Holocene jurisprudence

Article:

Holocene jurisprudence

Alain Pottage

Professor of Law, London School of Economics. [1]

We are now accustomed to thinking of the Holocene as an epoch that we have left behind. But from what perspective do we close the Holocene and begin describing the Anthropocene? Academic disciplines have their own geology: epistemic or medial strata, sediments, or condensations, which condition the apprehension and communication of fresh insight. The phrase 'Holocene jurisprudence' draws attention to a particular epistemic sediment: the figure of appropriation or 'taking', which is reactivated in many critical commentaries on the Anthropocene. And if, speaking figuratively, one were to identify an index fossil that compellingly expresses the epistemic traditions and potentialities that are sedimented into the Euro-American figure of appropriation, then Carl Schmitt's Nomos of the Earth *would be a good candidate.*

1. GEOLOGIES

Strictly speaking, to assign an expression of law to a geological period such as the Holocene one would have to be able to find traces of its existence in the stratigraphic record. In other words, law would have to be fossilized. Modern geology recognizes two kinds of fossil, body fossils and trace fossils (or ichnofossils). Body fossils consist in the counterform or imprint of the body of an organism, and trace fossils are the geological traces or structures attributable to the activities of an ancient organism. The most obvious kind of trace fossil is the footprint of a dinosaur, but more routine examples are the burrows made by animals in mud, the holes bored by molluscs in rock, trails and tracks of animal movement, the impressions left by 'resting' behaviours, petrified excrement (coprolites), middens and shelters, and so on. The value of ichnofossils is that they offer the only evidence of how animals actually moved, hunted, dwelled, and so on, and certainly the only evidence of the existence of animals for which we have no body fossils. So one geological handbook proposes that: '[t]horough

---

observation of trace fossils leading towards a behavioural interpretation of their makers is therefore a valuable tool in bringing the fossilised animals back to life'.[2] But the basic methodological principle of ichnofossil analysis is that traces should be deciphered not as expressions of the ethos or authorship of a given organism, but only in abstraction from the animal itself, as agencies detached from agents. So, trace fossils are classified not in terms of producer biology but in terms of 'families' of traces, almost in the mode of structural linguistics. One studies the evolution of behaviours as such rather than the evolution of biological organisms. And the emergence of a new science of the ichnofossil encourages the belief that there could be such things as trace fossils of law.

The Anthropocene Working Group now speaks of 'technofossils' — a particular innovation on the theme of the trace fossil. The proposition is that the fossils that demarcate and characterize the Anthropocene are the traces of the agency or behavior not of humanity as such but of the 'technosphere'[3] — the economic, technical, system of which human agency is only one ingredient, and which has a certain autonomy from human designs. Again, recall that the trace fossil is a trace of activities abstracted from agents:

> The morphological range of technofossils is almost infinitely greater than the range of trace types produced by any other species. Most trace fossil-formers produce a single type of trace, though some may produce a small number of different types (e.g. trilobite species that produce at different times both Cruziana walking traces and Rusophycus resting traces). The number of different types of potentially preservable human artefacts, by contrast, numbers in the millions, as a result of cultural evolution, and is growing daily.[4]

Bearing in mind the implicit political agenda of the Anthropocene Working Group, the strategy here is to emphasize the radically artificial nature of these new fossils — plastics, plastiglomerates, purified metals and minerals, Plutonium-239, and so on — the better to emphasize the catastrophic break represented by the irruption of the Anthropocene in the 1950s. And this in turn implies a reversal of the forensic approach of modern geology. Instead of beginning with the fossil and eliciting context from it, one begins with context and finds the *Leitfossil* for that context. Or, as the representatives of the Anthropocene Working Group

---

put it, the object is to identify 'the environmental trends picked out as of major significance to contemporary global change by the Earth system science community' and considering 'whether or not they will leave a recognizable signal within strata'.[5] Here, the identification of fossils is focused on the 'first appearance datums',[6] and the basic question is 'when did the Anthropocene begin?' and 'how is that beginning marked in the fossil record?' Incidentally, the proto-cybernetic characterization of fossils or ichno-traces as signals is interesting because it introduces the distinction between signal and noise, and hence the position of the observer or medial device that distinguishes between the two, and of the human or nonhuman who will actually read our remains.

Although modern geologists disagreed about the nature of geological induction — with Lyell on one side, Peirce, Agassiz and Whewell on the other — there is a sense in which both sides agreed that they were reading 'a text written by Nature herself'. The Anthropocene would be the first geological epoch in which the text in question is written, or unwittingly inscribed, by those representatives of the species who are the prime movers of the technosphere.[7] And, in the figure of the technofossil, the geological fossil becomes a kind of observational machine, through which we, as components of the technosphere, are invited to observe the agencies of that sphere. These trace fossils will be geologically observable in the true sense only in the future; although deposits of ^{239}Pu, plastiglomerates, formations of concrete, and so on, are being formed in the present, they are decipherable as fossils only in the mode of the future perfect. The technofossil is the trace of a behavior that will be seen to have existed by future observers, and its agency in the present is an effect of how we anticipate that future observer.

In what sense, if at all, does this warrant speaking of 'Holocene jurisprudence'? Does the reinvention of the ichnofossil by the Anthropocene Working Group indeed make it easier to imagine finding trace fossils of law or legal operations? Perhaps the oldest media of law remain identifiable as such; in the form of Sumerian clay tablets, sediment returns to sediment. And it turns out that paper might generate a geological signal: 'paper might be expected to fossilize, in appropriate geological settings, about as well as delicate plant fossils such as

---

[5] Ibid., 88.

[6] Ibid., 87.

[7] One senses that the Anthropocene Working Group does not wholeheartedly subscribe to Haff's characterisation of the human as 'newly constructed technological parts based on old design information (DNA) captured from the biosphere' (Peter Haff, 'Technology as a geological phenomenon: implications for human well-being' in C Waters et al (eds) *A Stratigraphical Basis for the Anthropocene* (London: Geological Society, 2013) 301-309, at 303).

leaves'.[8] Yet, for all our talk of the materiality of law,[9] fossilized media would tell us little about the existence and operation of law as a discourse. So the reference to Holocene jurisprudence is necessarily figurative. Law does not fossilize. There is however a historiographical counterpart to the geological understanding of strata. *Zeitschichten* [*Sediments of Time*], the title of a collection of essays by Reinhard Koselleck, might well have been translated as *Strata of Time*. The geological image of strata as formations that 'set themselves apart from each other at differing speeds over the course of the so-called history of the earth'[10] was a metaphor that emerged with the modern understanding of historical time, and Koselleck transposes this metaphor 'back into' human or social history in order to capture his sense of time as having synchronic depth rather than simple linearity or cyclicality. It is precisely this move of bringing the metaphor of strata back into human and social history that warrants speaking of 'Holocene jurisprudence'.

As it moves back into human and social history, the metaphor of strata changes in ways that explain why *Schichten* was translated as 'sediments' rather than 'strata'. Whereas in geology strata are imagined as impermeable to each other — as static, self-contained, series[11] — the relation between historical or historiographical layers is dynamic. As Koselleck's translators put it: 'The metaphor of sediments captures the gathering, building up, and solidifying into layers of experiences and events, as well as the tensions and fault lines that arise between different sedimented formations.'[12] Historical sediments accrue, change, and reform in different ways, and at different rates; and, crudely, the slowness of one sediment is a condition for the speed of another. A basic premise is that 'recurrence [is] a precondition for singularity';[13] or, in the language of cybernetics, redundancy conditions variety. An event is apprehended as novel or surprising only against the background of a set of deeply conventionalized (sedimented) expectations, which constitute the experiential or phenomenological horizon against which the new can appear as such. In return, the sedimented archive of expectations is reconfigured by the apprehension and recording of the new. Koselleck makes an analogy with the co-articulation of speech and language:

---

[8] Zalasiewicz et al (n 4), 95.

[9] See Alain Pottage, 'The materiality of what?' (2012) 39(1) *Journal of Law and Society* 167-183.

[10] Reinhard Koselleck, *Sediments of Time. On Possible Histories* (Stanford, Stanford University Press 2018) 3.

[11] The self-contained nature of these series is, if anything, emphasized when a pattern of sedimentation is disrupted by nonconformities, which break through as monuments to deeper series.

[12] Stefan-Ludwig Hoffmann and Sean Franzel, 'Introduction: Translating Koselleck' in Koselleck (n 10) ix-xxi, at xiv.

[13] Koselleck (n 10) 5.

[E]ven someone who wants to say something new must still make what he or she wants to say intelligible in a preexisting language. In order to make individual acts of speech understandable, one must be able to recall the entire preexisting linguistic inventory [*Sprachhaushalt*]. Singular acts of speech thus depend upon the recurrence of language. Speaking performs this recurrence again and again, which changes only very slowly, even when something entirely new is put into words.[14]

Again, social-historical strata are not like geological strata. In the case of history, no layer is ever over and done with. The metaphor of strata/sediments presents differences in velocity or acceleration spatially, as differences in depth, the better to emphasize that the register of the recurrent does not precede the register of the singular. Rather, the two registers are co-present, co-active, and articulated in and by the same moment. So stratification has to be understood not as a mode of sequentiality but in terms of what Koselleck characterizes as the paradox or 'aporia' of the 'simultaneity of the nonsimultaneous' [*die Gleichzeitigkeit des Ungleichzeitigen*].[15]

With the theme or metaphor of fossilization in mind, what is particularly interesting is Koselleck's characterization of the deeper layers of sediment as 'structures of repetition [*Weiderholungsstrukturen*]'. The strata of these 'longer-lasting preconditions' range from the deepest layer of 'extrahuman conditions of our experiences', or 'the biological preconditions of life we share with animals', to 'linguistic structures of repetition within which all [the deeper] repetitions or repeatabilities were generated and recognized, and within which they are still generated and discovered'.[16] These layers are differentiated not in terms of their relative anteriority but in terms of the speed at which they change and the generality of their agency. The role of linguistic structures of repetition is particularly important because history as experience persists only through communication, and through the medial or cultural techniques of recording, copying, and rewriting in which sediments of experience accrue and change. Law features prominently in Koselleck's discussion of structures of repetition, because law is the social science that explicitly cultures and maintains structures of repetition as such. Precisely by virtue of the difference between legal history and social history — the history of law 'thematizes structures rather than events'[17] — legal 'structures' are the

[14] Koselleck (n 10) 5.
[15] See Reinhard Koselleck, 'History, histories, and formal time structures', in *Futures Past. On the Semantics of Historical Time* (New York, Columbia University Press 2004) 93-104. Nowhere does Koselleck acknowledge the source of this formulation in Ernst Bloch's *Heritage of Our Times* [*Erbschaft dieser Zeit*] (Cambridge, Polity 1991 [1935]).
[16] Koselleck (n 10) 162.
[17] Koselleck (n 10) 131.

paradigmatic form of structure of repetition. Indeed, law is paradigmatic not only with respect to the form of structures of repetition but also with respect to their content or function. If one can extend what Koselleck says of history to the social sciences in general — namely, that 'even so-called value-neutral historical accounts cannot avoid imputing justice or the lack thereof to history'[18] — then there is a sense in which all discursive structures of repetition have a normative, or perhaps even juridical, cast.

There may be structures of repetition that are not sustained by techniques of recording, copying and rewriting,[19] but if we take law as a paradigm then it is interesting to note that law's structures of repetition are sedimented into text: more precisely, texts that 'claim a repeated applicability above and beyond any specific individual application'.[20] In these terms, the sediments — perhaps even fossils? — that are revealed when one switches the metaphor of stratification from geology back into history are characteristically discursive: linguistic structures of repetition that are archived in historical science, and, by extension, social-scientific knowledge more generally. And these sediments are not inert tokens of an exhausted past. They are continually reactivated as schematic forms that condition the apprehension of events and their formulation and communication as social-scientific knowledge. The point of taking Koselleck's reappropriation of the metaphor of strata seriously is that it enables one to make a simple but important point about the Anthropocene. Discourses of the Anthropocene themselves have a geology, and any analysis of the Anthropocene is made from within a layering of epistemic sediments, which condition what is seen and how it is analyzed. In the case of geology, we know that geological strata 'monumentalize' diverse temporalities: 'the everyday times of geological fieldwork, analysis and committee decision-making [and] the "timeless" time of the Earth's ongoing formation'.[21] To these times, we should add the schemata with differing speeds that are held in the archives or inventories of the geological sciences. One might, for example, pick out schemata (structures of repetition) such as that which is compressed into the simple suffix -cene or

---

[18] Koselleck (n 10) 127-128.
[19] Even here, if we take 'sexuality [*Geschlechtlichkeit*]' as a drive that remains 'structurally identical' throughout history, its repetition always involves cultural scripting: For example: 'With and following the individualization of the concept of the person, the enlightened-romantic concept of marriage emerged; this concept no longer referenced the objective reproduction an securing of a family tied to a household but instead envisioned the subjective and autonomous self-formation [*Selbstbildung*] and self-commitment [*Selbstbindung*] of two persons to each other through their love' (Koselleck (n 10) 159). It is quite conceivable that Koselleck had in mind the account of scripting as a historically contingent factor that is given by Niklas Luhmann in his *Love as Passion. The Codification of Intimacy* (Stanford, Stanford University Press, 1998 [1982]).
[20] Koselleck (n 10) 132.
[21] Bronislaw Szerszynski, 'The Anthropocene monument: On relating geological and human time' (2017) 20 (1) *European Journal of Social History* 111-131, at 124.

kainos: the space of the 'new' into which the Anthropocene is forged through the reinvention of the conventionalized form of the –cene or *kainos*.

It is obvious that strata or sediments of structures of repetition cannot be mapped on to the geological periodization of the Earth's history. Again, whereas geological (and conventional historical) layers are sequential, the strata of structures of repetition are synchronic. Indeed, the distinction between the Holocene and the Anthropocene is itself conditioned by the way these layerings play out, as are the more detailed characterizations of each epoch. Here, it is important to draw out a dimension of Koselleck's *Weiderholungsstrukturen* that remains only implicit. One of his preferred metaphors for structures of repetition is the postal system: one might receive shocking news in the mail, but this singular event is possible only because 'the mail carrier returns at the same time each day regularly in order to transmit singular messages'.[22] This suggests the medial character of sedimentation and repetition. There is a resonance between Koselleck's notion of sediments and Hartmut Winkler's model of 'deposits' [*Niederlegung*]. For Winkler, written texts are material storage devices, or 'monuments', in which linguistic or cultural forms are deposited or sedimented, and which stabilize and continue these linguistic or cultural practices by providing a resource for repetition:

> Over centuries, a written text can be read by tens of thousands of readers who take it in hand and integrate it into their lives; select readers may read it repeatedly. Its material durability asserts itself, above all, by bringing about a certain type of repetition that creates a kind of centre of gravity for that repetition; this centre of gravity forces the repetitive act to, in fact, return in cyclical fashion to a describable point.[23]

In other words, sediments are medial in the sense that the processes through which they are reactivated and remade involve material or quasi-material media — monuments, texts, human subjects, computer hardware — and the set of cultural techniques in which these media function as means of recording and transmitting cultural or discursive practices.[24]

---

[22] Koselleck (n 10) 5.

[23] Hartmut Winkler, 'Discourses, schemata, technology, monuments: Outline for a theory of cultural continuity' (2002) 10 *Configurations* 91-109, at 96. In terms that accord with those of Koselleck, Winkler clarifies that repetition is neither linear nor cyclical, and that if one were 'to remain in the problematic sphere of geometric illustration', then the only possible figure would be that of a spiral (ibid., 102, note 20).

[24] '[M]edial acts have to be referred to medial deposits, and medial deposits, in turn, have to be referred to medial acts' (ibid., 106).

Although the phrase 'Holocene jurisprudence' remains figurative,[25] precisely because sediments in the human and social sciences cannot be mapped on to geological periodizations, it functions rhetorically to highlight a dimension that is often overlooked by discourses of the Anthropocene; namely, their own epistemic and medial infrastructures. Rhetorically counterposed to the Anthropocene, 'Holocene jurisprudence' points to an archive or inventory that is reactivated not only in law but in the human and social sciences more generally. Koselleck identifies law with the adjudicative logic of precedent or authority, but the notion of Holocene jurisprudence picks out a deeper layer of sedimentation: the set of discursive forms and techniques that underwrite the ascription of responsibility. And, in the case of discourses of the Anthropocene, these forms and techniques are concentrated in one particular figure: appropriation.

2. JURISPRUDENCE IN THE ANTHROPOCENE

According to Peter Slojterdijk, the human sciences are susceptible to the 'synthetic-semantic virus' of the Anthropocene because it insinuates a question of liability: 'Whenever we say "Anthropocene" we find ourselves only seemingly in a geo-scientific seminar. In reality, we are participating in a court case; more precisely, in a pre-trial negotiation in which the legal culpability of the accused first needs to be clarified'.[26] Given that the human and social sciences are in the business of ascribing agency — in the form of causation, responsibility, or power — this sense of being in a pre-trial hearing is familiar. And what Koselleck says of history is true of other human or social sciences: even those approaches that are not self-declaredly critical disclose the world in ways that lend themselves to (para-)juridical analysis.[27] The novelty of the Anthropocene hypothesis is that it extends agency-ascription into forms, textures, temporalities and spatial distributions that were once the province of the

---

[25] Perhaps, technically, we should now speak of the Meghalayan Age rather than the Holocene Epoch; interestingly, the Meghalayan has an anthropogeological moment in the sense that it is identified by reference to an impact of environment upon human civilisations, in this case the drought that is supposed to have provoked the collapse of a Mesopotamian civilisation.

[26] Peter Sloterdijk, 'The Anthropocene. A process-state at the edge of geo-history?' in Heather Davis and Etienne Turpin (eds), *Art in the Anthropocene* (London: Open Humanities Press, 2015) 327-340, at 327.

[27] Here, one might have in mind the genealogy that leads from social science back to law (see W.T. Murphy, *The Oldest Social Science?* (Oxford: Oxford University Press, 1997), or the way in which the social sciences have fostered a certain understanding of law's social function (cf. Alain Pottage, 'Law after anthropology: object and technique in Roman law' (2014) 31 (2&3) *Theory, Culture & Society* 147-166).

geosciences. This is not necessarily so novel. Although the engagement with geology or Gaia-ology[28] raises surprising questions — are minerals are our kin?; do rocks die?[29] — these questions are controlled by the arche-trope of late twentieth-century theory: the trope of connection or inclusive articulation, as expressed in networks, naturecultures, *agencements*, *dispositifs*, and so on.[30] In the hyper-organic imagery of Donna Haraway's Chuthulucene, attachments and detachments, cuts and knots, are 'tentacular'; and, 'the tentacular are not disembodied figures: they are cnidarians, spiders, fingery beings like humans and raccoons, squids, jellyfish, neural extravaganzas, fibrous entities, flagellated beings, myofibril braids, matted and felted microbial and fungal tangles, probing creepers, swelling roots, reaching and climbing tendrilled ones'.[31] The theoretical imperative to connect, articulate, ramify, or render symmetrical implies a particular sense of politics. As in Foucault's analytic of bio-power, power necessarily has to be immanent, capillary, productive. And, even as theorists of the Anthropocene seek to move beyond bio-power, and towards politics of fossilization,[32] bricolage[33] or geontopower, the sedimented tropes of connectivity-productivity persist. And what also persists is a tension that was already evident in Foucault's formulation of biopower: if the model of sovereign power, which at least allowed one clearly to identify the responsible parties, is dissolved into a mode of immanent bio-power, what possibilities remain for retracing and ascribing responsibility? The sense of urgency that is communicated by the Anthropocene hypothesis makes this question all the more difficult.

What has to be clarified first in our pre-trial negotiation is whether there actually is a subject against whom a case might be brought, or in respect of whom it would even make sense to speak of culpability or responsibility. If the *anthropos* of the Anthropocene is characterized as the species as such, then the situation eludes any legal or political technique for ascribing responsibility or personifying the addressee of a claim. Recall the reaction provoked by Dipesh Chakrabarty's suggestion that, as a 'geological agent', mankind acts as

---

[28] See Bruno Latour and Timothy M Lenton, 'Extending the domain of freedom, or why Gaia is so hard to understand' (2019) 45 *Critical Inquiry* 659-680.

[29] Elizabeth Povinelli, *Geontologies. A Requiem to Late Capitalism* (Durham NC: Duke University Press, 2016).

[30] See Urs Stäheli, 'The right to silence: From a politics of connectivity to a politics of disconnectivity?' (2016) 67(3)*Soziale Welt: Zeitschrift für Sozialwissenschaftliche Forschung und Praxis* 299-311.

[31] Donna Haraway, 'Staying with the trouble. Anthropocene, Capitalocene, Chthulucene', in Jason W Moore (ed), *Anthropocene or Capitalocene? Nature, History, and the Crisis of Capitalism* (Oakland CA, PM Press 2016) 34-76, at 36.

[32] Kathryn Yusoff, 'Geosocial strata' (2017) 34 (2&3) *Theory, Culture & Society* 105-127.

[33] Eduardo Viveiros de Castro, 'On models and examples. Engineers and bricoleurs in the Anthropocene' (2019) 60 *Current Anthropology*, np: 'An organism is a biobricolage that mutually adapts and adopts other organisms to form symbionts that co-adapt (i.e., ontologically empathize) with a meta-symbiogenic milieu. The same applies at the species level and beyond: every individual "species" is a society of species and every ecosystem a society of societies'

species, upon 'the boundary parameters of human existence'; or, more precisely, 'conditions for the existence of life in the human form that have no intrinsic connection to the logics of capitalist, nationalist, or socialist identities'.[34] Observing that Chakrabarty used the word 'species' on no fewer than fifty-one occasions within the span of a single article, Christophe Bonneuil retorted that this way of construing *anthropos* 'obscures the asymmetries among humans about nature — unequal access to environmental goods and exposure to environmental bads — and through nature — technical systems organise energy and material flows which co-produce a certain kind of "second" transformed, nature, together with a certain kind of social order, entailing unequal social, racial, gender, and geopolitical relations'.[35] Whereas Chakrabarty's strategy was to take the geoscientific characterization of man as a geological agent literally, the better to emphasise that the human and social sciences cannot deal with our current predicament in the mode of 'business as usual', Bonneuil and others reassert the prestige of those sciences, and their capacity to unfold agency in terms that greatly exceed the complexity of any earth science understanding of *anthropos*.

But the question posed by this dispute about *anthropos* is indeed whether agency-ascription can go on as 'before'.[36] Here, Latour and Lenton's unworking of Gaia is instructive. According to Latour and Lenton, none of the existing characterizations of Gaia — as a mystical (feminine) body, a superorganism, a mechanical or cybernetic device, or a body politic — really captures the uniqueness of the Earth as an entity that produces itself independently of an environment, that has no 'inside', and which is composed of ingredients and processes that transect distinctions between organic and mechanical, or living and non-living:

> The question of what is alive and what is not in Gaia is so hard to pinpoint that some solid material forms are directly produced by life because they rely on the oxygenation of the atmosphere, and some are fully abiotic. Similarly, some gases are uniquely biogenic (isoprene, dimethyl sulphide), many others have their abundance massively altered by life, and some do not interact with life (noble gases). In other words, Gaia is very much a patchwork and *not a unified* domain, sphere, region or entity.[37]

---

[34] Dipesh Chakrabarty, 'The climate of history. Four theses' (2009) 35:2 *Critical Inquiry* 197-222, at 217. Recall that Chakrabarty begins (at p 216) with the question of responsibility: 'Why should one include the poor of the world—whose carbon footprint is small anyway— by use of such all-inclusive terms as species or mankind when the blame for the current crisis should be squarely laid at the door of the rich nations in the first place and of the richer classes in the poorer ones?'

[35] Christophe Bonneuil, 'The geological turn. Narratives of the Anthropocene', in Clive Hamilton, Christophe Bonneuil and François Gemenne, *The Anthropocene and the Global Environmental Crisis: Rethinking Modernity in a New Epoch* (London: Routledge, 2015) 20.

[36] For analysis of the figure of anthropos in law, see Anna Grear, 'Deconstructing Anthropos: A critical reflection on "anthropocentric" law and Anthropocene "humanity" (2015) 26 *Law & Critique* 225-249.

[37] Latour and Lenton (n 28) 669.

The point is that Gaia is a unity that exists only as a multiplicity: 'there is one Gaia, but Gaia is not "a whole"'.[38] There is no 'whole' within which each part can be assigned a place, no 'centre' that functionally or symbolically 'holds' the distributed elements, and no single process that organizes the parts into a functional system.[39]

In a different theoretical idiom, Erich Hörl deciphers the Anthropocene hypothesis as an expression of 'general ecology': '[The] proliferation of the ecological is accompanied by a shift in the meaning of "ecology". The concept is increasingly denaturalized. Whereas previously it was politically-semantically charged with nature, it now practically calls for an "ecology without nature". Thus it not only abandons any reference to nature, but even occupies fields that are definitively unnatural'.[40] This sense of ecology without nature was first developed in Niklas Luhmann's *Ecological Communication*, which identifies the environment not as nature, or as a pre-existing ecology, but as a product of the ways in which different social systems reconstruct their 'outside'.[41] Neither 'inside' nor outside 'exist' until they are distinguished by the system that produces and reproduces itself by means of that distinction, so the difference between system and environment, and the terms themselves, are always in process. It would be wrong to say that a system 'produces' its environment, and the diversity of material, chemical, organic and social forms and processes that are on the side of the environment, but the system organizes its own representation of and its own modes of susceptibility to these conditions. But the essential point about this original sense of 'ecology without nature' is that, as in the case of Gaia, a system exists only as a multiplicity, with no determinate centre or boundary, and the ecological relation between system and environment is 'denaturalized' in the sense that it is a model for couplings and connections that are not based on any ontic difference between nature and society.

If we take 'general ecology' as the expression of an essential feature of the Anthropocene,[42] then one can see the difficulty that it poses for responsibility-ascription. In

---

[38] Ibid., 674.

[39] So the difficulty of describing Gaia arises from the fact that it is a composition in which 'the whole is not above the parts but is in continuity with the parts – the word part being a way to name rather clumsily how elements are overlapping with one another' (Latour and Lenton (n 28) 677.

[40] Erich Hörl, 'Introduction to general ecology. The ecologization of thinking', in Hörl (ed), *General Ecology: The New Ecological Paradigm* (London, Bloomsbury 2018) 1-74, at 2.

[41] Niklas Luhmann, *Ecological Communication* (Cambridge, Polity Press 1989).

[42] Latour's epidermal allergy to Luhmann gets in the way of an appreciation of what systems theory is really about, but Hörl includes Latour in his rather ecumenical sense of general ecology.

the idiom of 'Gaia-graphy':[43] 'any human trying to situate himself or herself as part or participating in this history can no longer be defined only as "free" but, on the contrary, must be defined as being dependent on the same sort of intricate and intertwined events revealed by Gaia'.[44] In other words, those in charge of the pretrial hearing find themselves immersed in a skein of contingencies that offers no point or perspective from which to begin retracing responsibility. And if we follow the sense of Hörl's general ecology, then, even more than Koselleck's theory of structures of repetition, what are also in question are the medial and epistemic infrastructures that allow Gaia-graphers and others to thematize contingency in the first place. According to Hörl, the cybernetic operations that are articulated in Luhmann's theory are no longer ecological enough.[45] Although theories such as Luhmann's already construed communication, for example, as a process that did not begin with the human subject and its competences, but with the operations into which abstracted those competences away from their bearers, the suggestion is that our ecology is now one that is radically anhermeneutic. General ecology is characterized by the expansion and intensification of affects, meanings and sensations that transect the sphere of subjective perception.

How, then, might one do jurisprudence in the Anthropocene? One solution is to curtail connection: Gaia-logical or ecological entanglements have to be originated or terminated somewhere, which has the effect of unifying them into the form of a traceable process or an (asymmetrical) pattern of distribution, and which gives them the form of an 'object' in relation to which the social scientist can assume an external observational position from which to ascribe responsibility and decide on future action.[46] No jurisprudence can truly 'stay with the trouble'; a cut has to be made somewhere. Hence, for example, the argument that Frédéric Neyrat makes in his critique of 'geo-constructivism': 'Without separation, that is, without the ability to produce a distance within the interior of a socio-economic situation, no real political decision is possible, no technological choice is truly conceivable, no resilience — understood in the first instance as the capacity to draw back — can be expected'.[47] Latour's actor-network

---

[43] See Alexandra Arènes, Bruno Latour and Jérome Gaillardet, 'Giving depth to the surface: an exercise in the Gaia-graphy of critical zones' (2018) 5 *Anthropocene Review* 120-135.

[44] Latour and Lenton (n 28) 674.

[45] Systems theory was an effect of the emergence of cybernetic machines in the mid-twentieth century, and cybernetic observation cannot apprehend the agency of the digital machines and media of the twenty-first century, which bypass meaning and evolve regimes of sensation and cognition that further distribute (or ecologize) subjectivity itself. See Erich Hörl, 'Luhmann, the non-trivial machine and the neocybernetic regime of truth' (2012) 29(3) *Theory, Culture & Society* 94-121.

[46] On the operation of cutting network to produce a (hybrid) object, see Marilyn Strathern, 'Cutting the network' (1996) 2(3) *Journal of the Royal Anthropological Institute* 517-535.

[47] Frédéric Neyrat, 'Elements for an ecology of separation. Beyond ecological constructivism' in Hörl (n 40) 101.

Deleted: which

Deleted: ¶

Deleted: –

Deleted: –

theory, argues Neyrat, is a theory that 'does not allow us not to want':[48] Latour's celebration of emergent hybrids does not allow us to gain any critical purchase on the entanglements of nature and culture, and to choose which of these to foster and which to curtail. The objection that actor-network theory is politically agnostic is not new, and critics are unlikely to be satisfied by the exhortation to 'extend the domain of freedom [that is manifested in Gaia] by sharing it more widely on both sides.[49] And although they might find compelling the diagnosis that speaks of our 'refusing to know and to cultivate the capacity of response-ability; of refusing to be present in and to the onrushing catastrophe in time; of unprecedented looking away',[50] they might not find in it a capacity for effective intervention.

Most participants in our pre-trial hearing already have a good sense of who the guilty party is and what they are guilty of. Sloterdijk himself observes that, 'in truth, and for the time being' the humanity that would be arraigned for the Anthropocene is 'European civilization and its technocratic elite'.[51] But how should this 'humanity' be specified and responsibilized? A more detailed indictment is drawn up by Christophe Bonneuil, who draws attention to the historical debt arising from the 'unequal ecological exchange' that structured the relationship between the industrialized nations and the nations of the South with respect to the environment, and to 'the asymmetry that is created when the peripheral or subjected nations of the global economic system export products with a high ecological use value, and in return receive products of a lesser value, or products that cause harm (waste, greenhouse gases, etc)'.[52] Andreas Malm retraces the rise of steam power in England in nineteenth-century England; the steam engine prevailed over the waterwheel because it could be more efficiently accommodated to the capitalist reification and expropriation of labour power.[53] But what is particularly interesting here is Jason Moore's critique of these ascriptions of responsibility to industrial capital, and to the colonial powers, notably Britain, which extended it across the globe.

In his theory of the Capitalocene, Moore construes capitalism as a persistent, deeply-insinuated, and pernicious inflection of the 'web of life', it is first and foremost 'a way of organizing nature — a multispecies, situated, capitalist world-ecology':[54]

---

[48] Ibid., 103.
[49] Latour and Lenton (n 28) 679.
[50] Haraway (n 31) 39.
[51] Sloterdijk (n 26) 328.
[52] Christophe Bonneuil, 'Tous responsables?' *Le Monde Diplomatique*, November 2015, at p 16.
[53] Andreas Malm, *Fossil Capital. The Rise of Steam Power and the Roots of Global Warming* (London, Verso 2016).
[54] Jason W Moore, 'Anthropocene or Capitalocene? Nature, history, and the crisis of capitalism' in Moore (n 31) 1-11, at 6.

Not only does human activity produce biospheric change, but relations between humans are themselves produced in and through the web of life. Nature operates not only outside and inside our bodies (from global climate to the micro-biome) but also through our bodies, including our embodied minds. Humans produce intra-species differentiations which are ontologically fundamental to our species-being: inequalities of class especially, inflected by all manner of gendered and racialized cosmologies.[55]

The Anthropocene, or at least the variant that Moore calls the 'Popular Anthropocene',[56] is a 'bourgeois' concept because it retrenches the ideological misrepresentation of the web of life that was produced by material and symbolic operations of capitalism itself. Crudely, capitalism imposed the division between nature and society by emptying nature of some humans (not slaves, indigenous peoples, women) and reducing it to a stock of resources that were made available to capitalist accumulation.[57] Political theories such as those of Bonneuil and Malm work within this capitalist framing of ecology. For example, Malm's identification of the Anthropocene with the rise of the fossil economy reproduces and performs the distinction between nature and society by treating capitalism/society as an organization external to nature. The relation is one of inputs and outputs: fossil fuels enter the industrial-capitalist system at one end, and toxic wastes and environmental depradations 'leave' at the other. Capitalism is understood as 'a closed system that interacts with the rest of nature'.[58]

Bearing in mind the question of jurisprudence in the Anthropocene, the strategy of Moore's critique is interesting in itself. The strategy is to ecologize capitalism to the point at which it becomes a truly geological, or at least geosocial, mode of existence. In Moore's version, capitalism originates as a mode of 'environment-making' that got under way in the fifteenth century, with a shift from land-productivity to labour-productivity, which implied disciplining, ordering, and objectifying nature in order to turn it into a resource for labour-productivity and commodity production:

---

[55] Jason W Moore, 'The Capitalocene, Part I: on the nature and origins of our ecological crisis' (2017) 44(3) *The Journal of Peasant Studies* 594-630, at 603.

[56] Jason W Moore, 'Confronting the Popular Anthropocene. Toward an ecology of hope' (2017) 9 *New Geographies* 186-191.

[57] 'To turn work into labour-power and land into private property was to transform nature into Nature – and to treat Society as something outside of Nature, the better that Society could turn Nature into a set of discrete units, into a repertoire of calculable objects and factors of production' (Jason W Moore, 'The rise of cheap nature' in Moore (n 31) 88.

[58] Ibid., 113.

The modern world-system becomes, in this approach, a *capitalist world ecology*: a civilization that joins the accumulation of capital, the pursuit of power, and the production of nature as an organic whole. This means that capital and power — and countless other strategic relations — do not act *upon* nature, but develop *through* the web of life.[59]

Polemically, the strategy of ecologization, which highlights a *longue durée* in which the dominant imperative is labour-productivity, asserts the ability of the theory of the Capitalocene to see further and better than other political theories of the Anthropocene, which are 'captive to the very thought-structures that created the present crisis'.[60] The theory of the Capitalocene might indeed be a kind of super-jurisprudence, which is capable of configuring responsibility once and for all, but as the ecological frame expands and ramifies, one cannot but ask whether the cut is being made in the right place, and how in any case one would know what the right place is. So it is not surprising that the rejoinder to Moore involves rehabilitating nature as a horizon against which to delimit and anatomize the social.[61]

2.1 Terra nullius

Against this background, it is interesting to reflect on Bruno Latour's rediscovery of Carl Schmitt's *Nomos der Erde* as a field guide to the politics of Gaia.[62] In a brief report on a seminar devoted to readings of *Nomos*, Latour observes that: 'because Schmitt as a jurist does not make the usual distinction between fact and value, what is and what ought to be, and because he takes seriously the fabrication of space in its relation with power, there is a way to repoliticize

---

[59] Ibid., 97.

[60] Ibid., 113.

[61] See Andreas Malm, *The Progress of This Storm. Nature and Society in a Warming World* (London, Verso 2018).

[62] See generally Bruno Latour, *Face à Gaia. Huit conférences sur le nouveau régime climatique* (Paris, La Découverte 2016). I comment on a different aspect of this rediscovery in 'Our geological contemporary', in Justin Desautels-Stein and Christopher Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge, Cambridge University Press 2017) 177-195. In referring to Schmitt as a guide to our condition as 'Earthbound people', Latour is careful to respect the epistemo-sanitary protocols that the well-intentioned reader of Schmitt has to observe. In the text of his 2014 Gifford Lectures, he consistently applies the warning label 'toxic' to each appearance of the proper noun: Schmitt is 'toxic and unavoidable', or 'dangerous and reactionary'; his prose is 'terse and toxic' (Bruno Latour, at pp 101, 105, and 121, respectively). In the book form of the lectures, Latour observes that: 'The Nazi lawyer is rather like a poison that one keeps in the laboratory for those occasions on which one needs an active principle that is powerful enough to counter poisons that are even more dangerous: what matters is that one gets the dosage right' (Bruno Latour, *Face à Gaia*, (Paris: La Découverte, 2015), at p 295). In the context of his Nomos of the Earth, we should notice Schmitt's grotesque appropriation of the Holocaust as a metaphor for his own fate: 'Socially, I am dead. Now begins the dance of the Parsis upon my tomb. But this is still quite inoffensive. There are no longer any tombs; we are burned, and our ashes are spread by the wind. These ashes keep falling, they spread across all countries' (Schmitt, *Glossarium*, November 13, 1949, at p 278).

and rematerialize the question of land-grab — a question that has become essential to modern day politics'.[63] Latour's insight here is that Schmitt's sense of the space as a materialization of the political, and of the political as a mode of instituting the contingent ground of a geosocial Earth, qualifies his *Nomos* as a jurisprudence for the Anthropocene. Schmitt understood space not in terms of the singular cartographic globe, or the 'blue marble' presented by the first pictures from space, but in terms of practices that generated their own topologies, and realized their own worlds: 'For [Schmitt], as for today's historians of science, *res extensa* is not that within which politics is located — as the basic grid [*fond de carte*] of any geopolitics — but that which is produced by political action itself and by its technical instrumentation'.[64] This sense of ground or grounding as an effect of composition seems to resonate with the understanding of Gaia as an articulation of multiple ingredients and processes.

Even those who are wary of Schmitt will find in his *Nomos*, and more precisely his theory of land-appropriation [*Landnahme*], a sense of 'land-grab' that resonates closely and intensely with their understanding of the genealogy of our current situation. *Nomos der Erde* is an account of how legal order emerges not from a juridical mastery of cartographic space, but from appropriational events that precede and ground the order of positive law, and which condition its interpretation and operation. Legal and political orders unfold from the space that is created by the act of demarcating and cultivating land. These originating acts are authorized by a 'law' inherent in the soil, which Schmitt called an *Ontonom*. In her brilliant essay on Schmitt's *Nomos*, Cornelia Vismann observes that colonial land appropriations were justified in precisely these terms, as original appropriations that were authorized by a norm immanent in the ground, a norm manifested in the emptiness that underwrote the originality of an original appropriation. The emptiness of a ground justified its occupation and appropriation: 'The land that has no visible order imprinted in the soil is the land that authorizes, merely by the absence of any order, the imprinting of such an order, which is to say, the occupation of the land'.[65]

But these acts of appropriation by demarcation and cultivation were not truly original;[66] they were prefigured or 'framed' by the apprehension of land as empty space, and this apprehension was an effect of the cognitive and political violence that emptied colonized territories of order, and which instituted them as *terra nullius*. Justifications of appropriation

---

[63] 'Meeting on Carl Schmitt's Nomos of the Earth - A Report', At:
http://modesofexistence.org/meeting-on-carl-schmitts-nomos-of-the-earth-a-report/
[64] Latour (n 62) 298.
[65] Cornelia Vismann, 'Starting from scratch: concepts of order in no-man's land' in Bernd Hüppauf (ed), *War, Violence and the Modern Condition* (Berlin, De Gruyter 1997) 46-64, at 51. See also the following formulation (also at p 51): '[T]he object of occupation is simultaneously the agency of its legitimation'.
[66] On this theme, see Jacques Derrida, *Psyché. Inventions de l'autre*, vol 1, (Paris, Galilée 1987).

in terms of 'originality' obscured and legitimated the prior operations, which, so to speak, cleared the ground, and allowed it to be figured as devoid of visible order. Vismann associates Schmitt's *Nomos* with a particular post-1918 strategy of reviving this mode of justification; a project which she characterizes as that of 'gaining ground again for a concrete law', and which was fostered in the aftermath of World War I by two interested parties: 'those whose daily business is occupations — the military', and jurists with a desire for 'the concrete, the just'.[67] Materially, the project of creating the preconditions of original appropriation was perfectly exemplified in the operations of the Wehrmacht on the Russian Front in World War II, which involved using a specific engine — the *Schienenwolf* or *Schwellenpflug* — to tear up the railway lines that evidenced Soviet occupation: '[W]here no-man's land did not exist, their mission was to produce one, precisely to produce desert zones. Their mission was to erase all lines in order to start from scratch. …Thus, before colonization comes the production of a no-man's land.[68]

Against the emerging welfare state politics of the post-war period, which suggested that the central political question was distribution rather than appropriation, Schmitt argued that the persistence of appropriation was plain to see in the way that the violence of *Landnahme* was applied to other terrains or media:

> Allegedly, no longer anything is taken, but only divided and developed. An important representative of political science at a leading university in the United States recently wrote to me: 'Land-appropriation is over and done with'. I replied that it has become even more serious with the appropriation of space. We have no right to close our eyes to the problem of appropriation, and to refuse to think any more about it, because what one today calls world history in the West and East is the history of development in objects, means, and forms of appropriation interpreted as progress. This development proceeds from *land-appropriations* of nomadic and agrarian-feudal times to the *sea-appropriations* of the 16th to the 19th century, over *industry-appropriations* of the industrial-technical age and its distinction between developed and underdeveloped areas, and, finally, to the *air-appropriations* and *space-appropriations* of the present.[69]

In other words, the medium or object of appropriation changes, but the logic of appropriation as the taking of a radical title remains constant. Critical theories of the

---

[67] Vismann (n 65) 48-49.
[68] Ibid., 64.
[69] Carl Schmitt, 'Nomos-Nahme-*Name*' in *The Nomos of the Earth* (London: Telos, 2003) 336-350, at 346-347.

Anthropocene rearticulate this sense of the persistence of appropriation, first by emphasizing how the asymmetries that are manifested in the distribution of 'environmental goods and environmental bads' were produced by processes of appropriation and spoliation that began with the colonial era, and second, by developing an understanding of how appropriation in the age of general ecology is articulated across a diversity of agencies, media, discourses, and temporalities.

In her study of herbicide fumigation in Colombia, which is justified by the Colombian state as a measure to eliminate cocaine production, but which is in reality a mode of appropriation that eradicates the forest to make way for the activities of state-sponsored petroleum, mining and palm oil industries, Hannah Meszaros Martin characterizes fumigation as a form of ecocide that 'does not occur solely within the frame of war but similarly finds expression in the slower violence of resource extraction, state domination and other forms of uneven development'.[70] In one sense, the practice of fumigation can be seen as an evolution of older colonial campaigns of violence against land and people; it empties the land so as to leave it free for the operations of the mining industry. But it is also a violence that becomes ecological in the sense that it infiltrates the metabolisms, life cycles, and sympoietic[71] entanglements of plants, leaving toxic residues that 'exhaust' the earth, creating through 'slow violence' an Anthropocenic form of *terra nullius*. This calls for enhanced techniques of responsibility-ascription — 'As we begin to think in geological time, our capacity to commit "crime" and indeed "violent crime" also expands'[72] — which are capable of following the different temporalities, or temporalized sediments, of ecologized appropriation.

In an illuminating discussion of *Nomos* in the Anthropocene, Andreas Folkers draws on Michel Serres' *Le mal propre* to rework Schmitt's figure of the *(Land)-nahme* into a figure of 'atmosphere-appropriation'.[73] Serres sketches out a model of pollution as appropriation: 'Whoever spits in the soup keeps it to himself; no one will take any more of the salad or cheese that he pollutes in this way'.[74] Property is not (only) acquired through a Lockean process of extending the *suum* into things by means of labour, but through the inscriptive excretion of bodily wastes or fluids (in sublimated form). Without mentioning the Anthropocene, Serres

---

Deleted: which

---

[70] Hannah Meszaros Martin (2018) 'Defoliating the world', (2018) 32 (2&3) *Third Text* 230-253, at 238.
[71] In the sense of Haraway (n 31).
[72] Ibid., 238.
[73] See further Andreas Folkers, 'Resilienz als Nomos der Erde. Earth System Governance und die Politik des Anthropozäns' in Henning Laux and Anna Henkel (eds) *Die Erde, der Mensch und das Soziale: Zur Transformation gesellschaftlicher Naturverhältnisse im Anthropozän* (Bielefeld, Transcript, 2018) 137-160.
[74] Michel Serres, *Le mal propre* (Paris, Pommier 2012), at 11. On the same page, Serres observes that '*le propre s'acquiert et se conserve par le sale. Mieux: le propre c'est le sale*'.

observes that through the construction of 'world-objects [*objets-monde*]' — 'a satellite orbits at the speed of a moon, the nuclear industry manipulates energies that have an intensity and a lifespan that are close to that of the Earth' — mankind turns its environment into a foil for its powers of hyper-appropriation: 'the very growth of appropriation becomes what is proper to Man' [l*a croissance même de l'appropriation devient le PROPRE de l'Homme*]'.[75] In Folkers' reading, the atmosphere-appropriations of the industrial powers take the form of the *mal propre*; the effect of pollution is to make the atmosphere the *proprius* of those powers, to the exclusion of former colonies or dependencies and future generations. Again, the trope of appropriation/*Nahme* is imaginatively reinvented as a figure for the ecology of the Anthropocene.

3. GEOJURISPRUDENCE[76]

For Schmitt, colonization was 'the fundamental fact of European public law'.[77] And one finds in *Nomos* not only a compelling insight into the originary force and persistence of colonial appropriation, but also a sense of how this persistence was facilitated by the power to produce the topology within which those appropriations could be construed as legitimate. While he was writing *Nomos of the Earth*,[78] Schmitt came across paragraph 247 of Hegel's *Philosophy of Right*, which he considered to be essential to his account of European public law. Hegel refers to the expansion of civil society beyond national boundaries and across the seas, to the evolutionary gains that business makes when it begins to engage with the risks inherent in trading across oceans, and, beyond that, to the practical necessity of European expansion through colonization, which, according to Hegel, 'provides part of its population with a return to the family principle in a new country, and itself with a new market and sphere of industrial

---

[75] Ibid., 73-4. The sense of the formula *objet-monde* is of objects with a metonymic relation to the world.

[76] This term is hardly innocent. The German lawyer Manfred Langhans Ratzeburg first used the term *Geojurisprudenz* in 1928. Ratzeburg was interested in developing what he called a 'geojuristic' cartography, which would depict the actual relative power of formally equivalent nations or peoples (see Joseph W Bendersky, *Carl Schmitt. Theorist for the Reich* (Princeton, Princeton University Press, 1983), at 250-236). This was part of a broader interest in the relation between geography and normativity, which included figures such as Karl Haushofer (see David T Murphy, *The Heroic Earth. Geopolitical Thought in Weimar Germany 1918-1933* (Kent OH, Kent University Press 1997), esp at 107). For Schmitt's relation to this theme, see William Hooker, *Carl Schmitt's International Thought. Order and Orientation* (Cambridge, Cambridge University Press 2009), chapters 4 and 6.

[77] Carl Schmitt, *Staat, Grossraum, Nomos* (1940), cited in the French translation of Nomos – *Le nomos de la terre* (Paris, Presses Universitaires de France 2006), at 15.

[78] Carl Schmitt, *Glossarium. Aufzeichnungen der Jahre 1947-1951* (Berlin, Duncker and Humblot 1991), August 2nd 1948, at 185.

activity'.[79] In *Nomos*, Schmitt focuses on the distinction between land and sea. But the point about the spatiality of the sea was as the basis for the legitimacy of colonial appropriation. In the original constitution of European public law, land beyond the European seas was land 'beyond the line'; it was 'a sphere outside the law, and open to the use of force'. The distinction between land and sea was itself a kind of originary incision that rendered the surface of the Earth as discontinuous or non-finite space. The contrast here is with Kant, for whom the necessity of private property was an effect of the shape of the Earth: 'the spherical surface of the earth unites all the places on its surface; …if its surface were an unbounded plane, people could be so dispersed on it that they would not come into any community with one another, and community would not then be a necessary result of their existence on the earth'.[80] The division between land and sea that Schmitt ascribes to Hegel divides the surface of the Earth into 'zones' that are implicated in one another so as to create a discontinuous plane, intensifying space in ways that Kant's understanding of boundaries or limits could not.[81]

It is precisely this intensification of space — or, as Latour puts it, its fabrication in relation to power — that engages many of those who have written recently on *Nomos der Erde* or Schmitt's sense of space more generally.[82] Space has a potentiality that lends itself to understanding appropriation in ways that seem to hold together the violence and asymmetry of the colonial moment and the complexity of our contemporary ecology. But it is worth recalling that the plasticity of Schmitt's topologies was first worked out in the context of his

---

[79] See G W F Hegel, *Elements of the Philosophy of Right*, edited by Allen W Wood translated by H B Nisbet (Cambridge, Cambridge University Press, 1991), para 247, at 268: 'Just as the earth, the firm and *solid ground*, is a precondition of the principle of family life, so is the *sea* the natural element for industry, whose relations with the external world it enlivens. By exposing the pursuit of gain to danger, industry simultaneously rises above it; and for the ties of the soil and the limited circles of civil life with its pleasures and desires, it substitutes the element of fluidity, danger, and destruction. Through this supreme medium of communication, it also creates trading links between distant countries, a legal [*rechtlichen*] relationship which gives rise to contracts; and at the same time, such trade [*Verkehr*] is the greatest educational asset [*Bildungsmittel*] and the source from which commerce derives its world-historical significance'. And see also paragraph 248: 'This extended also supplies the means necessary for colonization - whether sporadic or systematic - to which the fully developed civil society is driven, and by which it provides part of its population with a return to the family principle in a new country, and itself with a new market and sphere of industrial activity' (ibid., 269).
[80] Kant, *The Metaphysics of Morals*, in Mary Gregor (ed.), *Practical Philosophy* (Cambridge: Cambridge University Press, 1996), at 414.
[81] For a reprise of Hegel's critique of Kant's distinction between boundary (*Grenze*) and limit (*Schranke*), see Gillian Rose, *Hegel Contra Sociology* (London, Athlone 1995), at 188ff. For Schmitt, vehicles or creatures (the whale) could be seen as intensifiers of space; consider the example of 'freebooters' navigating 'non-state vessels': 'with them, the sharp distinction between state and individual, public and private, even between war and peace, and war and piracy, disappeared' (Carl Schmitt, *Nomos of the Earth* (London, Telos 1996) 174).
[82] See, for example, Claudio Minc and Rory Rowan, *Schmitt and Space* (Abingdon, Routledge 2016); Stephen Legg, *Spatiality, Sovereignty and Carl Schmitt: Geographies of the Nomos* (Abingdon, Routledge 2011).

Deleted: it

analysis of the *Grossraum* order. According to Schmitt, the earliest sense of *Grossraum* had to do with the sense of space that arose from 'programmes of electrification and long-distance energy supply'.[83] These generated what he then called an associative economy: 'an organisational process of universal importance [to] the new order of international law'.[84]

It was precisely in this context that his zonal[85] — as distinct from cartographic — sense of space was evolved. Schmitt suggested that 'the word and concept of the *Grossraum* [is] an indispensable bridge from the obsolete to future conceptions of space', and he draws on the sciences of the period, and in particular biology, to sketch out an approach to space that the dimension of *Nomos* that appeals to geo-constructivist interpretations: 'Movement' for biological knowledge does not proceed in the hitherto existing space of natural science; rather, movement produces the spatial and temporal arrangement':[86]

> The spatial is generated only in and as (subjective) physical reality [*Gegenstände*], and spatiotemporal [*Raumzeitlich*] orders are no longer mere clerical entries [*Eintragungen*] in a previously empty space, but instead correspond far more closely to a real situation, an actual event. Only now has the idea of an empty dimension [*Tiefendimension*] and a basic formal spatial category finally been overcome. Space has become a space for accomplishment [*Leistungsraum*].[87]

In *Nomos* the theory of the *Grossraum* order is rendered in more neutral terms: the 'sphere' of international law is determined by the 'space' of economic power.[88] And, from being what it was for in the 1930s — 'a short circuit between factual necessity and the authority of the law'[89] — the theory of economic space began to suggest a potentially catastrophic transformation of European public law.

In his *Glossarium*, Schmitt reflects on the question whether the expansion of economy might lead to the situation in which things would be so contingently entangled that it would

---

[83] Carl Schmitt, 'The *Grossraum* order of international law with a ban on intervention for spatially foreign powers: a contribution to the concept of Reich in international law', in *Writings on War* (Cambridge, Polity Press 2011) 75-124, at 78.
[84] Ibid., 79.
[85] See Vismann (n 65) 60: 'In the zone, change and expansion can be expressed by emphasizing the *elasticity* of a spatially organized order. Therefore, Schmitt prefers expressions like "Grenz-zone" or "Mark" as opposed to the linear boundary. "Elastic and yet effective [*Elastich und doch wirksam*]," he characterizes them. And as in military discourse, it is movement that creates the zone as the outline of an empire's terrain'.
[86] Schmitt (n 83) 123.
[87] Here, I adopt the translation given by Hooker (n 76) 145.
[88] Schmitt (n 81) 226.
[89] Vismann (n 65) 61.

no longer be possible to identify any original moment of appropriation, or any concrete materialization of the political:

> The most terrible transformation of the world, which is effected by a mindless aggrandisement of power, consists in the fact that things that are beyond the measure of our physical senses are now rendered visible, audible, and perceptible: perceptible and therefore capable of being possessed. The new concept of property or rather: the domination of functions: *cuius regio, eius economia*, henceforth: *cuius economia, eius regio*. That is the new Nomos of the earth; no more Nomos.[90]

    The spectre of the technological production of things that are destined to become intangible property is that of a mode of production that is not premised on appropriation as the seizure of terrestrial materials or media. At one point, Schmitt observes, quite conventionally, that appropriation presupposes scarcity, and, equally conventionally, that intangible properties are not naturally scarce (a sense of the Earth that is not so far removed from Kant's understanding of its sphericality).[91] The point about an economy in which things that are 'beyond the measure of our physical senses' are rendered 'capable of being possessed' is that the creation of such artefacts is an effect of the technical and economic practices and discourses that render them perceptible and appropriable. In other words, appropriation is no longer based on the terrestrial or elemental paradigm of Nomos, on land as the essential substance of political foundations; it becomes a contingent effect of the articulation of an ecology of discourses, technologies, media and affects. What is interesting here is that the equivocation in the *Nomos of the Earth*, between the 'concrete order' of European public law and an emergent regime in which 'things govern themselves',[92] has the effect of enhancing the capacity of the figure of appropriation to persist into the analysis of the Anthropocene.

---

[90] Schmitt (n 78), 16th July 1948, at 179. Interestingly, this formulation resurfaces, unattributed, in Koselleck's discussion of the relation between history and space, and more precisely the role of 'continental blocs': 'These are greater [geopolitical] areas [*Grossräume*], and the larger part of the rest of the earth's inhabitants depend on their economies. *Cuius regio, eius oeconomia* [Whose realm, his economy]. Or rather: *Cuius oeconomia, eius regio*' (Koselleck (n 10) 38).

[91] To the extent that the Earth in the age of our new *Nomos* is traversed by lines, these lines are trajectories rather than inscriptions, they effect movement rather than localization; like the course plotted by an aeroplane, they simply pass over the grounding medium of land or earth. See Schmitt (n 78), 20th August 1948, at 192: 'Berlin is on the plane route between New York and Moscow; and on this very line West meets East. But lines such as these produce neither localisation [*Ortung*[]] nor order [*Ordnung*], and this is precisely what my *Nomos of the Earth* seeks to show'.

[92] 'Everything on earth based on progress and development, in both East and West, now contains at its core a precise creed: There is only production, only the problem-less fortune of pure consumption…. Unchained production no longer is partial and unilateral, like the bees, mankind has finally found its formula in the beehive. Things govern themselves' (Schmitt (n 69) 347). The reference is to Mandeville's Fable of the Bees.

4 RADICAL TITLE

With the theme of Holocene jurisprudence in mind, the most essential figure in Schmitt's *Nomos* is that of appropriation or 'taking'. Although the phrase 'land-grab' is a crude translation of *Landnahme*, the complexities of Schmitt's formulation actually lend the figure of appropriation a plasticity and persistence that sustain the normative intuition that is expressed in 'land-grab'. The original moment of appropriation generates what Schmitt, ostensibly quoting Locke, calls 'radical title';[93] an original act of appropriation that informs the subsequent devolution or distribution of property rights in much the same way as the sovereign decision on the exception permeates the architecture of what might otherwise look like mere positive law. On the basis of an original act of appropriation, a 'people' can begin to distribute land and produce from it. *Nomos* unfolds from appropriation into distribution, and thence into production:

> Each of these three processes — appropriation, distribution, and production — is part and parcel of the history of legal and social orders. In every stage of social life, in every economic order, in every period of legal history until now, things have been appropriated, distributed, and produced. Prior to every legal, economic, or social theory are these elementary questions: Where and how was it appropriated? Where and how was it divided? Where and how was it produced?[94]

Schmitt offers *Nomos* in this trinitarian form as a fundamental category of the human and social sciences; he proposes it as an answer to 'the scholarly problem of discerning basic categories that not only are intelligible immediately, but that provide a proper formulation of questions common to [all areas of specialization]'.[95] And indeed, not only does the theme of appropriation persist in jurisprudences of the Anthropocene, it persists in something like the extended or ramified form that Schmitt seeks to capture in his trinitarian formula. Appropriation is a deeply-sedimented and all but inescapable structure of repetition in jurisprudences across the human and social sciences. The advocates in our pretrial hearing

---

[93] Carl Schmitt, 'Appropriation/distribution/production: An attempt to determine from *nomos* the basic questions of every social and economic order', in *The Nomos of the Earth* (London, Telos 1996) 324-335, at 328. I have not been able to find the phrase 'radical title' in any of Locke's published work. At a guess, he may have found the phrase in M.F. Lindley's monograph of 1924, *The Acquisition of Territory in International Law*, which referred to the early twentieth-century House of Lords cases in which the term 'radical title' was used to describe the sovereign powers of the British Crown in relation to subsisting native title interests.
[94] Schmitt (n 93) 327-328.
[95] Ibid., 324.

share a common strategy, which is that of bringing the ramified, sympoietic, ecology of the Anthropocene back to a core schema of appropriation-distribution-production, which is, inevitably, reconfigured and enriched through its reactivation.

Nomos is a secular trinity; indeed, doubly so. To the form of appropriation-distribution-production one has to add the trinity of *Nomos-Nahme-Name*: *Nomos* in the sense of primitive demarcation and division, *Nahme* in the sense of European land-appropriation, and *Name* in the sense of symbolic nomination. Before returning to the construction of the first trinity, it is worth noticing the last element of this second trinity. The element of *Name* is interesting because it indexes a dimension of appropriation that is easily overlooked if one focuses only on the production of space, namely, the dimension that Schmitt describes as the 'iconographic reality'[96] of appropriation. Referring to what he calls 'the legal history of institutions',[97] Schmitt reflects on what distinguishes a traditional marriage from 'an erotic adventure':

> [A] man took a wife. The wife recognised the husband, and subjected herself to his name. …The man, who in this special way takes a wife, gives her his name; the woman takes the man's name, and their children are born with the man's name. Today, everything is completely different, and, what is more, disavowed legally and constitutionally. According to Bonn's Basic Law, husband and wife automatically have equal rights. The fact that with us a legally married woman still must use the man's name is a customary vestige of times past. Nevertheless, it serves our purpose to consider the deeper relation between *Nahme* and name, so that we understand how the marriage of our fathers, from whom we sprang and whose names we carry, was instituted. If the unity of *Nahme* and name were to be forgotten completely, we would lose any understanding of how we got our own names.[98]

In the case of land, '[a] land-appropriation is constituted only if the appropriator is able to give the land a name'.[99] And as the example of marriage makes clear, the effect of naming is to institute what would otherwise remain as a simple and illegitimate fact. Juridically, to institute a fact means to inscribe it in the symbolic order, which in the case of traditional

---

[96] Schmitt (n 69) 349.
[97] Schmitt (n 81) 147.
[98] Schmitt (n 69) 347-348. Schmitt here refers to the moment of revelation or transfiguration apparently experienced by Simone Weil while reciting George Herbert's poem *Love (III)*: 'I used to think that I was merely reciting it as a beautiful poem, but without my knowing it the recitation had the virtue of a prayer. It was during one of these recitations that …Christ himself came down and took possession of me' (Simone Weil, *Waiting for God* (Abingdon, Routledge, 2009), 21). Schmitt emphasises the sense of seizure or appropriation in the original French: '*il m'a prise*'.
[99] Ibid., 348.

marriage is a patrilineal and patriarchal genealogical order, which institutes sexual difference, filiation, and identity.[100] So, appropriation as *Name* (re-)institutes law even in the face of the threatened dissolution of the old order of European public law.[101]

Here, the first formulation of the trinity is the more significant. In explaining how original appropriation persists as an active premise for distribution and production, Schmitt refers to Kant's transcendental deduction of property rights: 'Even Kant's legal theory takes as a principle of legal philosophy and of natural law that the first substantive acquisition must be land. This land, the foundation of all productivity, at some time must have been appropriated by the legal predecessors of the present owners. Thus, in the beginning there is the "distributive law of mine and thine in terms of land for everyone" (Kant), i.e. *nomos* in the sense of *Nahme*'.[102] Given the evident difference between Kant's plane of noumenal possession and Schmitt's *nomos*,[103] the reference might seem curious, but the point is that even the most ungrounded philosophy of 'mine and thine' assumes that the individual titles that enable land to be distributed have to be retraced to a 'radical title'. Even Kant postulates an originating moment, and imagines that this moment is expressed through to the present in each phase of distribution. This unfolding of radical title into the core social sinew of appropriation-distribution-production-distribution is what turns appropriation into a figure that can be worked into the ecology of the Anthropocene while retaining a sense of originary violence. This recurrence of a colonial moment is made explicit in Vismann's commentary on Schmitt's formula — '*Dem Nehmen …folgt das Teilen und Weiden*': 'To translate this apparent etymological interpretation — *neimen* as the root for *nomos* and for grazing — into the

---

[100] The reference to 'instituting' life should be understood in the sense that it is given by the work of Pierre Legendre. See especially Pierre Legendre, *Leçons IV. L'inestimable objet de la transmission. Étude sur le principe généalogique en Occident* (Paris, Fayard 1986).

[101] In a world in which Europeans were 'asking to be forgiven for the heroic acts of their forefathers', it was important to notice that there were new names: 'the building that once housed the former German Supreme Court in Leipzig is now called Dimitrov House' (Schmitt (n 69) 350).

[102] Schmitt (n 93) 328.

[103] Recall that the object of the transcendental deduction is to 'ground' property rights in the dimension of intelligible or noumenal possession, as distinct from physical possession: the deduction 'puts aside any conditions of empirical possession in space and time' (Kant (n 80) 404). According to Kant, natural law theories of the emergence of property rights through acts of physical mastery or possession – grasping, subduing, cultivating, enclosing – were not sufficient to justify anything more than a provisional or empirical title. Physical mastery could not of itself generate a right to maintain possession against someone who had usurped the first possessor. One would have to imagine 'a guardian spirit accompanying the thing, always pointing me out to whoever else wanted to take possession of it and protecting it against any incursions by them' (ibid., 413). Kant makes a point that common lawyers are more likely to attribute to Hohfeld: a property right is a right between persons in relation to a thing, not a relation between a person and a thing. For Kant, this implied that property in the sense of a right to possess an object as against others, even when one did not actually have it in one's custody, could only be based on a rational agreement between the members of society that each should be allowed to treat as external objects as possible objects of property.

language of international law: occupation of land is followed by erecting boundaries and by colonizing'.[104] Even Marxism fits the frame: 'a doctrine such as the expropriation of the expropriators is obviously the strongest imperialism, because it is the most modern'.[105]

As with the quadripartite form of the Leviathan,[106] the conceptual potential and political charge of *Nomos*, and also its difficulty, lies in the way that each trinity functions as a combinatory in which one can foreground one or other term and, in so doing, highlight different relations and affinities. But in this trinitarian form, appropriation acquires the latent complexity that allows it to carry forward the normative charge of 'land-grab', especially as it is expressed in Vismann's formulation of the operation of colonial appropriation, while at the same time making it adaptable to the ecological dynamics that emerge in discourses of the Anthropocene. Or, to reverse the proposition, the scheme of appropriation-distribution-production brings ecological complexity back into a jurisprudential frame; it restores normativity to the ramified extension of 'general ecology'. In that sense, and with due regard to the point that discursive sediments cannot be mapped on to geological periodizations, one might say that although it might now be proposed as a field guide to the Anthropocene, Schmitt's *Nomos* is in fact the last flourish of 'Holocene jurisprudence'.

*

It seems unlikely that law will fossilize in any geological sense. Even if paper were to fossilize so as to leave a contact print of text, it is difficult to see how a human or nonhuman observer could elicit from such a trace any sense of the 'know-how' of law or jurisprudence. But if we imagine jurisprudence as an archive or inventory in Koselleck's sense, then it is possible to identify jurisprudential sediments that are operative in our apprehension of the Anthropocene. And as with all sediments, reactivation necessarily implies invention; structures of repetition necessarily have a latency or potentiality that enables them to persist into new epochs. Appropriation is just such a deep sediment, and Schmitt's trinitarian *Nomos* is a perfect *Leitfossil* of that sediment. The equivocations that are held together in *Nomos* express the aptitude for reactivation that gives the Euro-American figure of appropriation such persistence. At one pole, there is the moment of invention, which recommends *Nomos* to

---

[104] Vismann (n 65) 50.
[105] Schmitt (n 93) 334.
[106] See Etienne Balibar, 'Le Hobbes de Schmitt, le Schmitt de Hobbes', in Carl Schmitt, *Le Leviathan dans la doctrine de l'Etat de Thomas Hobbes* (Paris, Seuil, 2002), at 22-25. Balibar observes of the quadripartite figure of Leviathan that 'it reminds one of Heidegger's *Geviert*, or, equally well, a blasphemous variant of the Trinity' (ibid., 23).

interpreters of the Anthropocene: the ongoing fabrication of land as a political-juridical substance, and the sense of this fabrication as a mode of (almost) post-Holocene ecologization. At the other pole, there is the moment of convention: the moment of colonial appropriation that is highlighted by Cornelia Vismann, and which is echoed in the 'iconographic' element of *Name* and its capacity to 'rejuridify' spatial fabrications. Added to that, Schmitt's *Nomos of the Earth* is not strictly speaking a theory of law: it confounds the languages of politics, law, and philosophy. Perhaps for that reason, his trinitarian form of appropriation-distribution-production has a capacity for reactivation that works within many of the disciplines or perspectives that are constelled in or around the theme of the Anthropocene.[107] Of course, not all theories of the Anthropocene participate in the deep idiom of the pretrial hearing; not all are interested in the question of liability or responsibility, and if they are, they may be engaged more in Haraway's sense of 'response-ability'.[108] But to the extent that the figure of appropriation remains central to our techniques of legal and political discrimination, the rhetorical formula of 'Holocene jurisprudence' poses the question of whether or how one might do without appropriation.

---

[107] '[The Anthropocene] has proliferated promiscuously in ways unforeseen by its creators. To an extent, the geosciences have lost ownership of the term as other disciplines, fields and institutions engage in deliberate or inadvertent projects of 'anticipatory semantics' to frame its meaning' (Jamie Lorimer, 'The Anthropo-scene: A guide for the perplexed' (2017) 47(1) *Social Studies of Science* 117-142, at 132).
[108] Haraway (n 31) 39.