.com/stories/dont-buy-this-jacket-black-friday-and-the-new-york-times/story-18615.html> accessed 13 June 2023.

[608] See Anderson (n 606). See also founder Chouinard's description of this culture in Yvon Chouinard, 'The Next 100 Years' (1995) <https://thedesignofprosperity.se/2009/press/chouinard/TheNext100Years-YvonChouinard-Patagonia-Inc.pdf>.

[609] Erin McCormick, 'Patagonia's Billionaire Owner Gives Away Company to Fight Climate Crisis' *The Guardian* (14 September 2022) <https://www.theguardian.com/us-news/2022/sep/14/patagonias-billionaire-owner-gives-away-company-to-fight-climate-crisis-yvon-chouinard> accessed 13 June 2023. The nonprofit collective holds 98% of Patagonia stocks, worth about USD 100 million a year in dividends.

sedimented narratives. In the first case, the sedimentation lies at the foundation of a particular ideology and is often openly linked to a particularly charismatic leader, a transcendental scripture, or a thinker who incarnates the ideology. The ideology is intentionally (and generally consensually) adopted and is value-laden. Legal orders that fall within the imperial quadrant, on the other hand, tend to disavow the existence of narratives. Instead the imperial naturalises sedimentation, giving it a scientific or objective existence idealised as independent of human values, emotion, or bias. The imperially sedimented narrative is (artificially) set apart from human doings and in this sense considered natural/unintentional. It is admired for its status as scientific "truth" rather than its transcendental meaning.

Spatially, imperial legal orders tend to be "unperfected" (or interrupted) in a way that hegemonic legal orders simply are not.[610] This adds a layer of complexity to the imperial map, for it means that the top-down order is constantly striving to piece together the bitty map into something more whole. One cannot do this by "cancelling" those who do not comply with the sedimented sectors of the punctured map. Instead, the pockets of un-imperial (or less-imperial) order must be integrated somehow into the imperial web. It seems to me that this corresponds to Pasternak's idea of "perfecting settler sovereignty" as discussed in the context of the story of the Algonquins of Barriere Lake.[611] Pasternak frames her very interlegal argument in terms of "jurisdiction", which derives "from the Latin ius dicere – literally to speak the law".[612] The active mapping of the law embodied by jurisdiction parallels the legal ordering I have discussed under the head of *ipse*-legality: it is the rendering concrete of the law, the everyday sayings or doings that breathe life into the law.

The trend has been to "perfect" imperial sovereignty either by minimising the space of existence available to alternative maps or by attempting to "reconcile" the strange map to the imperial map, translating the strange other into terms recognisable by the imperial. In the first

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[610] This point is made repeatedly by Pasternak in her excellent book, Pasternak (n 82). She argues that imperial legalities are "uneven" with differentiated legal zones (ibid 7). This idea of "unperfected" settler sovereignty (in the sense that settlers are never completely able to ensure the overlap of sovereignty, territory and jurisdiction) comes from Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Harvard University Press 2010). I believe this is characteristic of the imperial quadrant.

[611] Pasternak (n 82) 8.

[612] Dorsett and McVeigh (n 593) 4. For Dorsett and McVeigh, jurisdiction connotes both authority and this act of speaking the law, thus "to exercise jurisdiction is to bring law into existence" (ibid). It is worth noting here that this jurisdicting act is very similar to the initiatory move in ipse-legality; it is the first "I will hold firm". It is the first acknowledgement that there is something to hold fast to and thus the first affirmation of law's existence (or the existence of identity more generally in Ricoeur's terms).

instance, imperial orders "perfect" pockets of un-imperial order by "taking up space".[613] This needn't imply physical occupation of course (though it may).[614] A web of overlapping (imperial) jurisdictional frameworks may have the same effect, gradually undoing the vitality of "grounded authority"[615] within un-imperial orders. Ford and Dorsett have also discussed this "perfecting" of a singular settler sovereignty through the progressive quashing of all competing claims to jurisdiction.[616] But this "perfecting" of the imperial legality does not exclusively single out indigenous legalities. Jurisdictional techniques of "taking up space" have also been used to try and perfect sovereignty where ZADs (in France) threaten to undermine the singular fabric of the imperial law.[617]

In the second instance, an imperial order may "reconcile" a pocket of un-imperial order by rendering anew, that is, by rendering doings legible within the supposed objective, scientific, or naturalised narrative as a whole.[618] "A truly sovereign ipseity assimilates competing sovereignties to itself."[619] I think that assimilation is probably more piecemeal than this quotation suggests. The un-imperial pocket is rarely assimilated wholesale; instead the pocket is gradually unpicked. Taking up the position of a good Samaritan, the settler state may (for example) impose on itself a fiduciary duty to acknowledge alternative practices,[620] all the while

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[613] Pasternak describes in detail how the Canadian settler state has claimed authority over Algonquin territory in Barriere Lake "through *taking up* Indigenous space" (Pasternak (n 82) 22 (italics in original))
[614] Indigenous peoples have often seen their traditional land base drastically reduced in size, for eg, see Justin Farrell and others, 'Effects of Land Dispossession and Forced Migration on Indigenous Peoples in North America' (2021) 374 Science eabe4943 <https://www.science.org/doi/10.1126/science.abe4943> accessed 22 June 2023: "Of the tribes that still have a land base, their present-day lands are an average of 2.6% the size of their estimated historical area".
[615] This is the title of Pasternak's book (Pasternak (n 82)) and refers to Indigenous jurisdiction on the ground.
[616] As referenced by Pasternak (ibid 12).
[617] See, for eg, the space occupied by the ZAD Notre Dame des Landes in France.
[618] For example, indigenous practices may be "reconciled" or translated into more familiar rights-language. Bracken suggests that "Reconciliation is an immune system that saves the law from contamination by other, 'pre-existing' cultures." (Christopher Bracken, 'Reconciliation Romance: A Study in Juridical Theology' (2015) 24 Qui Parle 1, 4 <http://www.jstor.org/stable/10.5250/quiparle.24.1.0001> accessed 9 October 2020).
[619] ibid 2. This is a quote from Bracken which appeals to Derrida's concept of "ipseity" (the capacity for self-causation) to describe what he calls "reconciliation", a process of rendering the law of another semblable (*adsimilatio* in Derrida's terms). Bracken suggests that reconciliation occurs when courts reconcile aboriginal practices to settler state law (as in *R v Van der Peet* [1996] 2 SCR 507) by translating them into common-law rights, making them "same". "European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights." (*Mitchell v MNR* [2001] 1 SCR 911, at para. 10).
[620] See an in-depth discussion of the Canadian Crown's fiduciary duty in Ryan Beaton, 'The Crown Fiduciary Duty at the Supreme Court of Canada: Reaching Across Nations, or Held Within the Grip of the

retaining the power to carve out exceptions to that duty and so ensuring passive reliance on continuing Good-Samaritanism. Legalities in the imperial quadrant then are typical in their insistence on a singular and perfected map: imperial sedimentation is about ensuring regularity across space as much as time.

Apocryphal quadrant

Sedimentation in the apocryphal quadrant carries something of the imperial insofar as it too appeals to an objectivised narrative, though the narrative is objectivised by "neutral" technical structures (eg market dynamics, big data, statistical analysis). However, this "neutralised" narrative is not transcendental in the sense that the imperial narrative makes itself out to be; it is absolutely immanent. The narrative is strictly composed of aggregated doings – no more and no less – with statistical analysis or models serving as stand-ins for sedimentation. The repetitive citation which congeals into sedimented narrative tends to be quantified in data, money or numbers, with quantification itself providing the narrative content, as in Rouvroy's "algorithmic governmentality".[621] Here the appeal is not to a naturalised or scientific truth, but to a neutral narrative, one that adheres so closely to actuality that it cannot be dismissed. It is *"un régime de fiabilité sans vérité ; l'information est opérationnelle, ni vraie, ni fausse"* ("a regime of reliability without truth; information is operational, neither true, nor false").[622] Rouvroy refers to this as "neutralisation"[623] because the sedimented narrative (which is really no more than a collection of doings) is suggestively projected forward in time, neutralising future possibilities. Rather than seeking to "perfect" settler (or imperial) sovereignty in a spatial sense then, apocryphal orders are arranged[624] such that they seek to "perfect" legality in a temporal sense, by colonising the future ("taking up [future] space" and "reconciling" the future to the aggregated data). In the ideal-type corner of the quadrant, sedimented narratives encourage absolute path-dependency, appealing to probable doings (as calculated from "numerical fluxes")[625] in order to shut down a large range of future "possible" doings. In this way, algorithmic governmentality "acts in advance on what bodies can do".[626]

Crown?' (2018) 6 <https://www.cigionline.org/publications/crown-fiduciary-duty-supreme-court-canada-reaching-across-nations-or-held-within-grip/> accessed 24 November 2023.

[621] See Rouvroy, 'Governing Without Norms' (n 400).

[622] Rouvroy (n 399) 61 (my translation).

[623] Rouvroy, 'Governing Without Norms' (n 400) 100.

[624] They do not "seek to" perfect legality as in the imperial quadrant since there is no intention to the aggregative models that drive such behaviour.

[625] Rouvroy, 'Governing Without Norms' (n 400) 101.

[626] ibid 100.

An example should make this clearer. Amazon recently adopted artificial intelligence (AI) technology in order to help automate its application process. After years working on the automated system, the team of researchers was disbanded. Why? Having been fed 10 years of application data (heavily biased in favour of male applications), the AI technology had taught itself to sort applications on a sexist basis. CVs that mentioned "woman" or that listed a women's college were rapidly discarded. Even once this was corrected for manually, the AI technology privileged CVs that used terms such as "executed" or "captured" since these were more regularly employed by men.[627] These same tendencies were highlighted in a recent report by UNESCO, the Inter-American Development Bank (IDB) and the Organisation for Economic Co-operation and Development (OECD) examining the effects of the use of AI on the working lives of women.[628] This type of inbuilt bias makes one wonder how "neutral" the algorithmic determinations of parole discussed in Chapter 3 can possibly be.[629]

It is worth considering a less extreme market example to round out the description of sedimented apocryphal narratives. Creating markets for certain products – which results in a price being allocated to such products – may neutralise future doings in just the same way that AI or algorithms may do. In an early and impassioned treatise on blood donations,[630] Titmuss argued that the British system of relying exclusively on voluntary donations of blood was economically, medically, and morally superior to the American system, in which many blood suppliers were paid. He clearly had a point because even today the World Health Organisation (WHO) favours donations on the basis of studies that have repeatedly shown donated blood to be more reliably safe (since there is no incentive to lie about ones medical history or risk factors) and more reliably sourced over time (since people more readily come forward in times of need or during gluts).[631] It turns out that, when suppliers are paid, Titmuss was right: blood is supplied primarily by needy populations (who may end up being exploited);[632] blood is more

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[627] See Reuters, 'Amazon Ditched AI Recruiting Tool That Favored Men for Technical Jobs' [2018] The Guardian <https://www.theguardian.com/technology/2018/oct/10/amazon-hiring-ai-gender-bias-recruiting-engine> accessed 7 June 2023.
[628] Clementine Collett, Gina Neff and Livia Gouvea, 'The Effects of AI on the Working Lives of Women' (UNESCO, IDB, OECD 2022) <https://publications.iadb.org/en/effects-ai-working-lives-women> accessed 7 June 2023; see also Natalie Huet, 'Gender Bias in AI Recruiting: How Algorithms Hold Women Back' <https://www.euronews.com/next/2022/03/08/gender-bias-in-recruitment-how-ai-hiring-tools-are-hindering-women-s-careers> accessed 7 June 2023.
[629] I suppose that "as neutral as our non-neutral human doings permit them to be" is the correct answer.
[630] Richard Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (Allen & Unwin 1970).
[631] These arguments are helpfully set out in Stanford Blood Center, 'Why Blood Donation Is Unpaid: A Global Perspective' <https://stanfordbloodcenter.org/pulse-volunteer-donations/> accessed 8 June 2023.
[632] Richard Titmuss, 'The Gift of Blood' (1998) 35 Society 88, 91 <https://doi.org/10.1007/BF02838132> accessed 8 June 2023.

frequently found to be unsafe;[633] volunteer populations decrease;[634] and price hikes are required to respond to crisis situations.[635] The qualification of human blood as a tradeable market product (considered a most basic and "neutral" move by "*laissez-faire* economists, lawyers, and American medical writers hostile to 'socialised medicine'")[636] in fact changes the sedimented narrative. This manifests as doings that follow a particularly predictable (and not necessarily more advantageous) economically-motivated path-dependency.[637]

In what way does this suggest an apocryphal colonisation of the future? Our (occasional) choice to leave markets to their own devices (by accepting *laissez faire* self-regulation for example) inevitably shuts down certain future doings. When negative externalities (such as pollution or excessive use of non-renewable resources) are disregarded by existing market-players (ie prices do not reflect these externalities), companies have no incentive to do anything about the ecologically devastating consequences of their production lines. Similarly, the use of ratings (such as environmental, social, and corporate governance (ESG) ratings, financial ratings, or nutritional ratings) inevitably skew the future doings of individuals and businesses impacted by the social or market consequences of such ratings.[638] Both in the market cases and in the ratings cases, we find ourselves in a situation where doings that deviate from the path-dependency suggested by the data, market-price or statistical aggregates must be explicitly explained. Like surprising events in a narrative, some folding back in is required to integrate

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[633] "A vendor has an incentive to conceal unfavourable product information; a giver has none. Thus, the blood market, like the insurance market, is vulnerable to adverse selection." (Iain McLean and Jo Poulton, 'Good Blood, Bad Blood, and the Market: "The Gift Relationship" Revisited' (1986) 6 Journal of Public Policy 431, 440 <https://www.cambridge.org/core/journals/journal-of-public-policy/article/good-blood-bad-blood-and-the-market-the-gift-relationship-revisited/95D8B30C2A4548F861820287B450AF9B> accessed 8 June 2023).

[634] The knowledge that some are selling blood may dissuade others from giving it. In addition, "Kantian reciprocators" (as one article calls blood donors) tend to believe "that it is wrong to free-ride. Therefore, if the only way to provide blood for transfusion is through donation, he will feel guilty if he does not donate. But add a market, and the guilt disappears. I (if I am such a person) no longer feel that I am parasitic on those who supply blood, by not supplying any myself." (ibid 443). Indeed the very fact that the only way to get blood in the UK is via donations may increase the motivation of [Kantian-type] donors. In addition, commercial blood suppliers tend to discourage the growth of not-for-profit facilities (ibid 439).

[635] "You can increase gifts by inducing more people to give but you can increase sales only by raising the unit price" (ibid 440). This has obvious repercussions on treatment options since

[636] ibid 434.

[637] Simmel also argued that the economic bonds had this effect of sterilising affective relationships (and thus solidarity) in his article on the mental life in the metropolis, see Georg Simmel, 'The Metropolis and Mental Life (1903)' in Gary Bridge and Sophie Watson (eds), *The Blackwell City Reader* (Wiley Blackwell 2002).

[638] On ESG ratings and how these skew investments despite their unregulated methodology and limited relevance, see Cam Simpson, Akshat Rathi and Saijel Kishan, 'Sustainable Investing Is Mostly About Sustaining Corporations' [2021] Bloomberg.com <https://www.bloomberg.com/graphics/2021-what-is-esg-investing-msci-ratings-focus-on-corporate-bottom-line/> accessed 26 June 2023.

the exceptional event into the previously coherent narrative.[639] Oftentimes, those doings that do not comply are reconciled to the narrative as exceptions that prove the rule, as the tail ends of the bell curve. As "exceptions" they are likely to be considered of little interest and as a result don't receive much attention.[640]

This type of apocryphal legality is not simply anecdotal. Indeed with the advent of large language model AIs, the apocryphal quadrant is likely to become more densely populated than ever. Unlike imperial legalities, here there are no explicitly enumerated precepts. Driven by doings, the apocryphal legality stands squarely in the camp of the "world creating". And certainly, on the face of it, new doings are always possible. Still, it is worth acknowledging that our ability to record all doings and aggregate them into standardised categories and averages with standard deviations removes some of that innate freedom. In a world where there is a record of all deeds (which itself becomes a compiled narrative), the ease with which we are able to exit the narrative or take a tangent is also reduced. I talked about Reisman's "brief encounters" as belonging to this quadrant in Chapter 3. Indeed basic cultural norms such as "la bise" greeting in France and the head wobble to signal understanding and/or agreement in India also fit the apocryphal category. These are signalling behaviours that are driven (during normal periods) exclusively by past signals.[641] Similarly, in our interactions with social media, we are generally unaware of how much of our everyday behaviour is canalised by strategically

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[639] Flashbacks can serve this purpose in a narrative, filling in missing pieces. In the apocryphal legality quadrant, extra effort must be made to render intelligible doings that deviate from the (technically) sedimented narrative.

[640] There is a very interesting medical example of this, labelled (by an engineer) as the LMHR phenotype. LMHR stands for Lean Mass Hyper Responder. Individuals who fit this phenotype are generally lean and very fit for their age. When they go on a ketogenic diet, however, they see their LDL cholesterol skyrocket to numbers previously only seen in instances of familial hypercholesterolaemia. It is highly unlikely that cholesterol levels in these individuals fit the traditional narrative of high cholesterol = heart disease, particularly since their HDL and triglyceride levels remain extremely healthy. As such, they could be an extremely interesting population to study just out of scientific curiosity. But no major medical funding institution will fund a study on a bell curve tail end (particularly one that involves essentially healthy individuals). This type of shortsightedness doesn't help us advance our understanding of cholesterol. But it does protect the sedimented narrative that high LDL cholesterol inevitably means a heightened risk of heart disease and should be treated with a statin (see further Nicholas G Norwitz and others, 'Case Report: Hypercholesterolemia "Lean Mass Hyper-Responder" Phenotype Presents in the Context of a Low Saturated Fat Carbohydrate-Restricted Diet' (2022) 13 Frontiers in Endocrinology <https://www.frontiersin.org/articles/10.3389/fendo.2022.830325> accessed 7 June 2023).

[641] I found it very interesting to note during the Covid-19 pandemic the latency with which French people gave up la bise following government orders to adopt the fist-tap instead and then took up la bise again post-Covid. There was a period of uncomfortable hesitation, where each new person one met had to be explicitly asked *"tu fais la bise ou pas?"* ("Do you kiss or not?") It was period during which it became blindingly obvious how such social conventions simplify meetings and greetings and how lost we feel without them.

arranged dopamine hits or social conventions tied to our desire to be understood and accepted.[642] But AI takes everyday social norms to a new level precisely because of its extraordinary aggregative possibilities. It takes multiplied doings over years and establishes their average impetus as a technically-inspired "neutralised" narrative. It is far too early to say how much of an impact this will have on law. Suffice it to say that future work in legal theory is unlikely to be able to continue to ignore the apocryphal quadrant.

Paideic quadrant

Finally, we come to the paideic quadrant. Sedimentation in this quadrant, contrary to the other three, is harder to come by. Indeed, at the extreme corner of the paideic, the lack of sedimentation is a defining feature. Here identity is fleeting and flighty. There is much less to hold firm to. Narrative construction is ongoing and narrative creativity is paramount. Similar to the apocryphal, this is perhaps the domain of legality where narrative carries the heaviest imprint of the present. In the upper quadrants, the present (one's current position in mapped space and projected movements) has depth in the form of sedimented narrative past (hegemonic and imperial). In the apocryphal quadrant, sedimentation is projected rather than achieved; it is the narrative vision that shuts down possibilities. Current doings are unintentionally channelled in a certain direction, much like the footsteps falling into a cohesive rhythm on the Millennium Bridge. In the paideic quadrant, one's position and one's doings in the present are guided more by affect and emotion (either one's own or the affects and emotions of those closest to us). Again sedimentation is more likely to be projected than achieved; the present is pregnant with expectations. When the narrative vision becomes excessively sedimented though, it is often a sign that the paideic legality itself is either losing steam (the creative energy that drives new narratives may be flagging)[643] or that the legality is heading north towards the hegemonic or the imperial quadrants (as practice solidifies around a single narrative).[644]

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[642] I am still intrigued when this happens in WhatsApp groups created for parents or for informational purposes. When a piece of information is delivered and one parent says thank you, the whole list of parents seems to feel a socially imposed obligation to do the same, cluttering the "informational" space with time-consuming and relatively pointless(?) messages.

[643] This may be the case in movements that suffer from high levels of activist burnout for eg.

[644] This may be the case in an alternative school for eg, where the first years may be quite anarchic and horizontal, but where often a central figure or pedagogical ideology tends to provide a more solidified structure and narrative over time. A French intellectual with a Spinozist bent, Lordon, argues – convincingly I think – that strict anarchy is impossible: the anarchist organisation will always move towards some form of verticality over time (even if this is simply in the form of a unifying narrative) (see further 'L'anarcho-Syndicalisme' <https://www.dailymotion.com/video/x2kt7tq> accessed 11 June 2023).

There are two concurrent risks run by paideic legalities. First, the extreme narrative creativity that characterises such legal orders is both its most appealing feature and a destructive Achilles heel. In positive terms, it means that nothing stultifies: meaning is always being engaged with, questioned, redefined, remapped. This anarchic jurisgenerativity is what gives the paideic legality a refreshing vitality not found in other legalities. This is the lightness of which Kundera spoke. Something must hold this anarchic identity together though, else the paideia risks narrative fragmentation and total loss of meaning. The legal order would be at constant risk of falling apart. Two things hold the paideic legality together. First, the whole is held together by instinctual emotions, familial bonds, friendship and attachment. One is inducted into a culture through such bonds, so the term paideic seems particularly apt to characterise such legalities. Bonds of trust can be absolutely essential in certain paideic legalities.[645] Sometimes an additional spiritual layer may be called upon,[646] but this is not a defining aspect of the paideic. Second, a paideic legality is held together by external recognition of its unity. Sometimes, within a movement itself, dissension is rife. Despite this, the fact that an (often hostile) outside deems the legality to be relevant, unitary at least in the sense of a recognisable unit, and deserving of unitary treatment may be sufficient to hold the movement together. A full-on legal attack by the state or excessively violent police treatment may reinforce feelings of unity with a radical environmental movement for example.[647]

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[645] Particularly the paideic examples one finds in the corner of the quadrant such as small-scale immigrant camps, Roma communities, ZAD (*zone à défendre*) activists, radical environmental movements.

[646] I have often remarked, for eg, that environmental movements (particularly the more radical among them) have a tendency to develop (encourage even) an esoteric spiritual dimension. I wonder whether this dimension of the movement is developed in the hope that it will help to hold the legal order together when the group becomes too large for familial or affective bonds to do this work. This is of course purely anecdotal, but I couldn't help noticing that other environmental activists have had similar thoughts/experiences (eg Aric McBay, Lierre Keith and Derrick Jensen, *Deep Green Resistance* (1st edn, Seven Stories Press 2011) 160–163). This "spiritual" dimension could also be linked to a particular shared passion, such as the love of cricket for the members of the Marylebone Cricket Club.

[647] On 29 March 2023, Gérald Darmanin (French Minister for the Interior) declared that the government would dissolve the ecological movement *Les Soulèvements de la Terre* (Earth Uprising), a movement that had just participated in the violent demonstrations held at the giant retention basin in Sainte Soline. The following day, a petition was published entitled *"Nous sommes les Soulèvements de la Terre"* ("We are the Earth Uprising"), which promptly attracted 100,000 signatures. At the same time, they called for local chapters of the movement to declare their creation: 140 such chapters promptly did so. Note that the dissolution has not yet (as of 10/06/2023) been pronounced and seems increasingly unlikely given the movement's success (see further https://lessoulevementsdelaterre.org; Juliette Delage and Pauline Moullot, 'Soulèvements de La Terre : Une Dissolution Opaque ?' [2023] Libération <https://www.liberation.fr/societe/police-justice/dissolution-des-soulevements-de-la-terre-simple-retard-ou-vrai-recul-20230501_XXJ6UFTRTFA5VLSCOXQXYHMNAE/> accessed 9 June 2023).

Unbearableness?

We can conclude from the above that there are some obvious differences in sedimentation as between the quadrants. In particular, it seems clear that the first two quadrants tend toward more heaviness, while the second two quadrants espouse many aspects of lightness. Sedimentation in the northern quadrants is a layering of the map; it has the depth of intensive use throughout the past or intensive use in a particular space. The map is messier in the southern quadrants; there is a lot of noise and less obviously distinguishable layering. Creative adaptability is paramount. Nevertheless, sedimentation is also present here in the form of path-dependency or group expectations. It is felt as a projected sedimentation: one that colonises the future by predicting intensive use going forward, even to the point of closing down future possibilities. The map is better defined in the northern quadrants; the future direction of the narrative attracts more attention in the southern quadrants.

What is not clear however is the extent to which the tendency towards heaviness or towards lightness is "unbearable". In the final two sections, I will discuss when and how sedimentation may also be legality's undoing.

Unbearableness: Legality's undoing

In Chapter 3, I suggested that we might better understand legality as experienced by degrees and from two different standpoints. Legality may be experienced internally by the subparts of the collective self (to what extent can I self-explain our narrative – ie the causes and effects of our joint action), but also externally by concerned-others (to what extent is a particular legal narrative – ie the causes and effects of some legal order's joint action – intelligible to others outside of the legal order). In the conclusion to that chapter, I noted that internally experienced legality ensures the permanence of a legal order, while externally experienced legality determines the relevance of that legal order. All legal orders are at some point concerned to protect their internal intelligibility (permanence) and their external intelligibility (relevance). This is part and parcel of the "strategic defence" of (legal) individuality.

What does sedimentation have to do with legality? Sedimentation gives a legal map depth; the map has greater definition, at least in those corners of the map that are most used. It is a laying down for posterity of today's legal narrative. For the subparts who rely on the map to self-position and orient their doings, this definitional depth is likely to improve legibility somewhat and thus protect internal legality. For concerned-others, increased sedimentation would also seem to facilitate legibility at a distance and over time, since it is likely to reduce impetuous

changes to the map. If this is so, then it would seem to be a good move strategically for a legal order to encourage sedimentation.

With Kundera's warnings in mind, however, this seems a hasty conclusion. First, the degree of legality or legibility is more closely tied to legal narrative than to the map itself. Of course, sedimentation is the imprint of legal narrative to date (mapped narrative). But legal narrative does not stop at this imprint, as the map does. Legal narrative continues to self-perpetuate through the interaction of the map with actuality itself: the non-imprinted, striving part of narrative turns the map into potential. It is both a normative projection into the future of those precepts that have been mapped and an ongoing mapping manifested in everyday doings. Legibility requires a map that is both decipherable and functional, helping one to orient in the world. It follows that a map with greater definition in some (no doubt essential) parts is not necessarily a map that is easier to read or to use. Forced "hubness" may make it difficult to locate oneself and may even slow progress from one place to another, causing frustration or leading the map-user to abandon the map entirely. Similarly, an excessively defined map leaves little room for narrative potential, for transformation through contact with alternative narratives, and more specifically the narratives of concerned-others with whom one may wish to forge better relations. Sometimes heaviness may support legality; other times heaviness is unbearable, undermining legality.

Moreover, sometimes sedimentation in service of internal legibility (ie permanence) may work against external legibility (ie relevance), or vice versa. In the imperial quadrant, for example, sedimentation may be relied upon to give some structure (ie internal legibility) to what is likely a piecemeal legal order (eg the legal order of the European Union). The fact that the imperial order often naturalises its narrative means that this sedimentation tends not to be recognised as such. The upshot of this might be that subparts (eg Wallonia or the UK through Brexit) react to the heaviness of the unacknowledged imperial narrative by denying its relevance in a particular instance of overlapping-jurisdiction. In so doing, these subparts take up position as concerned-others, temporarily (or permanently) denying their "subpartness", their belonging.[648] This type of activity undermines the "unperfected" order's ability to ensure its

[648] The cases of Wallonia and the UK might not seem, at first sight, to be "concerned-others". Are they not subparts of the EU legal order itself? I would argue that they are both at once, depending on the issue. The imperial order of the EU is far from complete, so they cannot be deemed fully encompassed as might be a smaller paideic order within a national legal order. There exists therefore, a large swathe of terrain in which they are fully "concerned-others" (stepping outside the EU map and relying on a separate national or regional narratives). This same argument might be made (and is made by Ken Foster, 'Is There a Global

external legibility (and thus relevance) in future disputes. The reverse may also be true. In the paideic quadrant, for example, it may be helpful for external legibility (and thus relevance) that the paideic order present a united/sedimented front with regard to the encompassing legal order. At the same time, this external legibility may facilitate categorisation by the encompassing legal order and thus frustrate internal creativity (a defining feature of the paideic, without which it is unlikely to be able to ensure its permanence).[649] These two examples show that while sedimentation may serve narrative legibility on one front, this same sedimentation may undermine narrative legibility on the other front.

As I mentioned at the outset to Sedimentation in the quadrants, sedimentation is only useful insofar as it recognises the necessary interplay between heaviness and lightness, an interplay that varies from quadrant to quadrant.

Western quadrants

In the western quadrants, maps are distributed, strategically designed to function across wide-ranging terrain. Sedimentation in these quadrants acquires ultimate meaning through the use of hub-like structures, exerting structural normative pull by facilitating those doings that use the hub-linked pathways. Hubs are often unintentional structural concentrations. Nevertheless, legal order in these quadrants remains "unperfected" and this is especially visible with regard to the sedimented parts of the map. Imperial orders are unperfected in a spatial sense: sedimentation does not hold for all subparts. This means that doings (*ipse*-identity) may not always reflect the map that has been drawn up (*idem*-identity). Sometimes subparts will explicitly avoid the hubs. The character of the imperial legal order (*idem*-/*ipse*-overlap) may shift occasionally because of this. Apocryphal orders, on the other hand, are unperfected in a temporal sense: sedimentation is projected but not yet achieved. This means that the map (*idem*-identity) awaits confirmation of sedimentation by actual doings (*ipse*-identity) and this expectation may sometimes be frustrated. Remember that the apocryphal map is a "neutralised"

Sports Law?' (2016) 2 Entertainment and Sports Law Journal 1 <https://www.entsportslawjournal.com/article/id/693/> accessed 26 June 2023, p. 2) in the apocryphal quadrant for *lex sportiva*: "*lex sportiva* […] is a cloak for continued self-regulation by international sports federations. It is a claim for non-intervention by both national legal systems and by international sports law. It thus opposes a rule of law in regulating international sport."

[649] A parallel might be drawn here with the ZAD Notre Dame des Landes in France. Once the battle against the construction of an airport had been won, the French state wanted the community disbanded and all dwellings removed from the land. Having insisted primarily on this dimension of their common map, the community's external "relevance" had been reduced to this, despite the fact that internally there was much more going on (a weekly market with no prices, new forms of property, communal responsibilities, etc).

version of identity with all extremes removed (or at the very least diluted) because of their statistical insignificance. Projected hubs may not adequately represent the variety of potential future pathways. The character (*idem*-/*ipse*-overlap) of the apocryphal order may shift without notice as a result of marginal doings that project non-hub-routed alternatives. In both imperial and apocryphal orders then, the result of "unperfected" sedimentation may be a pressing need for character (*idem*-/*ipse*-overlap) shifts.

Narrative legibility in the western quadrants may thus be undermined by underinclusive sedimentation because of the "unperfected" pockets of legal order.

The "unperfected" pockets will tend to be spatial for the imperial. This means that sedimentation (or the heavily imprinted parts of narrative) may be underinclusive in the imperial quadrant. The burden of underinclusive sedimentation may be made particularly heavy by the tendency to naturalise the imperial narrative, denying its inevitably localised and intentional quality. As a result, the bitty imperial map is constantly plagued by "unperfected" subparts. These "unperfected" subparts represent the ongoing possibility that the imperial map will produce concerned-others within its own fabric. "Concerned" insofar as the imperial web enwraps them; "others" insofar as imperial sedimentation does not correspond to their own "grounded"[650] narratives. As Pasternak states, "To the state, Barriere Lake lands could not possibly exist outside of this European spatial order. But, of course, Indigenous jurisdiction poses precisely this dislocation to state narratives of sovereign power."[651] The drive to achieve a high degree of internal legality through sedimentation may thus undermine external legality (lack of responsiveness to "unperfected" subpart – always potentially concerned-other – pockets).

The "unperfected" pockets will tend to be temporal for the apocryphal. That is, the projected sedimentation may be insufficiently inclusive of potential doings. The apocryphal quadrant is less legible by nature, because of its bottom-up structure. The map is immanent rather than deeply imprinted. As a result, the intelligibility for concerned-others (external legibility) is likely to be low. With limited external relevance, the focus tends to be internal. Through their

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[650] I see "grounded narratives" as the way in which interpretive commitments embody narrative on the ground. "Jurisdiction" (ie speaking the law) may well be a synonym for grounded narratives. See the link to Pasternak's discussion of "grounded authority" in the citation that follows.

[651] Pasternak (n 82) 188. The first sentence acknowledges the naturalised sedimentation of imperial settler maps. The second sentence acknowledges the "unperfected" pockets and their potential to renege on "subpartness". Dislocation might be understood as precisely this: the insistent shift from subpart to concerned-other.

doings, subparts affirm the apocryphal narrative going forward. Doings are the everyday proof that legibility (in this case internal legibility) is still possible. What threatens legality in the case of the apocryphal then?

Externally: irresolvable conflicts with motivated/intentional narratives of concerned-others.[652] This was the case for example with the apocryphal *bise*[653] in France during the period of Covid-19. The French government invested in serious advertising to persuade the French population to avoid *la bise*.[654] Fist bumps, elbow taps, and feet kisses were all suggested. For an interim period, greetings in France became fuzzy… no one knew what to do. Eventually the fist bump prevailed in most situations. But as the successive Covid waves passed, vaccines became available, and the vast majority of the population had already caught and recovered from Covid, the question arose again. During this second interim period, consent was required. One had to repeatedly ask "Do you kiss?" so as not to be presumptuous. Today the projected sedimentation of *la bise* has come undone somewhat. Since its intentional questioning and subsequent *ipse*-variance, it has become less legible internally. Where the alternative narrative is convincing, projected sedimentation may shift (even if temporarily as in this case).

Internally: irresolvable conflicts with the motivated/intentional narratives of "unperfected" temporal pockets. Those who refuse to "read" directly off the script (eg the judge who wishes to question the AI-suggested parole decision) represent the "unperfected" temporal pockets and these unscripted doings must be explicitly justified before they will be accepted by the apocryphal order. Where the justification (based on an alternative narrative) is convincing, projected sedimentation may again shift.

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[652] One might ask why this is a case of conflict with the narrative of a concerned-other (that concerned-other being the French state). The apocryphal order of *la bise* is not a precept of the state order, nor is it particular to France, and its origins probably date back to the late Antiquity (see further Mathieu Avanzi, 'Which Cheek and How Many? In France and Beyond, a Kiss Isn't Just a Kiss' <http://theconversation.com/which-cheek-and-how-many-in-france-and-beyond-a-kiss-isnt-just-a-kiss-124917> accessed 20 July 2023). Motivated by the spread of the Covid-19 pandemic, this was a state response to something that the French state had no immediate control over.

[653] The greeting used in France when one meets another person. This involves 1, 2, 3 or 4 (depending on the region: see the mapped versions of *la bise* at https://francaisdenosregions.com/2016/12/21/la-carte-des-bises/) alternate cheek-to-cheek "air kisses". The side on which you are presumed to "start" may also vary from one region to another. In some regions, men do *la bise* (mostly around the Mediterranean) and in others they resort to a supposed more masculine handshake. Only foreigners end up in the uncomfortable nose-to-nose position (or hand-and-cheek presented simultaneously) because they have not yet fully integrated the complex precepts!!

[654] Eg Ministère des Solidarités et de la Santé, 'Quand on Aime Ses Proches, on Ne s'approche Pas Trop' <https://www.youtube.com/watch?v=SDn0GrWK88U> accessed 27 June 2023; Ministère des Solidarités et de la Santé, 'Passons Un Bon Été Avec Les Bons Réflexes' <https://www.youtube.com/watch?v=6h5CvY8Un-8> accessed 27 June 2023.

In both of the Western quadrants then narrative legibility may be undermined by "unperfected" pockets. In the imperial quadrant, the risk is that these unperfected pockets assert their concerned-otherness, reneging on their subpartness. In the apocryphal quadrant, the risk is that the subparts or concerned-others interrupt projected sedimentation (a kind of temporal "unperfection"), by introducing intentionality into the "neutralised" apocryphal narrative.

Eastern quadrants

In the eastern quadrants, maps are more detailed, more tightly knit. The link to the terrain is stronger, driven by affect and embodied in rituals, routines and sacred/significant spaces ("home" for the family order and places of worship for the Catholic Church, for example). Sedimentation acquires ultimate meaning and achievement through intentional commitments, driven by valence. In the eastern quadrants, sedimentation holds greater normative pull for this reason, but is nevertheless always at risk. For the hegemonic order, sedimentation is at risk from excessive heaviness and a consequent inability to adapt to changing circumstances (that is, too much "holding firm" or reliance on the map when acting in the world). Doings (*ipse*-identity) are excessively constrained by the map (*idem*-identity), which reduces their creative adaptability. Further, the self-affirming expressive aspect of "we will hold firm" is removed when the affirmation becomes a foregone conclusion. This can transform into a potentially fatal pressure point.[655] For the paideic order, sedimentation is at constant risk from excessive lightness and an inability to "hold firm" over time. The innate creativity of such orders makes fragmentation a highly likely outcome. The lightness of everyday doings (*ipse*-identity) may cause the paideic map (*idem*-identity) to come undone. In both hegemonic and paideic orders then, the flipside of high-pull sedimentation (whether excessive or insufficient) may be disintegration of the map itself.

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[655] Dostoevsky described this outlook in Fyodor Dostoevsky, *Notes from Underground* (Richard Pevear and Larissa Volokhonsky trs, Everyman's Library 2004) 27–28: "Shower him with all earthly blessings, drown him in happiness completely, over his head, so that only bubbles pop up on the surface of happiness, as on water; give him such economic satisfaction that he no longer has anything left to do at all except sleep, eat gingerbread, and worry about the noncessation of world history – and it is here, just here, that he, this man, out of sheer ingratitude, out of sheer lampoonery, will do something nasty. He will even risk his gingerbread, and wish on purpose for the most pernicious nonsense, the most noneconomical meaninglessness, solely in order to mix into all this positive good sense his own pernicious, fantastical element. […] he will wish to keep hold of, with the sole purpose of confirming to himself (as if it were so very necessary) that human beings are still human beings and not piano keys, […] And more than that: even if it should indeed turn out that he is a piano key, if it were even proved to him mathematically and by natural science, he would still not come to reason, but would do something contrary on purpose, solely out of ingratitude alone; essentially to have his own way. And if he finds himself without means – he will invent destruction and chaos, he will invent all kinds of suffering, and still have his own way!"

Narrative legibility in the eastern quadrants may thus be undermined by excessive or insufficient sedimentation, both of which are obstacles to legibility in general.

Sedimentation is encouraged in the hegemonic quadrant. As a consequence, internal *and* external legibility are likely to be at a peak. However, hegemonic sedimentation may also tend toward excessive heaviness. This means that spatially, there is likely to be terrain rendered illegible by a narrative that has become unduly rigid. Because of this rigidity, some subparts may question the utility of the narrative in their everyday doings, producing a subset of doings that no longer "hold firm". Provided this subset remains small, the permanence of the legal order (its internal legibility) will not necessarily be affected. The divergent subparts will simply mutate into concerned-others. "Concerned" insofar as the hegemonic map leaves its imprint on their past; "others" insofar as hegemonic sedimentation has proved ill-adapted to the particular terrain they must traverse and so no longer seems to provide the appropriate narratives.

Internally then, excessive sedimentation may betray an inability to adapt to the actual terrain (itself evolving over time). If too many doings diverge from the sedimented narrative, choosing more responsive pathways, the hegemonic legal order's sedimentation (heavily imprinted parts of the narrative) may itself come undone; and legality with it. The excessive sedimentation, no doubt driven by a desire to achieve a high degree of internal legibility, may end up undermining internal legibility itself (lack of responsiveness to the context in which the map must be used).

Externally: excessive sedimentation may betray an inability to acknowledge the narratives of concerned-others. In the worst-case scenario, such a clash of narratives might result in war (and potential destruction). In less dire circumstances, the hegemonic legal order might simply forego a few degrees of legality, as the unproductive clash results in "containment" of (one of) the irresponsive narrative(s). It is possible that this is what happened with the veil debate in France. The Islamic hegemonic order has tended to uphold certain sedimented religious values (eg *hijab* is the appropriate attire for women in public). Similarly, the hegemonic order of French *Education Nationale* has tended to uphold the sedimented value of *laïcité*[656] by insisting that there should be no visible signs of religion in public schools. The French state has thereby circumscribed the meaning of "in public" for Muslims in France, killing off or seriously containing part of the unresponsive hegemonic *hijab* precept in the process. Individual clashes

[656] The French constitutional principle of secularism, embodied in the 1905 law on the separation of the Church and the State.

of this sort are not necessarily fatal, but an accumulation of such clashes is likely to significantly undermine sedimentation and legibility.

Responsive "lightness" is generally prioritised over sedimentation in the paideic quadrant, though sedimentation is inevitably present to some degree in all quadrants. External legibility is likely to be limited as a consequence of this subtle sedimentation; the map may be too recent to have strong definition. Internal legibility is not affected to the same extent, as legibility in the southern quadrants is inevitably more forward-facing. In the paideic quadrant, for example, narrative legibility is more focused on responsive navigation of the actual terrain than on the narrative imprints left by past doings. Subtle sedimentation supports this kind of approach to *ipse*-identity. In the paideic quadrant, then, external and internal legibility pull unhelpfully in different directions.

The internal vitality of the paideic order and the uncontrollable *ipse*-creativity of subparts means that often paideic sedimentation may be not just subtle, but insufficient. This can be problematic for the paideic order because it means that, in time, doings may become unmoored, capable of limitless flightiness. Without minimal but adequate moorings, the legal order fragments irretrievably. In discussing clinical schizophrenia, this state has been referred to by Deleuze and Guattari as an excess of reality.[657] But I think the diagnosis applies just as aptly to composite individuals – such as legal orders – insofar as the excess of reality, of perception and consequent doings, of *ipse* over *idem*, leads to a schizophrenic legal order no longer capable of "holding firm" to anything.[658]

If deficient sedimentation is troublesome for internal legibility, it is an ever-greater problem for external legibility. Being small in size, the paideic order is heavily reliant on external recognition for its existence. It must prove its relevance to those orders that envelop it. Without

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[657] Deleuze and Guattari specifically refute the traditional characterisation of clinical schizophrenia as a "loss of reality". They suggest that: "Far from having lost who knows what contact with life, the schizophrenic is closest to the beating heart of reality, to an intense point identical with the production of the real" (Gilles Deleuze and Félix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (Robert Hurley, Mark Seem and Helen R Lane trs, Viking Press 1977) 86–87). As Deleuze says (in Felix Guattari, *Chaosophy: Texts and Interviews 1972-1977* (Sylvere Lotringer ed, David L Sweet, Jarred Becker and Taylor Adkins trs, Semiotext(e) 2008) 62): "Schizophrenia is an involuntary and stupefying experience, some thing very, very acute, very intense, with high levels of intensity."

[658] I should note here that this temperamentally paideic outcome completely parallels the experience of interlegality. For interlegality, too, is an instance of (temporary) unmooring. The only difference here is that interlegality is writ large, the interlegal events combining to become overwhelming. Multiple individuals (or composite individuals) straddle multiple narratives and in so doing open the door to the vast "outside" of unrealised possibilities. If these come flooding in with no perceptual frame with which to control the flux, unmoored schizophrenia is the likely outcome.

sedimentation, this is difficult to do. The paideic order is inevitably torn then between the need to present a united front externally and the need to protect its creative vitality (its source) internally. Externally-projected sedimentation may shatter internal legality. But the reverse is also true: internal-responsiveness may destroy the legal order's relevance more broadly (external legality).

Sedimentation and legal rupture

In the previous section, I tried to explain how sedimentation may be linked to legality. In each of the quadrants the relationship seems slightly different.

In the western quadrants the legibility of narrative suffers mainly from a puncturing of the narrative by unperfected pockets. Sedimentation tends to be underinclusive. These unperfected pockets are subparts that appeal to concerned-otherness (in the imperial quadrant) or intentional interruptions by subparts or concerned-others (in the apocryphal quadrant). In both cases, unperfected pockets are the impetus for further work on perfecting legibility (whether internal or external, and they tend to run in parallel). This work generally demands heavy lifting in the imperial quadrant and lighter adaptations in the apocryphal quadrant.

In the eastern quadrants, the legibility of the narrative is naturally high internally (despite differences in sedimentation). In both cases however sedimentary tendencies can be self-undermining. In the hegemonic quadrant, excessive heaviness pushes legibility to the limit (denuding it of all responsiveness). This may vex concerned others, but also subparts for whom the heaviness becomes unbearable. Both result in a dismantling (whether radical or gradual) of the hegemonic narrative, along with its narrative legibility. In the paideic quadrant, excessive lightness has a similar effect, pushing legibility to the limit. This results in a total lack of external legibility (denying all relevance) and/or internal fragmentation of the paideic narrative (undoing permanence), and so destroys narrative legibility. Some paideic orders find themselves in a double-bind, however, where their continuing existence (permanence) depends on ensuring their continuing relevance for some encompassing-other. This may push the paideic order to overdo sedimentation as a means of encouraging external legibility. And sometimes this externally-projected sedimentation can create internal tension in terms of narrative legibility.

In this final section then, I would like to consider how sedimentation ties into legal rupture.

To recap the conclusions in Chapter 4, interlegality is a localised straddling of narratives concretised in and initiated by a specific doing. Insofar as narratives embody a selective

perceptual frame, a means of interacting with the world, interlegality proposes a shift in perceptual framing. The concept of interlegality is a becoming-legal insofar as it is *suggestive* of an infinite number of potential frame shifts that could materialise. Far from representing a space *beyond* the legal, it is itself intensely legal, insofar as it exposes an active search for improved legibility. In most instances, interlegality is a becoming-legal that is eminently navigable. The requested shift in perceptual frame is already intelligible even if it has not yet been mapped. That is to say, there is enough overlap in the narrative orders for a coherent common narrative sequel to be envisioned. An opening onto the infinite number of potential frame shifts is always a theoretical possibility in interlegal doings, but for the most part the strange narrative stitch is quickly integrated into the map rather than causing uncontrolled unravelling.

Legal rupture is a particular form of interlegality. It refers to the point at which identity loses its footing. Legal rupture transpires when a localised straddling of narratives (temporarily) provokes uncontrolled unravelling of the legal map. Inspired by Deleuze and Guattari's forays into schizo-analysis, we might refer to this as **schizo-legality**. Not only is the narrative link between map and doing undone, but the ruptural event serves as a portal that brings into view a wealth of previously invisible (un/acceptable) possibilities. The map is inundated with elusive possibility. The intensity of such experiences may provoke panic and/or exhilaration. Legal rupture undoes legality then because the singular initiatory illegible doing sends ripples through the legal order undoing the legal map more generally (rendering it illegible as a whole). To render the strange doing legible, the order must act urgently to contain and/or excise the ripple, or else substantively rewrite its map. While interlegal events may happen anywhere, legal rupture will tend to happen at points of sedimentation because this is where interlegality is most likely to have full-map ripple effects.

In Unbearableness? I suggested that legal orders in the northern quadrants were likely to have higher levels of sedimentation, while orders in the southern quadrants seemed "lighter" in mapped precepts. This suggests that interlegal events in the northern quadrants are more likely to be ruptural than those in the southern quadrants. As we saw in the section on Unbearableness: Legality's undoing, the imperial carries perhaps the heaviest risk because of its internal "unperfectedness"; the hegemonic is also somewhat at risk when its excessive sedimentation is deemed to negatively affect concerned-others. The former risks ruptural dislocation (actual disjointing of the pockets), while the latter risks ruptural dismantling (through lack-of-responsiveness to concerned-others).

It is worth noting that this latter risk is perhaps held at bay by the characteristic "insularity" of hegemonic orders. Cover used the terms "insular" and "redemptive" to describe two ways in which different *nomoi* come to terms with the "ontological reality of the other".[659] The *insular* mode of interaction is espoused by those who create some sort of "nomic refuge" and wish to keep it free from external interferences, particularly by the State (in Cover's work): they "characteristically construct their own myths, lay down their own precepts, and presume to establish their own hierarchies of norm. More importantly, they identify their own paradigms of lawful behavior and reduce the state to just one element, albeit an important one, in the normative environment".[660] He gives the examples of the constitutional visions of the Amish, the Mennonites, 19th century utopian communities, and the corporate charter of Massachusetts Bay, among others: "finding themselves within a state not under their control, [each] sought a refuge not simply *from* persecution, but *for* associational self-realization in nomian terms".[661] I think the concept of insularity can be usefully extended. It need not describe paideic *nomoi* alone and it may potentially underlie interaction with any legal order (not just the State).

Hegemonic orders are, I would argue, insular insofar as they privilege internal legibility (permanence) over external legibility (relevance). This should not be read as suggesting that insular orders are closed to new subparts. The point is rather that the insular narrative is not focused on saving all souls.[662] As a result, the number of concerned-others and the desire to achieve external legibility (and relevance) is rather limited. This is confirmed when terrorist groups or cults (for example) persuade subparts to break with competing normative worlds such as their families (another hegemonic, or alternatively paideic, order). It seems reasonable to suggest that apocryphal orders also fall into this category. As in hegemonic orders, the desire

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[659] Cover (n 2) 29.
[660] ibid 33.
[661] ibid 31.
[662] It might be wondered whether this is an apt characterisation of the exemplary hegemonic order, the Catholic Church. While the Catholic Church was no doubt redemptive (out to save all souls by replacing their central narratives, even by force where necessary) for much of its history, I would argue that since the Enlightenment and Nietzsche's declared death of God, institutionalised religion has settled into a more insular relationship with other legal orders. In the 1965 Vatican II decree ('Ad Gentes' <https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651207_ad-gentes_en.html> accessed 30 June 2023), it is stated: "The Church strictly forbids forcing anyone to embrace the Faith, or alluring or enticing people by worrisome wiles." Similarly, the focus of missionary work seems to have changed since Vatican II: "The Church on mission through its various religious and lay associations is today much more involved in an option for the poor and integral human development than in proselytizing." ('Catholic Missions' <https://en.wikipedia.org/w/index.php?title=Catholic_missions&oldid=1161054057#cite_note-37> accessed 30 June 2023)

to protect the "nomic refuge" against intrusion by other orders means that apocryphal orders will often negotiate with concerned-others to achieve the highest level of non-intervention possible. This is true, for example, of *lex sportiva* or *lex mercatoria*. Neither are out to transform the landscape of international law in general or of national law in particular. Nevertheless, they both seek to protect their ongoing nomic existence by staking out an insular reserve in which their legal identity may persist. They do this by strategically negotiating the nomic boundaries.

Interlegal events in the southern quadrants seem to be more manageable (and thus less likely to provoke ruptural events) precisely because of the innate responsiveness of these types of orders. Sedimentation is projected rather than imprinted, so never entirely fulfilled. This leaves room for flightiness when it is deemed necessary. Of course, the legibility of such orders is inevitably lower as a consequence: outcomes cannot be read directly off the map. But the upshot is that legality is also less affected by interlegal encounters: a small dip in legibility is quickly ironed over, as the narrative is adapted to actual doings.

That said, the *ipse*-driven creativity of the southern quadrants means that both subparts, and the orders they compose, are more likely to engage in interlegal doings. This is particularly true of paideic orders for two reasons. Contrary to apocryphal orders which tend to be large and "neutrally" networked, paideic orders are more likely to be small and intentional. As a consequence, they are inevitably buffeted by innumerable overlapping legal orders. Second, paideic orders are more likely than apocryphal orders to have a redemptive character,[663] and as such will be more likely to seek out interlegal encounters.

Above, I noted that Cover described paideic *nomoi* as either "insular" or "redemptive". The *redemptive* mode of interaction is utopian in some sense. It considers other legal orders (and particularly the most encompassing among them) to be in need of redemption and thus complements its own normative world with "a transformational politics that cannot be contained within the autonomous insularity of the association itself".[664] These groups generate "their own articulate normative orders concerning the world as they would transform it, as well

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[663] The slogan at the ZAD Notre Dame des Landes was initially *"Contre l'aéroport et son monde"* ("Against the airport and its world"). Another slogan that has arisen out of the conflict and was regularly used by ZADistes was: *"Nous ne défendons pas la Nature, nous sommes la Nature qui se défend."* ("We don't defend Nature, we are Nature that defends itself.") This slogan was very much taken up by the later movement *Les Soulèvements de la Terre*.

[664] Cover (n 2) 34.

as the mode of transformation and their own place within the world".[665] Here, Cover discusses the redemptive trajectories of radical antislavery constitutionalism and the civil rights movement, but the redemptive mode also extends to any variety of associations and cooperatives involved, for example, in responding to our ecological predicament in ways that betray the existence of both a thriving normative world and a desire to replace encompassing narratives with ecotopian alternatives.

If the redemptive mode of interaction is more likely to encourage interlegal encounters, one might wonder whether the imperial quadrant is also characteristically redemptive. I would suggest that it is, for two reasons. First, it is redemptive insofar as it considers its own narrative as "natural" or "objective". For a "naturalised" narrative is just one way of arguing that a narrative is necessarily valid for all souls (or at least all human souls). Second, the imperial has redemptive tendencies insofar as it seeks to "perfect" those unperfected pockets within its own weblike structure.

Whether or not particular legal orders will actively seek out interlegal encounters may depend on their redemptive or insular character. The brief overview sketched here suggests that the imperial and the paideic are most likely to seek out interlegal encounters. Whether or not particular legal orders will succumb to legal rupture cannot be determined exclusively on this basis, however. Ruptural events occur where interlegal encounters directly question sedimentation but are obviously more rampant in situations where sedimentation and redemptive impulses are combined. This means that imperial orders – as those orders highest in sedimented heaviness *and* in redemptivity – are the most likely to be affected by ruptural events. And who instigates these ruptural events? Not those orders that are most sedimented, for ruptural events require access to a strange outside. That strange outside is most likely to come from the quadrants versed in creative lightness, the orders who are constantly producing new outsides! But lightness alone is not sufficient. The flighty but insular apocryphal order is not particularly motivated to pursue interlegal encounters. Paideic orders on the other hand – as those orders highest in creative lightness *and* in redemptivity – are the most likely to engage in interlegal commitments with the potential to provoke ruptural events. Indeed "unperfected" imperial pockets will, as Cover made clear, regularly be of the paideic type. This makes the

[665] ibid.

imperial–paideic interlegal encounter the most likely to result in a ruptural event.[666] With all this said, it is perhaps clearer why Cover focused on the imperial and paideic *nomoi* as central to his theory of excess law and jurispathy: these are after all the two main protagonists.

To recap then: sedimentation varies across the quadrants. More specifically, in this chapter, I have shown that the hegemonic and apocryphal quadrants presented widely-imprinted (ie highly legible) homogeneous sedimentation. The imperial and paideic quadrants meanwhile presented more variable sedimentation (across space, in the first instance, and across time, in the second instance). While all quadrants experience interlegality, the variable quality of sedimentation (and thus of legibility) suggests that the latter two quadrants may be more likely to suffer from higher levels of ruptural activity.

Conclusion: Ruptural events

In this final chapter, I have effected a return to the ruptural. I asked first how ruptural events sit with interlegality. Ruptural events are an extreme case of interlegality: the initial trespassing provokes a loss of one's footing, the excess of law is felt as true excess. The two narratives straddled are so outlandish to each other that they provoke an unravelling of the map itself.

My second question was: Which parts of the legal map are most at risk of rupture? To answer this question I developed the metaphor of heaviness and lightness, finding the northern quadrants heavier and the southern quadrants lighter. This, in turn, impacted their sedimentary tendencies, with the former privileging spatial sedimentation, while the latter are future-oriented, projecting their sedimentation.

Having wandered through numerous examples in each of the quadrants, I then consider when and how sedimentation might become unbearable. In the western quadrants, sedimentation is distributed and hub-like; there are unperfected pockets. This means that sedimentation may not always be sufficient to ensure narrative legibility (and thus legality). In the eastern quadrants, on the other hand, sedimentation may be stifling. It may be overbearing in the hegemonic quadrant in a way that reduces its relevance (external legibility); it may stifle creativity in the paideic quadrant, thus reducing its permanence (internal legibility).

A quick review of Cover's concepts of redemptive and insular orders suggests that, while all quadrants experience interlegality, the variable quality of sedimentation (and thus of legibility)

[666] It is perhaps worth noting that the ruptural events internal to the paideic order are likely to be the most common, simply because of the paideic's extreme creativity. However, these involve individuals or composite-individuals-in-formation and cannot be referred to as strictly interlegal.

mean that the imperial and paideic quadrants may be more likely to suffer from higher levels of ruptural activity.

Conclusion

> *It is always difficult to say what is new about a particular theoretical work. It is not the case that everything has already been said, because each saying or theorising constitutes a new iteration of ideas, in a new time and place, and usually in a new context. However, a great deal has been said, and it is very difficult for a theorist to carve out a space that is really distinctive. Theorising is intrinsically a collective activity, because it draws on the present state of thinking. But it is also personal, channelled through a particular knowing entity at a specific location and time.*
>
> — Margaret Davies , 'Doing critical-socio-legal theory'[667]

Ruptural work

This dissertation has been about the role law might play in the context of ecological collapse. Ecological collapse requires two things of the law: (a) that it contribute to mitigating the extent of collapse and (b) that it evolve to ensure the ongoing provision of basic social and ecological needs despite collapse. Both of these are likely to require extraordinary legal change. Current legal scholarship faces two opposed problems: either the scholarship is too incremental, achieving frustratingly little in the way of mitigation and impervious to work required to accompany collapse; or the scholarship is of the paradigm-shifting variety, potentially capable of rising to the occasion on both counts, but providing no explanation of how such dramatic legal change will come about.

Relying on incremental legal reform via legislatures or the judiciary has so far proven inadequate for a variety of reasons. I continue to worry that prime amongst these I think is the commitment to economic growth. And this is the concern that set the dissertation ball rolling for me. If ecological collapse is intimately linked to collapse-of-economic-growth, how can the growth-imbued tools of current state and international legal systems help us navigate the new terrain? I put forward the view that legal reform is not the only outlet for legal change. Indeed, viewing change as inevitably a story of legal reform (even of the judicial variety) seems a very limiting view of the legal toolbox.

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[667] Margaret Davies, 'Doing Critical Socio-Legal Theory' in Kirsten McConnachie, Marc Mason and Naomi Creutzfeldt (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (1st edn, Routledge 2019) 91–92 <http://www.taylorfrancis.com/chapters/critical-socio-legal-theory-margaret-davies/e/10.4324/9780429952814-6> accessed 6 February 2021.

Some varieties of ecological law[668] have sought instead to throw the legal toolbox out completely. This strain of legal scholarship outlines a form of radical change that more closely resembles a sweeping new mythology than a strictly legal revolution. However, this scholarship generally has very little to say about *how* such changes will come about. Perhaps the most grounded proposals in this field come from proponents of rights for nature (whether constitutional, legislative, or judicial). Rights for nature[669] involve "environmental rights that grant cognizable legal rights and remedies to non-human entities, especially aggregates such as species, ecosystems, or rivers".[670] This may prove a useful inroad since it has the potential to bring questions of anthropomorphism, instrumentalisation of nature, and economic growth imperatives to existing legal fora.[671]

Since this is perhaps the most promising avenue for change, it is worth setting out briefly the three most obvious problems with this "solution":

1. It overlooks the role of legal narrative in providing a legal map with a particular charge: in particular, it assumes that it is possible to make sense of nature's rights excised from the indigenous legal systems in which they developed (ie in the absence of a non-instrumental relationship to nature);
2. It downplays the power of (Global North) narratives in existing legal fora: that is, it assumes that it is possible to preserve the meaning of nature's rights within legal systems imbued with anthropocentrism, instrumental thinking about nature, and a commitment to economic growth;

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[668] Again, I use ecological law as shorthand for all the work that has so far been done to go beyond environmental law. See, in particular, work on Green Legal Theory (eg M'Gonigle, 'Green Legal Theory' (n 14); M'Gonigle, 'Logics as Law' (n 14); M'Gonigle, 'Green(ing) Legal Theory' (n 14); M'Gonigle and Takeda (n 10)); critical environmental law (eg Philippopoulos-Mihalopoulos (n 14)); Earth jurisprudence and wild law (eg Cullinan (n 14); Murray, 'Earth Jurisprudence, Wild Law, Emergent Law' (n 14); Murray, 'Earth Jurisprudence, Wild Law, Emergent Law' (n 14); Burdon, *Exploring Wild Law* (n 14); Burdon, 'Ecological Law in the Anthropocene' (n 14)); ecological law (eg Anker and others (n 14); Garver (n 14); Sbert (n 14)); sustainability law (eg Bosselmann (n 14)) and ecological integrity (eg Westra (n 14)).

[669] I refuse to take the easy route out here. There are obvious examples of law-review-article type legal "solutions" in the context of ecological collapse: at the national level, laws on pollution; at the international level, the COP21 agreement. Nature's rights seem to be less obviously dependent on excessive framing to ensure their presentation as a "solution". Indeed, when the idea was first tentatively suggested in 1972, it was presented as quite revolutionary, an "unthinkable" idea (Stone, 'Should Trees Have Legal Standing? Toward Legal Rights for Natural Objects' (n 15) 450). Later works continue to insist on the revolutionary nature of rights for nature (see Boyd (n 15)).

[670] Guim and Livermore (n 15) n 5.

[671] See, in particular, Boyd (n 15), Introduction.

3. It assumes that rights are straightforward: that is, it assumes that it is possible to objectively determine the relative importance of different species or ecosystems – or harms to different species or ecosystems – and that human guardians will concur on the ranking of such rights.

This is not to suggest that the recognition of rights for nature is an unimportant shift in environmental law. It is simply to note, as does Schlag, that relative to what we want to know – ie how might law play a role in responding to ecological collapse – we are still in the realm of the trivial, insofar as almost all the heavy lifting remains to be done.

I insisted at the outset and will insist again here: no part of this dissertation suggests that efforts at legal reform should be abandoned. Legal reform has an important role to play in mitigating the extent of collapse and will (and should) continue to be fought for by environmental lawyers and ecological associations alike. In the same way, it is worth pointing out that I do not consider efforts in the field of ecological law to be misplaced. It is important to call into question our anthropomorphism, our instrumental relationship with nature, and our addiction to economic growth (among other things) even if such considerations rarely gain traction in the field. Nevertheless, and despite the tangible benefits each provides, both have represented frustrations for me.

This dissertation is the child of that double frustration. Seeking a middle road between the irrelevance of piecemeal legislative reform and the untetheredness of ecocentric mythologies, I began to wonder whether the law's potential role in ecological collapse was necessarily limited to these two avenues. Perhaps there were more options? The question was posed in these terms: "What can the law do" when faced with intractable and complex crises such as ecological collapse? Is it our own thinking about law that blinds us to its potential?

The experimentation in legal theorising that ensued may have left some readers wondering whether the questions that in fact drove this dissertation were not "What is the law?" or "What is a legal order?" If I have raised these issues along the way, it is not out of a love of intellectual esotericism, but because I found myself unable to grapple with the potential for radical legal change without a clear appreciation of the ingredients of change and an understanding of the sites from which change might emerge. Far from being driven by obscure theory, these questions have grounded me. I felt that if radical legal change was to have any practical ramifications – whether that be in the form of fieldwork or ecological activism or state

preparedness – it was essential that my reconnaissance of the potential components of change be thorough.

Without specifying the precise content of radical legal change,[672] I argue that one of the avenues for achieving some version of it may be ruptural events. I even suggest that legal change may increasingly be of the ruptural sort. If this is true, the phenomenon of legal rupture deserves more attention. In an attempt to direct some attention in this direction, I tried (in Chapter 1) to provide some exploratory insight into the possibilities of legal rupture as an avenue for legal change. I pointed to spaces of interlegality as the most fruitful terrain for legal rupture and expressed some concern that the legal literature had not given this concept more thought. There was, though, a good reason for this.

My forays into interlegality made it clear that the fuzziness of our concepts of the "distinctness", the "legalness" and the "intersectingness" of legal orders (discussed in Chapters 2, 3 and 4 respectively) have made it hard to operationalise interlegality. This may explain why the literature is so lacking in this area. It is extraordinarily difficult to conceptualise the domain of interlegality without a strong definition of law. And yet the strong definitions of law, which tend to limit the frame to state legal systems and certain well-developed international or regional legal systems, reduce interlegality to little more than conflict of laws or overarching norms. Interlegality is far less interesting in this context.

Furthermore, as soon as one considers the variety of legal structures, legal actors and types of law now discussed by the legal academy, this strong definition of law unravels. We have so unravelled ourselves that some legal theorists now settle for the position that there is no appropriate definition of law[673] or that law is whatever people say it is.[674] Partially unsatisfied by both these answers, I have tried to propose a third version of "unravelled" law. At each stage of the argument, I tried to draw on the conclusions provided by earlier chapters to build a workable exploration of legal order (at least for the purposes of further research into legal rupture).

I suggested in this dissertation that we might broaden the definition of law so as to recognise that legality is both composite and exists by degrees (Chapter 3). It is composite insofar as it

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[672] Though acknowledging that, in the interval between environmental law and ecological integrity, there is certainly room for significant shifts in our understanding of "What the law can do".
[673] Griffiths, for eg, has settled for the position that "law is all over" simply refers to a range of normative orders (Griffiths (n 45)).
[674] Eg Tamanaha (n 58).

includes those orders that are discussed by pluralists (as Griffiths) as well as the entangled multidisciplinary narratives that sustain such orders (as suggested by Cover). It exists by degrees insofar as legality is more or less intelligible or legible to those who use it to orient their behaviour. In advancing this, I wanted to acknowledge that Schlag had correctly destroyed any watertight separation of the legal from the social, while nevertheless differentiating along an alternative axis that I thought might be more productive to future research. Precepts encompass more than simply norms (whether categorised as "legal" or "social") and they are kept operational via a variety of different social structures, most notably narrative, without which they would hold no weight. I suggest that the more successful such precepts and accompanying narratives are in "holding firm" – and thus the more legible they are to those who follow them – the greater the degree of legality. Law is indeed all over, but perhaps it subsists in active and in watered-down varieties.

Amidst these chapters, the aim of the Interlude was to provide some relief from high-flying theory and gradually invoke a return to more grounded things. After all, legal rupture is not a theoretical object for me, but a concrete and ongoing practice. These inroads are initiated by (composite) individuals who should not remain beyond the perceptual gaze of the legal theorist.

The penultimate chapter (Chapter 4) engaged one last time with the fuzzy conceptual assumptions behind legal order by considering "intersectingness". I wondered in that chapter whether it was actually helpful to view interlegality as overlapping anything—whether maps, norms, or institutional jurisdictions. I suggested there that Santos' reference to "trespassing" might be a helpful trope instead. I used legal – and, more importantly, social – licences as an example of a type of interlegal narrative stitch. Licences are just one way of responding to an interlegal commitment that is outlandish, that trespasses. The initial narrative stitch may, depending on the case, provide a basis for further interlegal dialogue.

The final chapter (Chapter 5) was an attempt to come full circle, bringing the discussion of "distinctness", "legalness" and "intersectingness" to bear on legal rupture itself. I suggested that rupture was most likely to occur in the parts of legal orders that are the most sedimented, because – in hub-like fashion – these are the parts of a legal order that hold the map together. Rupture in the sedimented corners of the map has ripple effects that are difficult to contain or manage. Of course, different quadrants have different sedimenting tendencies. This may mean that scholars interested in legal rupture should focus their attention primarily on the northern quadrants where sedimentation is the heaviest. Perhaps even more so on the imperial quadrant, since the combination of high levels of sedimentation and redemptive aims makes these orders

particularly subject to legal rupture. And if this is so, the paideic too will require close attention since its size and potentially redemptive desires encourage it to actively seek out interlegal encounters potentially provoking legal rupture as a result.

When I talk of legal borderlines then, it is to insist on paying attention to something *other* than borders in the traditional sense, whether borders between legal systems, between maps, between jurisdictions. This dissertation is not about the external frontiers, but about the internal borderlines that carve out the map itself and that shape a legal order's understanding of the legal/illegal, the acceptable/unacceptable. Interlegality is produced here, at these borderlines. This is where interlegal trespassing occurs, within a map, and it is where outlandish possibilities are creatively woven together in response to narrative friction. This is the space of interlegality.

And sometimes, within this space of interlegality, the friction is such that it causes a loss of bearings. Legality is undone. This space of schizo-legality is one of exhilarating new potential and at the same time panic-ridden destabilisation. Here there is room and potential for radical legal change, of many varieties.

Is the law capable, then, of contributing to the "radical action" demanded by the successive reports of the Intergovernmental Panel on Climate Change? If it is, where might such a response come from? The point of this dissertation has been to explore law's potential for extraordinary legal change when the context requires it. The focus has been on one potential source of extraordinary legal change: ruptural events. The contours of legality and the mapping of legal orders sketched in these pages are proposed as potential tools for examining the where and the how of legal rupture.

I do not claim that extraordinary legal change will *necessarily* happen. Nor do I claim that, if it does, it will necessarily happen *via ruptural events*. Nevertheless, I *do* claim that there is potential here for the type of legal change that the context seems to call for. And, if this is so, I suggest that legal theorists should start paying more attention to the phenomenon of legal rupture. My contribution to this call-to-attention is a small one. I hope to have provided some theoretical insights into how we might go about studying the where and the how of legal rupture. These include three shifts in perspective with regard to the way we think about legal orders. More specifically, I have tried to highlight some of the limits with regard to our conceptual assumptions of "distinctness", "legalness" and "intersectingness" and explore some alternative perspectives. I have also attempted a mapping of legal orders in the hope that this

might facilitate further discussion of the where and the how of legal rupture. Finally, I have suggested a measure of the susceptibility of legal orders to legal rupture with the notion of sedimentation.

Beyond the contribution to legal theory, I hope that there may also be some ripple effects. In particular, the questions raised here may productively trouble ecological lawyers. We share the belief that law should be involved in the "radical action" demanded by the IPCC. Nevertheless, radical visions without a footbridge to get there may be dangerous chimeras. Perhaps the exploring I have done on the theme of legal rupture will prompt other ecological lawyers to pay more attention to the potential avenues for radical legal change, and in particular whether top-down ecological integrity (through international norms or constitutional changes) may be achieved without attendant changes in interactional-practices.

In the same vein, I hope that the analytical frames proposed in this dissertation will be useful tools for those on the ground who are fighting to have their "inherent jurisdiction" recognised.[675] I have been encouraged by their resilience and buoyed by their creative potential in writing this dissertation. I believe that these legal orders, these pockets of practical resistance, will be a big part of the "where" of legal rupture. But my account also suggests caution. One of the characteristics of legal rupture is the unexpected revealing of practical possibilities previously ignored. This event compels a response in the form of active engagement to preserve or ameliorate the legibility of the trespassed narrative (ie legality). This would seem to rule out (or at least discourage if one is seeking legal change) jurisdictional activism that does not espouse alternative practical possibilities in one form or another. One of the most recent works on avenues for radical change (outside the field of law) comes from the Marxist geographer and "new guru of radical ecologists",[676] Andreas Malm.[677] He argues that it is time to go beyond strategic nonviolence and engage in material sabotage. In the decree disbanding *Les Soulèvements de la Terre* – who have advocated "disarmament"[678] of ecologically toxic infrastructure as "legitimate self-defence" – the French Interior Minister

[675] I am referring here to the "inherent jurisdiction" of the Algonquins at Barriere Lake as described by Pasternak in Pasternak (n 82). But I mean of course to cast the net more broadly. Pockets of "inherent jurisdiction" abound, and not just in indigenous communities.
[676] At least in France, see Alix L'Hospital, 'Andreas Malm, Nouveau Gourou Des Écologistes Radicaux : "La Révolution Est Son Obsession"' [2023] L'Express <https://www.lexpress.fr/idees-et-debats/andreas-malm-nouveau-gourou-des-ecologistes-radicaux-la-revolution-est-son-obsession-P25YPJYQPRGHXOUKLSVNFIK7V4/> accessed 25 July 2023.
[677] See Andreas Malm, *How to Blow Up a Pipeline* (Verso Books 2021).
[678] The newly promoted – because supposedly more acceptable – term for eco-sabotage.

referred to Malm as the intellectual behind the movement.[679] My point is this: sabotage of property does not, of itself, provide an unexpected revealing of practical possibilities previously ignored. Perhaps what made the ZAD Notre Dame des Landes, the union takeover of the LIP factory, Wallonia's no to CETA, the Algonquins' resistance at Barriere Lake, etc so potent was this capacity to make concretely visible alternative narratives that were previously invisible, unimaginable? If so, it is a point at least worth considering as we seek to deploy new activist strategies to achieve radical change.

Limitations

The content of my dissertation has its own limitations and failings. One that I am particularly conscious of is the lack of fieldwork. I know that the argument I have tried to make here would have been much stronger had I been able to actually ground it in one or more experiences of legal rupture, whether through the use of ethnographic material or collected sociological data. Indeed I was strongly encouraged to undertake this kind of research and refused to do so from the outset, so I take full responsibility for this failing. My argument at the time was that I preferred to do one thing to the best of my ability than attempt two things and be unconvincing on both fronts. I considered that I didn't have enough time to do ethnographic fieldwork justice (especially with young children at home) and I didn't have the skills to convincingly engage in qualitative sociological research. And I really *did* want to try my hand at theory, a space that I had never quite dared to enter into dialogue with. I knew that this would be enough of a challenge for me on its own.

That said, theory is clearly borne of (personal) experience. And this dissertation has been no exception. I have benefitted immensely from the work of others who have taken the time to inhabit these borderline laboratories. The documentaries and reports from the ZAD Notre Dame des Landes particularly inspired my theoretical musings.[680] In what was sometimes referred to as *"le plus grand squat de France"*[681] ("the biggest squat in France"), a group of 200–300 people occupied a piece of land stretching across 16km2. Over the years spent

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[679] See Thibaut Sardier, 'Que Dit Le Livre «Comment Saboter Un Pipeline», Cité Dans Le Décret de Dissolution Des Soulèvements de La Terre ?' [2023] Libération <https://www.liberation.fr/idees-et-debats/que-dit-le-livre-comment-saboter-un-pipeline-cite-dans-le-decret-de-dissolution-des-soulevements-de-la-terre-20230623_4MW7TTALUFFTJFMF7UPKYRULA4/> accessed 25 July 2023.
[680] Jade Lindgaard (ed), *Éloge Des Mauvaises Herbes: Ce Que Nous Devons à La ZAD* (Les Liens qui libèrent 2018); Daniel Schneidermann, 'Notre-Dame-Des-Landes : "On Ne Défend Pas à Tout Prix l'anonymat"' <https://www.arretsurimages.net/emissions/arret-sur-images/cent-noms-un-moment-bouleversant-on-ne-sattendait-pas-a-lexpulsion-de-la-ferme> accessed 25 July 2023.
[681] Lindgaard (n 680).

together, through creative interactive-practices, they forged and fought to protect their own *idem*-identity as a distinct, legal order. Over the years, they also had to contend with their "intersectingness" with the French state, navigating both police violence and bureaucratic ultimatums. Through their ongoing practices, they insisted on their permanence for those onsite and their relevance for the French state seeking to disband them. Reading Pasternak's work on the Algonquins of Barriere Lake convinced me that examples like this abound if we are awake to them. More recently, Kristin Ross has published a book on the genealogy of the Paris Commune format,[682] linking it to three separate grounded rejections of airports (at Notre Dame des Landes in the 2010s, but also Mirabel airport outside Montreal and Narita airport outside Tokyo in the 1960s).

These are just a selection of (relatively) recent examples of enduring grounded occupations, where particular sites are purposefully occupied to expose unimagined possibilities. In these cases, the potential for legal rupture is ongoing and interlegal dialogue is consequently fraught. But the terrain of legal rupture stretches far further. Even the most spontaneous and fleeting of legal ruptures has the potential to leave a lasting mark on a legal order. Amongst these, the most striking recent example for me was Wallonia's "no". But there are more carnivalesque examples, closer to the type of rupture invoked by Banksy's stunt. The Extinction Rebellion

[682] Kristin Ross, *La Forme-Commune: La Lutte Comme Manière d'habiter* (Etienne Dobenesque tr, 1er édition, La Fabrique Editions 2023).

festive occupation of London bridges in 2019,[683] parallel currencies,[684] "guerrilla" gardens,[685] mock trials,[686] "a-legal spaces",[687] etc.

In the midst of my dissertation, I spent a year (2018–2019) deeply engaged in activist work for Extinction Rebellion (XR) France. I didn't seek out this experience for its potential to

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[683] Occupation of public streets, squares, and roundabouts has now become a common ruptural tactic. Examples include the Yellow Vests in France, the Occupy movement, Critical Mass events (which invade the roads with large groups of cyclists, resting sovereignty back from drivers); the London precursors to XR (Reclaim the Streets in the 1990s and Stop the City in the 1980s), the blockades organised by the disbanded *Soulèvements de la Terre* in France, etc. I use the term "carnivalesque" in reference to Bakhtin. In his book, Mikhail Mikhaĭlovich Bakhtin, *Rabelais and His World* (Indiana University Press 1984), Bakhtin describes the carnivalesque as a literary mode that subverts and liberates the assumptions of the dominant style or atmosphere through humour and chaos. He traces the origins of the carnivalesque to the concept of the medieval folk carnival and its associated practices of folk laughter, uninhibited language and folk grotesque. He clearly distinguishes folk humour from "negative" satire which laughs *at* something else (but not at oneself in the world) and simple drollery, which has no philosophical content. The medieval folk carnival was a time of unruliness: hierarchies, privileges, norms and prohibitions were undone; the profane intermingled with the spiritual; "[t]he entire world is seen in its droll aspect, in its gay relativity." (ibid 11) The medieval carnival "celebrated temporary liberation from the prevailing truth and from the established order […]. Carnival was the true feast of time, the feast of becoming, change, and renewal. It was hostile to all that was immortalised and completed." (ibid 10) Everyone participated on an equal footing and communication was liberated: profanities and indecent comments abounded, as did festive laughter. This was not a spectacle however; the people lived in it. For during carnival time, no other life existed outside it and life within the space of the carnival obeyed only its own laws: those of freedom. I believe all of the above have elements of the carnivalesque.

[684] As Totnes found out when they first introduced the Totnes pound in 2008, there is no law against producing your own money. But the rising interest in parallel and virtual money schemes is causing even the European Central Bank a little anxiety. It has published two reports in the last ten years on how we should go about regulating these new unruly practices (cf ECB, 'Virtual Currency Schemes' (European Central Bank 2012) <https://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemes201210en.pdf> accessed 20 July 2023; ECB, 'Virtual Currency Schemes: A Further Analysis' (European Central Bank 2015) <https://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemesen.pdf?d5b48352d3ce982d8c4507dcad038018> accessed 20 July 2023; see further Jackie Brown, 'The Power of Local Money for a Thriving Local Economy' <https://www.yesmagazine.org/economy/2021/07/09/local-money-equity> accessed 20 July 2023).

[685] See, for eg, John Paull, '"Please Pick Me" – How Incredible Edible Todmorden Is Repurposing the Commons for Open Source Food and Agricultural Biodiversity' in Jessica Fanzo and others (eds), *Diversifying Food and Diets: Using Agricultural Biodiversity to Improve Nutrition and Health* (Routledge 2013).

[686] A 3-day people's tribunal was staged in the Hague in October 2016 adopting the format of the UN's ICJ (see further John Vidal, 'GM Seed Firm Monsanto Dismisses "Moral Trial" as a Stunt' [2016] The Guardian <https://www.theguardian.com/global-development/2016/oct/13/monsanto-staged-stunt-gm-seed-firm-faces-moral-trial> accessed 20 July 2023). Another example might be the mock-trial *Exxon v. the People* staged by Naomi Klein and Bill McKibbon, during which witnesses from all over the world gave their statements concerning the impact of Exxon's activities on their livelihood. The format calls to mind the Russell–Sartre Tribunal organised in 1966 to denounce the US intervention in Vietnam. See also the 2010 Franco-Swiss documentary, "Cleveland vs. Wall Street" by Swiss director Jean-Stephane Bron.

[687] Eg the Aboriginal Tent Embassy where aboriginal activists protesting for land rights erected tents outside the Australian Parliament and declared it an embassy and unauthorized referenda such as the first Catalan independence referendum in 2009 (see further discussion of a-legal spaces in Carys Hughes, 'Action Between the Legal and the Illegal: A-Legality as a Political–Legal Strategy' (2019) 28 Social & Legal Studies 470 <https://doi.org/10.1177/0964663918791009> accessed 22 November 2019).

contribute to my dissertation. The emergence of the movement in France simply coincided with a personal need to act. But acting in this context definitely left its imprint. While this activist parenthesis took me away from my dissertation, it also grounded my thoughts about paideic legal orders in something very concrete. There are infrequent references to my experience with XR in the text of my dissertation, but I know that this intensely frustrating and intensely buoyant period of activism has fed – perhaps at a subconscious level – into my musings on legal theory. The French government recently disbanded[688] *Les Soulèvements de la Terre*[689] and has previously referred to such movements as "eco-terrorists".[690] I think this speaks to the state legal order's real worry about the risks posed by unperfected pockets of legality such as the ZAD Notre Dame des Landes and the anti-mega-reservoir "battle" at Sainte-Soline led by *Les Soulèvements de la Terre*.[691] As the Interior Minister Darmanin vowed after the latter events, "It's finished […] Not one more ZAD will be allowed in our country. Neither in Sainte-Soline nor anywhere else."[692]

And finally, beyond these very strategic, intentional ruptural events, I strongly believe that the ruptural, while always initiated by an interlegal doing, may be perfectly spontaneous and unintentional, provoked by human and/or nonhuman doings.[693] Unintentional interlegality is even less studied than its intentional cousin and has hardly received the coverage I would have liked to give it here. But Connolly's image of the swaying Millennium Bridge sticks in my mind as a reminder of the power of unintentional ruptural events. Having experienced the Covid-19 pandemic (2020–2022) as an integral part of my dissertation journey, I can only say that it renewed my belief that future ruptural events will not always fall into the exclusively intentional category. The virus is a useful trope for unintentional interlegal doings. Whether it

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[688] On 21 June 2023 on the basis of a 2021 law on separatism which specifically targets private militia and terrorist groups (see further 'Les Soulèvements de la Terre, une dissolution problématique' *Le Monde* (23 June 2023) <https://www.lemonde.fr/idees/article/2023/06/23/les-soulevements-de-la-terre-une-dissolution-problematique_6178900_3232.html> accessed 2 July 2023).

[689] An amorphous offshoot of the ZAD Notre Dame des Landes and which unites Extinction Rebellion and other such movements (Youth for Climate, *Dernière Rénovation*, Just Stop Oil, Alternatiba, *Terre de Luttes*, etc), associations (such as *l'Association pour la taxation des transactions financières et pour l'action citoyenne (ATTAC)*), small-scale farmers (eg *la Confédération Paysanne*), and certain unions (eg *l'Union syndicale Solidaire*) under one umbrella.

[690] Baptiste Farge, '"Écoterrorisme": Pourquoi Gérald Darmanin Hausse Le Ton Face Aux Manifestants de Sainte-Soline' <https://www.bfmtv.com/politique/gouvernement/ecoterrorisme-pourquoi-gerald-darmanin-hausse-le-ton-face-aux-manifestants-de-sainte-soline_AV-202210310333.html> accessed 22 July 2023.

[691] For an account of the "battle" in English, see Robert Zaretsky, 'The Battle of Sainte-Soline' <https://quillette.com/2023/04/12/the-battle-of-sainte-soline/> accessed 22 July 2023.

[692] Quoted in ibid.

[693] Nietzsche taught us a long time ago that "just because we have to have grammatical subjects for all our sentences, we should not conclude that processes and events always have authors" (Valverde (n 53) 32).

originated in a research facility or jumped from one species to another is of little import, both are plausible future possibilities. Either way, the Covid-19 virus embodied a ruptural paradox insofar as it:

a) could not be ignored or displaced;
b) required a response;
c) made the possibility of dramatic legal transformation visible (at least temporarily: things that were previously unthinkable became thinkable);
d) forcefully irrupted into the legal order, temporarily upsetting the balance of power (the virus was – initially at least – illegible, making the scramble even more dramatic);
e) questioned the practical possibilities opened up or shut down by the legal order; and
f) came as a surprise.

Our emplacement in a variety of legal orders was upset by exposure to this new and unintelligible aspect of human–nature relations made visible by a nonhuman trespassing. This kind of unintentional ruptural event could also be provoked by nonhuman trespassings of other kinds: invasive species may overrun fresh water sources[694] or become new vectors for disease;[695] extreme weather events – whether floods, droughts, fires, etc – may upset living conditions to such an extent that large population movements result;[696] changes in animal behaviour as a result of destruction of their habitats which could bring new threats to cities; etc.

A second limitation is the surprising absence of ecological collapse in a dissertation which takes ecological collapse to be the pertinent context. I got over this halfway through the dissertation, realising that my planned thought path was simply too long. As a result, the ecological changes that have so far been noted and those that are still to come have ended up as bookends. But they are important bookends. These changes are what inspired me to get started on this PhD and are likely to inspire me to keep writing once I'm done. They are the

[694] For example, "the population expansion of the invasive zebra mussel in the North American Great Lakes was so great that it impeded water flow of municipal water supplies and hydroelectric companies" (United Nations Environment Programme, 'Global Environment Outlook – GEO-6: Healthy Planet, Healthy People' (2019) 150 <https://wedocs.unep.org/20.500.11822/27539>).
[695] For example, the Asian tiger mosquito that has now invaded most of France from more tropical climes is a potential vector of infectious diseases, including chikungunya, dengue and Zika.
[696] United Nations Environment Programme (n 694) 10.

reason I started thinking about law's role in contexts that are rapidly evolving. And my frustration with the law's inability to respond to these changes in a meaningful way is the reason I ended up focusing on legal change. I had planned to discuss how law is imbued with the growth logic, protecting and reinforcing economic growth with every move. I had decided, from my years teaching economics, that infinite economic growth was incompatible with the limited resources available on a single planet and that continuing to seek it out would only hasten ecological damage. There are a number of problems with this view, however. First, it is a totalising vision of the problem. In assuming that *all* law is growth-imbued, one assumes that positivist law is the only law legal theorists need concern themselves with. For clearly, *all* law is *not* growth-imbued if one takes a broader pluralist position[697] and considers the law of private institutions, indigenous law, religious law, the law of brief encounters, etc. And even positivist law may in some times and spaces question the growth logic: I'm thinking of Bhutan, for example, where the concept of gross national happiness (GNH) is used as an alternative to monetary values (namely GDP) to measure societal progress.[698] It was introduced in Bhutan's 1999 strategy for sustainable development[699] and is now an integral part of the country's constitution. All government policies and investments are therefore assessed against their contribution to GNH instead of their monetary cost and benefits. Much law is no doubt growth-imbued, but *all* law is not. And so I realised I needed to be more granular.

Second, it seemed in time to also be a totalising vision of the solution. Basing the "success" of law (in the context of ecological collapse) on its ability to embody degrowth[700] seemed a tad imperial. Certainly it felt at odds with my anarchist, localist and deeply democratic leanings. Obviously, some times and spaces require growth, while others don't. And even if degrowth eventually becomes inevitable – not as a choice but as a context (as it was for a short time in some spaces during the Covid-19 pandemic) – surely the variety of ecological difficulties to be faced will require a variety of "degrowth-like" responses. Degrowth is in some sense an *"hors-*

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[697] I already had a strong intuition, from years of teaching Sociology at school and encountering this question incessantly, that there is no bright line between legal norms and social norms.
[698] Maria-Teresa Lepeley, 'Bhutan's Gross National Happiness: An Approach to Human Centred Sustainable Development' (2017) 4 South Asian Journal of Human Resources Management 174 <https://doi.org/10.1177/2322093717731634> accessed 23 July 2023.
[699] See I Niestroy, AG Schmidt and A Esche, 'Bhutan: Paradigm Matters' in Bertelsmann Stiftung (ed), *Winning Strategies for a Sustainable Future: Reinhard Mohn Prize 2013* (Verlag Bertelsmann Stiftung 2013) <https://www.bertelsmann- stiftung.de/fileadmin/files/Projekte/31_Nachhaltigkeitsstrategien/Case-Study-Bhutan_Reinhard- Mohn-Prize-2013_20131016.pdf>; United Nations Environment Programme (n 694) 585.
[700] Or, at the very least, living within planetary boundaries, which given current overshoot will require some backtracking, at least in the Global North.

sol"[701] response to a Global North problem; my experience in Canada and my activist parenthesis suggested on the contrary that legal change in the face of ecological destruction requires grounded knowledge, grounded narratives and grounded adaptability. Some of my reading encounters along the way buoyed my sense of the limitless creativity to be found in pluralist legal orders: Piaget's fascinating account of the occupation of the LIP factory in Besançon in the 1970s; Moitessier's existentialist decision to forgo the Golden Globe prize and continue sailing around the world in 1969; Abram's *The Spell of the Sensuous*; and Kimmerer's *Braiding Sweetgrass*. There seemed to be hope at the granular level. And this granular level seemed to sit more easily with my feeling that just as there is not *one* growth-imbued Law, nor is there *one* Nature in which we are all embedded.

The third limitation tempers some of this hope. Of course, granular does not necessarily mean good, or helpful. This dissertation has focused on avenues for (potentially radical) legal change in a particularly dire context. I do not affirm however that these avenues will necessarily provide the *right* answers (if such a thing exists), or even sufficiently convincing answers. While I feel strongly that multiplying the sources of potential creativity is necessary in our current predicament, I am quite aware that some legal orders will propose dire solutions and some legal ruptures will promote chaos rather than channelling positive change. Opening oneself up to the intense potential of alternative legal orders comes with risks. And they are risks that positivist law has rarely been willing to take. With that said, the growing "intersectingness" of legal orders means that ruptural events of the type I have discussed here can only become more common. It seems to me that ignoring their likelihood and their power is itself a dangerous stance to take. The reaction of the French state to ruptural challenges within its own borders shows that one (imperially appealing) response to an initial interlegal trespassing is excessive policing or even eradication: the supposed no-risk, no-engagement-with-the-granular solution. I would argue that this is also the response that was adopted in some spaces during the Covid-19 pandemic, where granularity was also refused (those who were unvaccinated were policed and sometimes "removed" from public spaces, from jobs, from travel, etc). It is at least possible that this will become the standard ruptural response. And I think this would be a mistake.

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[701] The equivalent English term does not really exist: *hors-sol* refers to soil-less agriculture, but it also refers to someone (or some concept in this instance) that seems completely disconnected from the constraints of everyday life.

Despite the fact that legal rupture provides no ethical guarantees, the point of this dissertation has been to underline the fact that productive rupture requires narrative adaptations through interlegal dialogue. Just as licences were developed to authorise ostensibly illegal activities in some situations, and social licences have become the norm for "authorising" ostensibly unacceptable extractivism in some situations, so too legal orders will have to adapt to the demands of ostensibly unintelligible interlegal trespassing in some situations. Elucidating this process will surely help us do this better. As such, I think that this third limitation can only be remedied by further engagement with the idea of legal rupture. I hope that this dissertation will be considered a contribution that merits such engagement among legal theorists. The third limitation will also need to be remedied by governments and supranational institutions as they consider how interlegal dialogue might beneficially be engaged in the face of ecological destruction. Finally, this failing will need to be contemplated by non-positivist legal orders, and in particular the redemptive paideic orders: how will they protect their creative remit while also preserving their interlegal relevance? Paideic orders should perhaps be on their guard for excessive sedimentation (sometimes encouraged by the encompassing order) and excessive rupture (in their relations with other legal orders).

Postscript — Loose ends

With all this said, there are a few loose ends to tidy up. A dissertation can only hold so much. These loose ends represent the open questions that remain at the end of my seven-year journey. They are also page markers of the work that remains to be done, reminders of the inevitable unsatisfactoriness of the enterprise of a dissertation.

Sister orders

There is one aspect of the discussion in Chapter 1 that I never returned to, despite my promises to do so. In my initial discussion of legal rupture, I used a place marker ("sister orders") to describe the protagonists. It was too early to get into the precise nature of these sibling orders.

I adopted the descriptor "sister" for a reason. The term was intended to suggest that the two orders were related in some way, that they hailed of the same material perhaps. But the way I used the term might have been read as referring to two orders that exist out there: the French legal order and the ZAD legal order in Notre Dame des Landes for example. That misconception needs to be put to rest.

To do this I would like to return to Kafka's "Before the Law" to attempt a last possible reading of the parable… In Kafka's story, one can distinguish two separate scenes: a known, visible, mapped scene before the door and an unexplored, invisible, unmapped scene beyond the door. There is the territory that the narrator describes to us in great detail "before the Law" and there is a shadow territory that remains unrevealed (everything that lies beyond the door). The borderline between the two is guarded by a doorkeeper. The "man from the country" sticks to the mapped scene. With the help of the doorkeeper, he imagines terrible things beyond the door. Fear stops him from pursuing his initial investigatory impulses. And so the unexplored scene of the story remains uncharted. An enduring sensation when reading this story is a feeling of frustration: frustration about the lack of access to those unexplored wings; frustration about the man's fear which seems unjustified, or at least disproportionate; frustration about the time wasted by the "man from the country" (and the reader too who yearned for closure); frustration that no other protagonists came along to get the job done! Everything about the story creates a yearning to go beyond that door. And that yearning is completely frustrated. The ending points elsewhere: why me?

This reading of Kafka's parable embodies sister orders.

Sister-orders are made up of a duo: the existing legal order and its sisterly shadow, its remainder. The former embodies actuality, all that is, the reassuring relations that we know. This is the terrain occupied by the "man from the country" before the door, the visible scenery. The latter (its shadow) embodies potential, all that might be, the unimagined and unimaginable possibilities that lie beyond. This is the terrain that lies in the background, what lurks behind the door in Kafka's story. The term shadow is a useful term here because it is something we don't see until we turn a strong light on the existing order. The term "shadow" also suggests that it "belongs" in some sense to the existing order, since a shadow can only be produced by something that is. Finally, the term "shadow" plays the same role as Foucault's mirror in his discussion of heterotopias:[702] it is part-real (since its shape is determined by an actually existing order), but also part-virtual (since the shadow is not an order itself).

The existing legal order is necessarily an enclosure, a closing in and shutting out, that simultaneously affirms its existence and excludes a whole range of possibilities that are not in fact taken up. The sisterly shadow represents this remainder, all that is excluded as irrelevant and all that is excluded by default because its relevance cannot even be imagined. In this most basic sense, sister orders are forged of the same material. Kafka's story encloses us in the space before the door.

The legal order and its sisterly shadow are *not* two orders then. The latter is unordered, unidentified, amorphous – it is unmapped terrain. The sisterly shadow is simply a remainder that accompanies the legal order and persists in some form at all times. It will, of course, include other legal orders (paideic legal orders for example) – or parts of other legal orders – which remain unmapped and thus unintelligible to the legal order at issue. But it is also composed of the infinite stock of potential alternative narratives that have yet to find expression anywhere and which cannot be tied down to an identifiable order.

The sisterly shadow

If Kafka's story leaves us frustrated, on the borderline of the sisterly shadow but unable to access its secrets, the 1972 film *Deliverance* directed by John Boorman and based on the novel by James Dickey invites us to cross that borderline and face a full-on encounter with the sisterly

[702] Cf Michel Foucault, 'Of Other Spaces' (1986) 16 Diacritics 22, 24 <https://www.jstor.org/stable/464648> accessed 10 July 2023: "The mirror functions as a heterotopia in this respect: it makes this place that I occupy at the moment when I look at myself in the glass at once absolutely real, connected with all the space that surrounds it, and absolutely unreal, since in order to be perceived it has to pass through this virtual point which is over there."

shadow. The film recounts the story of four Atlanta businessmen who take a weekend off to go on a kayaking expedition down the Cahulawassee River. The river is soon to be dammed for the benefit of the city and the men want to render a final homage. Only one of them has any of the requisite skills to survive in the wild, but each of the characters has his own reasons for participating in the expedition. Everything about the terrain they must navigate is "outlandish": the ways of the locals, the strange noises at night, the rapids, the bugs, the lack of home comforts… The four men are stripped of their city-laden status. On the river, they are not just no one, they are incompetent no ones. There is plenty of fear and latent exhilaration. But once on the river, there is no turning back. The squeals of adrenaline as they race down the rapids in one piece seem to confirm that they have done the right thing by confronting their fears. The initial scenes are full of this exhilaration, as the men throw off the constraints of the city. Nature, the sisterly shadow of the City order, is depicted as both thrilling and accommodating.

Until the narrative turns against them.

Bobby and Ed are taken hostage by mountain men. Bobby is forced to "squeal like a pig" and is then sodomised. This is not the encounter with Nature they had bargained for. When Ed's turn comes, Lewis shoots the offender in the back with an arrow. Drew suggests they take the body down river to the police. Lewis is adamant that the law of these parts[703] will not save them. Ed and Bobby are persuaded by Lewis that their experiences on the river require that they hide the body and forge a new narrative. Pursued by their own psychological demons, they speed down the river. Drew falls out of the boat and drowns – a metaphor perhaps for his deteriorating psychological state bogged down as he is by guilt. He has no life jacket on: he refused the life jacket; he refused the alternative story invented by Lewis to save them all from the law.

Lewis believes Drew to have been shot by the second mountain man who lurks in the mountains above the river. This story too may be a figment of his imagination. After all, Drew's death is in no small part a consequence of his own actions. Perhaps this is simply his subconscious trying to save him from the burden of the death of his fellow adventurer? Drew's drowning provokes further disarray, with all three remaining men ejected from their boats by the rapids. Lewis, capable but overconfident, ends up maimed. Ed climbs the cliff to confront the remaining mountain man and manages to kill him. He proves his worth, beyond the humdrum of city life: a rebirth of sorts. No one is really sure he's killed the right man (he looks not to be

[703] In this particular scene, he hollers "Where is the Law? Where is the Law?"

missing teeth)… but they don't investigate further, preferring again the comforts of their own imagined heroic storylines. They sink the remaining bodies – the dead mountain man and dismembered Drew – to hide the evidence. And they return to dry land… emerging triumphant from the sisterly shadow.

This film stands as a perfect example of what it means to straddle sister-orders. It is a rollercoaster of emotion: shocking and exhilarating, juxtaposing awe-inspiring beauty and awe-inspiring horror. It is also a reminder that the sisterly shadow promises an unbounded experience but does not promise that the outcome will necessarily be positive. The sisterly shadow is neither good nor bad; it is simply potential.

What is interesting about the narrative is the way the men choose to re-enter order from the shadow. "Deliverance" (they moor at the site of a church and a graveyard…) is specific to each individual. All of them try to pull up the walkway behind them and shut off the horrors (and exhilarations) of the shadow world of potentiality. They each seek renewed closure by concocting a narrative bridge (the stitch) that will explain their exit from the existing city order and re-entry in terms acceptable to the order they know. Drew's deliverance is suicide: the absolute escape from his psychological demons. Ed's inability to snap back into familial chit chat over dinner and his subsequent nightmare show though that the shadow order has trespassed into the existing sister order despite his best efforts. Lewis feigns memory loss to erase all evidence of his own trespassing. Bobby disowns his experiences of trespassing and forges forwards without looking back.

This film is an interesting counterpoint to Kafka's parable insofar as it presents the sisterly "beyond" that Kafka avoids, filling it with beauty and horror. This, for me, is an insightful representation of the domain of the sisterly shadow or the a-legal as described by Lindahl. The film embodies both the exclusion of the unknown and thus irrelevant (Nature, in particular, but also autochthones who live off the land and the destruction of Nature required to support the City) and the enclosure of a specific set of relevancies which hold lives together (the policeman, the family, friendship, the shared meal, etc). Throughout the film, there are examples of the characters believing they have sussed out the locals (who they misjudge and mistreat), the rapids (which get the better of the best of them), the body (which never behaves as expected: trembling hands during hunting, squealing like a pig, members maimed and dislocated by the power of the river, a mountain man without teeth and then with them), the Law (present through its absence), and even death (bodies that don't stay put even in death: moved by the men, by the river, by the workers who come to dam the river, by the subconscious in dreams). Their

voyage into the sisterly shadow is a way of exposing their group-cockiness and questioning the solid groundings of their city life. It also embodies the possibilities for change (positive and negative) that arise from such trespassing.

The aesthetic experience of rupture

I returned to Kafka's parable and the film *Deliverance* to clarify two important points about the sisterly shadow. First, the narrative stitching that comes about as a result of occupying this outlandish space requires an *actual* (composite) individual doing which puts two worlds into one: an outlandish shadow narrative which comes to trespass on some part of the narrative order. This trespassing may be actively sought out or may be (at least in part) unintentional. Second, a trespassing of the sisterly shadow makes visible something that was previously invisible, replacing an absence by a presence. These two very different works provide a concrete experience of sister orders and in particular the sisterly shadow. Aesthetic experience has a way of shortcutting wordy descriptions by providing direct access to a new perceptual frame.

I opened with two artistic renditions of ruptural events. The first was Banksy's *mise-en-scène* of a self-destructing work of art and the second was a documentary calling attention to the self-mutilated fingertips of fleeing migrants in France. Both thrust upon us a shift in perspective, a relocating of attention. I did not get a chance to explore the realm of legal rupture in as much detail as I might have liked. If there is one aspect of the ruptural in particular that I think warrants further attention, it is its aesthetic nature. I don't think it is a coincidence that my opening (and closing) examples drew on the work of artists. Nor do I think it a coincidence that Rancière was a theorist of aesthetics, alongside his contributions to political philosophy[704] and his excursions into epistemology, education and method.[705]

There is much to be said about the aesthetic nature of an order's *idem*- and *ipse*-identity, and the aesthetic nature of any ruptural event that undoes – however temporarily – the narrative connection between the two. Rancière's account of dissensus gets at this aesthetic aspect. The "police" order refers to all the institutions that promote a logic of consensus and encourage a

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[704] Though he adamantly refuses the label of political philosopher (Jacques Rancière, 'Comment and Responses' (2003) 6 Theory & Event 10 <https://muse.jhu.edu/pub/1/article/44787> accessed 13 February 2023).

[705] "Rancière's work has been characterized by polemical interventions into an increasingly diverse range of fields; but they do not add up to a 'system' or a 'theory'. Rather he has described his 'method' as consisting in making interventions into always particular situations, specific instances in which ideas are 'at work'" (Bowman and Stamp (n 137) xii).

given configuration of the perceptible (of what can be seen, done, said). Within the hegemonic or imperial order, for example, there is a general "convergence" on a certain "sense" of society and its possibilities, and this convergence makes alternatives difficult to see. The convergence on this consensus refers to an aesthetic continuity wherein those without a part in the arrangement of social parts are not simply oppressed but absent to the senses. For Rancière, politics happens at the edge of the police order, when those who are uncounted, those who are absent to the senses and thus have no part in the "distribution of the sensible", as he calls it, make themselves visible as if they were equal, as if they had a role to play in the taken-for-granted arrangement of parts. This dramatic staging of equality provides the potential for emancipation or redemption by temporarily interrupting the distribution of the sensible.

Two aspects of his account are worth insisting on, since they appear neither in Lindahl nor in Cover: first, dissensus suggests a reconfiguration of aesthetic continuity; and second, dissensus involves a "staging of equality". While I have preferred to refer to ruptural events to avoid the strictly "political" associations of dissensus, I believe the two to be intimately linked.

The reconfiguration of aesthetic continuity mirrors the adaptation of narrative I discussed in the context of ongoing interlegal dialogue. Legal narrative is a selective perceptual frame. This perceptual frame strongly determines my doings insofar as I act on what I perceive to be the case. The original sense of an aesthetic (from the late 18th century) was precisely this: "relating to perception by the senses". I therefore consider a legal narrative to be fundamentally aesthetic: a way of perceiving, of paying attention. This understanding of narrative seems to be similar to that used by Abram in *The Spell of the Sensuous*:

> In this work I have tried to reacquaint the reader with a mode of awareness that precedes and underlies the literate intellect, to a way of thinking and speaking that strives to be faithful not to the written record but to the sensuous world itself, and to the other bodies or beings that surround us. […] [T]o *explain* is not to present a set of finished reasons, but to tell a story. […] Of course, not all stories are successful. There are good stories and mediocre stories and downright bad stories. How are they to be judged? […] The answer is this: a story must be judged according to whether it *makes sense*. And "making sense" must be understood in its most direct meaning: to make sense is *to enliven the senses* […], and hence to renew and rejuvenate one's felt awareness of the world.[706]

[706] Abram (n 88) 264–265 (emphasis in original).

This understanding of narrative as a way of "making sense" makes it easier to see why artists are obvious conduits for ruptural events. It has been argued that one of the defining features of art (if indeed it were possible to define art)[707] is this ability to play with perceptual frames and so "enliven the senses" in unexpected ways. For example, in a scientifically playful article,[708] Ramachandran and Hirstein argue that the "peak shift effect" may provide one neurological explanation (among others)[709] for much of aesthetic experience. The peak shift effect is a well-known principle in animal discrimination learning where an animal rewarded for recognising a rectangle will show a greater response to a rectangle with exaggerated characteristics (eg a 5x1 rectangle) than to the original prototype (eg a 4x2 rectangle). The authors suggest that artists (unconsciously) use this effect. They will subtract everything that is *average* about a scene (for example) and *amplify* everything that is exceptional to the scene, thus producing an image of the scene that is an amplified version of the original.[710] This has the neurological effect of producing a heightened experience of the scene than might be produced by the original. The peak shift effect can be applied to form, but also to other modalities such as colour, depth and motion. It may even be (unconsciously) tapping into perceptive modalities that we do not yet fully understand.[711]

It is possible that artists intuitively sense how to amplify actuality or the terrain in ways that will "enliven the senses". In doing so, they break with the aesthetic continuity, the average or consensual divvying up of our sensible experience. What is even clearer from the article though is that, for the person experiencing the artwork, this enlivening of the senses occurs prior to and irrespective of any intellectual engagement. There is a direct link to the limbic system,[712] and thus to emotion and motivated action as Damasio explains so well.[713] As such, the aesthetic experience produced by artists may be a particularly impactful means of enlivening the senses by bringing alternative ways of "making sense" (alternative narratives) into view.

What are we to make though of the appeal to a "staging of equality"? Rancière means by this that a ruptural doing must proceed on the basis of a presupposition of equality, even when the

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[707] As Picasso said, "Everyone wants to understand art. Why not try to understand the song of a bird?" (VS Ramachandran and William Hirstein, 'The Science of Art: A Neurological Theory of Aesthetic Experience' (1999) 6 Journal of Consciousness Studies 15, 16).
[708] Ramachandran and Hirstein (n 707).
[709] Note that another of the aesthetic principles Ramachandran and Hirstein discuss is metaphor, as discussed in the Introduction (see ibid 30–32).
[710] ibid 18.
[711] ibid 20.
[712] See further Ramachandran and Hirstein (n 707).
[713] See further Damasio (n 334).

extant order, through its distribution of the sensible, necessarily places the acting subpart in a situation of inequality (where the "*sans part*" are invisible to the distribution). Again, any particular distribution, any accepted mapping, is called the police order. Politics, for Rancière, is the way in which the "*sans part*" (those who have no part in the current distribution of the sensible) find a way to have some part in that distribution, even if temporarily. Very much as in Lindahl, the *sans part* are always, in some sense at least, internal to the existing police order. However, in order to take part, they must stage equality; they must make themselves a part of the existing distribution of the sensible. In general, this will involve bringing the monstrous outside (the sisterly shadow) in by rendering visible the fact that the current mapping has invisibilised their part, their sharing-in and their sharing-of.

How does this fit with my account of ruptural events? Rancière claims that politics (or democracy or dissensus) is the process by which the *"sans part"* dis-identify with the existing distribution of the sensible and insist instead that they play an equal part in that distribution. I would adapt this slightly by suggesting that the presupposition of equality operates not at the level of the individual subparts, but at the meta-level. Given his work on epistemological equality[714] and the methodological foundation[715] this seems to have set for all his later work, I am not sure Rancière would mind. It seems to me that what is presupposed by a ruptural event is not substantive equality among parts in the distribution, but the equality of consideration due to all narratives. Rupture presupposes the equality to define the narrative, to fit the map to the terrain. This meta-level equality suggests that each (composite) individual has the capacity and the inherent right to engage in "making sense" of the mapped order and of the individual's (relational) place within and beyond that order.

The suggestion that the distribution of the sensible instantiates a form of inequality is an important one. Lindahl focused on the boundaries rather than the internal arrangement of these boundaries, so it is perhaps normal that the inequality mapped by such boundaries was left out of his account. I want to consider this briefly now.

The link between inequality and rupture

Every legal order has its own strange or "monstrous" outside then, its sisterly shadow. This is one of the central arguments of Lindahl's *Fault Lines of Globalization*. Against the widely

[714] See Yves Citton, '"The Ignorant Schoolmaster": Knowledge and Authority' in Jean-Philippe Deranty (ed), *Jacques Rancière: Key Concepts* (Routledge 2014).
[715] See Rancière, 'Un-What?' (n 189).

endorsed assumption that we are now moving towards law without boundaries, Lindahl argues that boundaries individuate and thereby constitute any imaginable legal order. These boundaries order the "inside" and are the points at which the "outside" may irrupt into a legal order, thereby revealing unrecognised practical possibilities. I have called these boundaries "borderlines". The term appeals because it refers both to a legal order's many boundaries between the acceptable and the inacceptable (in its sense as a noun) and also the characteristic of being on the limit of the (un)acceptable (in its sense as an adjective).

These irruptions of the "outside" along internal borderlines are termed "a-legality" in Lindahl's work and are defined by the author as "strange behaviour and situations that, evoking another realm of practical possibilities, question the boundaries of (il)legality".[716] I have preferred to refer to these irruptions as legal rupture, during which a temporary schizo-legality takes hold. While very much inspired by Lindahl's a-legality, the term itself suggests an absence of law, an "outside" that holds no law. Legal rupture seems to me the more appropriate term insofar as it throws us into the experience of the full intensity of *excess* law (or legal potential), the "outside" comes gushing in.

Besides these superficial shifts in terms, there are two aspects of legal rupture that I have not developed but which may provide useful tools to take Lindahl's work a step further.

First, because of Lindahl's focus on international law perhaps, his account does not question the structures of domination or inequality that may exist *within* legal orders. In some sense, his map seems incredibly flattening. Ought-places, ought-times, ought-subjects and ought-behaviours are of course circumscribed by the map: boundaries abound. But there is little discussion of the fact that the IACA-model[717] introduces a space of non-reciprocity (where alternative mappings have no grip on the map). Thankfully, this innate flatness is remedied by appeal to the strange domain of the a-legal. Irrelevant or illegible mappings may, on occasion, thrust themselves into view along boundaries (which thus become "fault lines"), upsetting the flatness and potentially provoking a rearrangement of the map. But this overlooks the domination already at work within the map itself and so gives us little insight into what might drive ruptural events. Even if the overall distribution is generally preferred with regard to a strange a-legal outside, one can hardly infer that all subparts (a) are given the same value in the

[716] Lindahl, *Fault Lines of Globalization* (n 98) 3.
[717] The IACA-model refers to institutionalised and authoritatively mediated collective action. This is his more recent model presented in Lindahl (n 210).

distribution and (b) accord the same value (or normative pull) to the overall distribution. (Nor indeed, can one infer that all potential subparts have in fact been recognised.) The distribution inevitably provides a perceptual hierarchy of valence which facilitates certain types of action and disowns others.

While I don't think this undermines Lindahl's argument, I do think that his argument might be strengthened with more attention to this aspect of the legal distribution. My dissertation suggests two ways this might be done. First, by recognising legality beyond institutionalised "law", which gives us insight into how determining what will be present to the senses happens at a variety of (not necessarily institutional) levels, all of which contribute to fixing a certain set of relations between the subparts. And second, by drawing attention to excessive sedimentation, which may provoke ruptural events.

In the first instance, reconsidering legality as a necessarily multidisciplinary enterprise that exists by degrees makes it possible to recognise legal orders in all their multiplicity. Instead of relying on an authoritative institutional determination of law, this dissertation opted for a definition of legality that relied on law-as-map (*idem*-legality), interpreted through narrative and embodied in everyday interpretive commitments (*ipse*-legality). This approach recognises that there is rarely one homogenous conception of collective action, even when institutionalised and authoritatively mediated. While maps may suggest one conception, the map is always accompanied by subpart doings that sometimes comply and sometimes resist, that sometimes privilege the dominant map and sometimes turn to other maps, that sometimes follow hubs and sometimes reroute, etc.

It also recognises that institutions of authority are not the only harbingers of domination. It is possible that the focus on institutions of authority may invisibilise other spaces of non-reciprocity (where dominant mappings trump alternative mappings with impunity). Not all regulation of disputes goes on within institutions (as we saw in Lindahl and boundaries: Differentiating galore); much of everyday life takes place under the banner of mutual accommodations of the "other's" conduct.[718] Does this mean there is no domination beyond the institution? Hardly. Domination is rampant, in institutions as much as in the everyday. Rancière showed this in his critique of Althusser, whom he accused of peddling emancipatory knowledge for the sake of peasants who were, through his work, thereby conceived of as

[718] See Reisman's wonderful article on microlegal systems at the level of paradigmatic everyday brief encounters in Reisman (n 275); see also the helpful discussion in Jutras (n 275).

incapable of self-emancipation.[719] Similarly, in Johnson's 2001 discussion of the power of individual mappings, the example of a friend who shifts his wallet from one pocket to another on the approach of a young black man speaks millions.[720] These acts embody their own everyday hierarchical logics, one epistemological and the other racial.

These everyday examples of domination are translated, in the second instance, through the process of sedimentation. Sedimentation betrays increased valence: some aspects of the map are prioritised over others, some ways of being, of doing, of interacting. Sedimentation is the non-institutional everyday layering that piles up as subparts engage in interpretive commitments. Sedimentation unflattens the map, it provides a schematic way of envisaging how certain trajectories may carry more value, while others are disregarded and become absent to the senses. But sedimentation has explanatory potential too insofar as it points to pressure points, excessive burdens that may one day provoke ruptural doings. By suggesting that excessive sedimentation increases a legal order's susceptibility to legal rupture, I have tried to insist that legal rupture does not simply undo legality (by provoking unintelligibility), it also undermines the explanation for existing distributions of the sensible, existing hierarchies of valence embodied in sedimentation.

Open questions

A number of questions remain that are beyond the scope of this dissertation. At the outset, I asked "What can the law do?" in a context of ecological collapse. With this in mind, it would have been interesting to look at the tendencies of and the balance between each of the quadrants sketched in my mapping. Are there particular characteristics of the legal orders in each of the quadrants that might make them more or less adapted to certain contexts? Will certain quadrants "swell" given the right circumstances? In asking this question, I am thinking of course of the context of ecological collapse first and foremost, but any contextual situation that puts legal orders under pressure to instigate drastic legal change may have similar consequences.

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[719] See further Jacques Rancière, *La Leçon d'Althusser* (La fabrique éditions 2023).

[720] Johnson recounts the story of a friend who shifts his wallet from one pocket to another on the approach of a young black man. This story is a perfect example of everyday "small and private" mappings or commitments that may nonetheless have huge consequences when generalised. They serve to reinforce the place of the racialised other in a legal order's map and so foster continued discriminatory treatment (see Johnson, 'The Persuasive Cartographer' (n 66) 269–270).

My experience of the Covid-19 pandemic in particular, but also of the Syrian refugee crisis in Europe and the democratisation of access to AI-powered language models such as ChatGPT, have made me wonder if there is a risk that such contexts will provoke a slide towards insularity of the hegemonic and apocryphal varieties. There is some literature in political science discussing the prospect that authoritarianism may be context-specific rather than a character disposition more tightly tied to one's political leaning.[721] More recently, political scientists have investigated the emergent authoritarian tendencies as a result of the Covid-19 pandemic and the threat of climate change.[722] My personal experience of the pandemic context was one of floundering globalisation[723] and diplomacy, accompanied by surprisingly authoritarian measures on the domestic front. There was a lockdown on national narratives and heavy channelling and surveillance of individuals' doings to ensure compliance with the narrative. Government advertising campaigns and regular presidential broadcasts on national television played to affect, calling on national solidarity. These are all characteristic of the hegemonic legal order.

Similar shifts may be afoot in the direction of the apocryphal quadrant, facilitated by the increasing appeal to "intelligent" devices and AI capacity, or to the market. Recently, the French government has proposed to merge the national ID card with the national health service card. They suggest this is to avoid health service fraud, but the national health service is against the merger and a recent report on the subject suggests there is very little fraud of any such sort actually occurring.[724] Why then the sudden desire to merge the two? Perhaps a joint ID–health card would have facilitated policing during the pandemic and will be used to such effect next time we have to deal with a global pandemic? Much like market approaches to regulation and

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[721] Caroline Schnelle and others, 'Authoritarianism Beyond Disposition: A Literature Review of Research on Contextual Antecedents' (2021) 12 Frontiers in Psychology 676093.
[722] See Magdalena Hirsch, 'Becoming Authoritarian for the Greater Good? Authoritarian Attitudes in Context of the Societal Crises of COVID-19 and Climate Change' (2022) 4 Frontiers in Political Science <https://www.frontiersin.org/articles/10.3389/fpos.2022.929991> accessed 25 July 2023.
[723] Global trade had in fact already plateaued (between 2005 and 2021 it has oscillated around the same percentage of global GDP), see https://data.worldbank.org/indicator/NE.TRD.GNFS.ZS. And some analysts predict that deglobalisation is the next trend to look out for (see Pinelopi K Goldberg and Tristan Reed, 'Is the Global Economy Deglobalizing? And If so, Why? And What Is Next?' (The Brookings Institution 2023) {BPEA} conference paper <https://www.brookings.edu/articles/is-the-global-economy-deglobalizing-and-if-so-why-and-what-is-next/>).
[724] 'Fusion Carte Vitale-Carte d'identité : L'Assurance Maladie Émet de "Très Fortes Réserves"' [2023] Le Monde.fr <https://www.lemonde.fr/politique/article/2023/06/01/fusion-carte-vitale-carte-d-identite-l-assurance-maladie-emet-de-tres-fortes-reserves_6175763_823448.html> accessed 25 July 2023.

governance, this would provide the government with the ability to use "hands-off" governance to steer behaviour.

Similarly, when the war in Ukraine broke out and French stocks of gas were dwindling after the European refusal to buy from Russia, measures were taken (including a highly effective advertising campaign) to encourage French consumers to reduce their electricity consumption. A decree was passed in September 2022 to allow the French electricity operator to turn off automatic water heating (for those with Linky electricity meters) at certain times of day in case of strain on the network.[725] This is nothing of course and hardly bears mentioning. But it is another example of the potential for a slide towards tech-inspired "hands-off" regulation in hard times.

As a follow-on question from this one, it may also be interesting to consider whether the work of "perfecting" a legal order is a one-way street or whether it might pull both ways. Is there potential for "unperfecting" to occur, particularly in the scenarios described above? Is climate change likely to produce more unperfected pockets and thus more interlegality at large? Again my feeling is that it will. Whether this is a result of the above-mentioned tendency for legal orders to shift towards the hegemonic and the apocryphal or is itself driven by other contextual elements is unclear. A quick example of this might be the unperfected pockets of solidarity between health workers that emerged in the face of the government's decision to discharge all unvaccinated health professionals. A more telling example though is the networks of solidarity that have developed across France and other European countries in response to the state's unwelcoming stance towards migrants. Cédric Herrou, a French farmer, helped hundreds of migrants cross the French–Italian border in the Vallée de la Roya. He was arrested for "crimes of solidarity" in 2016 and put on trial. Much like Vergès, he response before the court was: *"C'est l'État qui est dans l'illégalité, pas moi"* ("It is the State that is acting illegally, not me", referring to the French State's own human rights violations.[726] Over the years, from 2016 to March 2021, he was arrested and charged innumerable times. A UN rapporteur referred to his

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[725] Prime Minister's Office, 'Coupure Possible de La Chauffe Automatique Des Ballons d'eau Chaude de 12h à 14h Cet Hiver' <https://www.service-public.fr/particuliers/actualites/A16007> accessed 25 July 2023.

[726] Émilien Urbach, 'Cédric Herrou : « C'est l'état Qui Est Dans l'illégalité, Pas Moi »' [2017] L'Humanité <https://www.humanite.fr/societe/delit-de-solidarite/cedric-herrou-cest-letat-qui-est-dans-lillegalite-pas-moi-629732> accessed 24 February 2023; for an English account of Cédric Herrou's story, see Adam Nossiter, 'A French Underground Railroad, Moving African Migrants' [2016] The New York Times <https://www.nytimes.com/2016/10/05/world/europe/france-italy-migrants-smuggling.html> accessed 25 July 2023.

particular situation as one of "judicial harassment and administrative pressure".[727] The charges were finally dismissed in 2021 before the Court of Cassation. Of course, he is not alone in his efforts to help migrants on their way. His region is home to an NGO *Roya Citoyenne* and a Festival organised around these *"passeurs d'humanité"* ("humanitarian smugglers"). The local NGO works with a wider humanitarian network, *Réseau Hospitalité*, and this network was itself was inspired by the City of Sanctuary movement in the UK and the US. Cédric Herrou is one of many. The criminalisation of humanitarian work aimed to save or help migrants is reminiscent of the charges of "eco-terrorism" bandied about in ministerial references to radical environmental movements.[728]

These examples do not show that there is an acceleration of "unperfecting" in particular circumstances, but they do suggest that it is an oversimplification to consider perfecting to be unidirectional. It would be worth exploring whether unperfecting is more likely to happen in certain quadrants or if the move to unperfected pockets is the result of concrete circumstances on the ground.

[727] See 'Cédric Herrou' n 20 <https://fr.wikipedia.org/w/index.php?title=C%C3%A9dric_Herrou&oldid=200540731#cite_note-20> accessed 25 July 2023.
[728] For a discussion of this criminalisation, see Tazzioli (n 408).

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