THE MATTER OF LAW:
RECONSIDERING THE NATURAL LAW TRADITION

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A dissertation submitted to Johns Hopkins University in conformity with the requirements for the degree of Doctor of Philosophy

Baltimore, Maryland
August 2017

Abstract

This dissertation recovers several stories from earlier times about law's relationship to embodiment, materiality, and nature. These stories range chronologically from Sophocles' *Antigone* in the fifth-century BCE to Leopold von Sacher-Masoch's *Venus in Furs* in the second half of the nineteenth-century, to contemporary inquiries into legal materialisms. Included are texts in the Western tradition of jurisprudence that deal with sometimes wide-ranging and diverse topics from modern social contract theory and the concept of political obligation to the phenomenon of animal trials, the classical Greek *nomos—phusis* debate, the medieval Scholastic concept of *analogia entis*, and contemporary discussions about law's spatial dimension. An effort to illuminate how these stories collectively compose an important—if today often overlooked—strand of the natural law tradition connects all the chapters. This strand of natural law thinking engaged law as a material embodied practice. It offers another way of doing and thinking about law that emphasizes material bodies and their interests rather than some abstract subject of law and right. The dissertation argues that these stories from the natural law tradition—from regions and thinkers intimate with and integral to the West's contemporary constellation—can still critically illuminate the matter of law in our world.

Chapters One, Two, and Three recover and disclose an understanding of law and nature that I show is obscured today and yet has been effectively articulated in the past in a tradition of natural law. My interest in these "story" chapters is with what possibilities for law and nature we obscure when we tell ourselves stories about the loss of the natural law or the disintegration of natural law theory. Each of these chapters turns to a specific historical moment and text in the Western natural law tradition to reconsider its

possibilities and ultimately pursue a "path not taken," or a "minor literature" of natural law thought so to speak.

The first chapter reveals three visions of law circulating in Sophocles' *Antigone*: legal positivist, conventional natural law, and one that focuses on the rapport between Polynices' corpse and the other characters of the play. This third vision of law offers an alternative reading of natural law as a material call rather than the unwritten imperatives or higher laws of the gods. The second chapter argues that for Saint Thomas Aquinas, natural law theory was never a moral theory, but a task of boundary drawing, care, and multiplication. Aquinas's interest was with the historical and ongoing production of boundaries and limits between the natural and its others. Aquinas did not reduce nature and its other to a stable binary, but constantly explored its limits along a proliferating spectrum of natural, supernatural, artificial, and preternatural. The third chapter shows how Leopold von Sacher-Masoch's famous sex and bondage novella *Venus in Furs* rethinks the concepts of contract and bond(age) at the very heart of legal positivism's attempt to define itself in the terms of social contract theory. The novella tells an alternative story of what it means to contract, one that is not oriented toward securing the future and establishing "islands of predictability," but towards being mindful—sometimes painfully mindful—of the present, of flesh contracting in the cold and under the whip, of hands literally con-tracted (or, drawn tight) to the bedpost with rope. The final chapter examines historical cases of nonhuman animal legal trials to show that they reveal a model of law that places human communities within nature rather than apart or outside it. I conclude by bringing the themes of law, nature, and materiality these stories

from the natural law tradition disclose into conversation with contemporary new materialist discussions of nature.

Acknowledgements

Henry David Thoreau commented that "it is difficult to begin without borrowing." Writing this dissertation has given this phrase new meaning to me.

Jennifer Culbert has guided this project from the beginning. Her ideas weave the entire text proving the difficulty in beginning without borrowing. A special bond develops between a dissertation advisor and student that I cannot find words to acknowledge appropriately. I am particularly thankful for ours. Jane Bennett's careful attention and keen insight nurtured the project and helped me overcome several impasses both intellectually and morally along the way. Bill Connolly offered essential guidance in seminars, as an interlocutor, and most importantly, as a role model and friend. A special thanks and acknowledgment of borrowing must go to Melissa Orlie, my senior thesis advisor. Anything good in this has been nourished by Melissa's compost. I am forever grateful for her commitment, insight, and lived "faithfulness to this earth."

Tripp Rebrovick and Pat Giamario read multiple versions of multiple drafts in our dissertation writing group. I cannot begin to thank them for their patience and encouragement, along with the host of other Hopkins graduate students who have helped me along the way.

Mom, Dad, grandparents, and family who cheered me on along the way and supported me, I love you and thank you. The borrowing began many years ago and continues. And most of all, to Jessica Lynn and my two children William Earl and Griffin David who were born along the way. I have borrowed the most from you. Only you know.

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Introduction: Law and Care

"Natural rights is simple nonsense…nonsense upon stilts."
Jeremey Bentham, *Anarchical Fallacies*, 501

"After all, can we come to so great evil if we keep a little fire on our hearths and in our souls, and welcome with open hand whatever of excellent come to warm itself, whether it be man or phantom, and do not say too fiercely, even to the ghouls themselves, 'Be ye gone'? When all is said and done, how do we not know but that our own unreason may be better than another's truth? For it has been warmed on our hearths and in our souls, and is ready for the wild bees of truth to hive in it, and make their sweet honey."
William Butler Yeats, "Belief and Unbelief," 10-11

Passing into Maryland driving north on US route 13 through the Virginia Tidewater region, one encounters a welcome sign. Below the greeting, one is met with what appears to be a command in the form of an imperative that is backed up with a conjunctive statement: "Buckle Up! We care—*and* it's our law." Signs notifying passersby of local laws requiring the use of seat belts while operating motorized vehicles are common sights in all fifty US states and beyond today. Yet the Maryland signs (signs with the same text can be found throughout Maryland's roadways) are interesting for a number of reasons.

Like other seat belt signs, the Maryland signs inform drivers and their passengers that state law requires the use of seat belts. The State of New York's welcome sign for example includes the text: "Buckle Up! New York Law. Seat Belt Use Required." And South Carolina's welcome sign has appended to it the text: "State Law: Fasten Seat

Belts." In both of these cases, as with the Maryland sign, drivers and their passengers are issued a command that the signs backup in some assertion about law to put on their seat belts—literally to bind themselves to a petroleum-fueled combustible machine or find themselves in non-compliance with the law.

Yet the Maryland sign does more. Besides issuing a command and abutting it with the claim of law, the Maryland sign also puts "law" into a relationship with "care." It does this not just using the conjunction "and," but a full stop dash, italics, and font change. The sign thus both conjoins *and* renders separate "law" and "care" in interesting ways. I want to spend a few minutes reflecting on what this sign might illuminate about how we in the late modern West experience, use, and think about law.[1]

In brief, my argument is that one important thing the sign reveals is our contemporary discomfort when law and care are brought together in the same breath. Both care and law constantly remind us of and return us to our embodiment, vulnerability, and common muddled material-semiotic existence where bodies and words shuffle together. These bodily reminders are permitted, even sometimes lustfully welcomed, in the private sphere where care is at home and intimate, but come as intrusions in the public realm. The sign then testifies not to the difficulty in experiencing law and care together, but the great effort and work that has been put into maintaining their separation.

[1] See Patricia Ewick and Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (1998) for a similar approach to the study of law and legality that focuses on "stories of everyday life to discover the different ways in which people use and think about law" (xi). This dissertation follows a similar method, yet attempts to include in its analysis what Jane Bennett has called the "traces of independence or aliveness constituting the outside of our own experience" (2010, xvi).

This dissertation is ultimately an attempt to recover stories from earlier times about law's relationship to embodiment, materiality, and nature; the specter of which still haunts the Maryland signs. I argue that collectively, these stories can be seen as composing an important thread of the natural law tradition.[2] Yet if Jeremey Bentham's eighteenth-century assessment of the natural law tradition as "nonsense upon stilts" rings just as true today,[3] I suggest that this is because something similar to the discomfort the conjoining of law and care evokes today has worked to occlude and sanitize these stories from our contemporary legal imagination. Returning to these stories of natural law—of how law matters and the matter of law—and "welcom[ing them] with open hand," as Yeats put it in contrast to Bentham, is the goal of this dissertation.

Law's Impersonalism

The Maryland sign's conjunctive statement literally conjoins or brings together "law" and "care" in the same sentence. At the same time though, the sign emphatically renders "law" and "care" separate. What do these terms mean?

On one side of the emphasized dash and "and" is placed "law." What is this "law"? And why the need to mark its difference from "care"? As a diverse range of scholars have shown, one crucial way modern legal theory organizes its thinking about law is in contrast to terms like "care," "love," and the "personal." As Linda Ross Meyer

[2] See Ernst Bloch *Natural Law and Human Dignity* (1987) and Douzinas and Gearey *Critical Jurisprudence* (2005) for similar attempts to, as Douzinas and Gearey put it, "present an alternative history of natural law" (80).

[3] Of course, there are numerous scholars today who advance natural law theories, see Finnis 1969. Moreover, a simple survey of political rhetoric will uncover the continued relevance of natural law concepts in the public realm. Part of my interest in telling alternative stories about natural law then is to explain its continued attraction despite its theoretical rejection.

and Martha Umphrey point out, "law, as legal theory usually understands it, belongs either in the realm of impersonal violence, as, for example, law as biopower, social control, or commands backed by threats; or law belongs in the realm of impersonal reason, as, for example, law as a system of conventional, generally applicable rules that treat like cases alike, or law as what reason would dictate behind a veil of ignorance or in a kingdom of ends or in a state of nature" (587). In both cases, whether law is understood as "impersonal violence" or "impersonal reason"[4] law is marked as "impersonal." Law addresses communities in the abstract, not persons. Law, in other words, explicitly eschews the familiarity and boundary-crossings between private and public that care seems to require. Law is public. Law strives for universality and objectivity in its application.[5]

This eschewal of the familiar in legal theory crosses jurisprudential schools. Both natural law theory and legal positivism—the two dominant choices in modern legal theory—approach law as an impersonal and theoretical object of concern.[6] Although often presented as two competing or opposed theories of law, thinking about law in terms of the impersonal reveals their similarity. Both attempt to clarify what law is by straining from it the familiar, the personal, the intimate. This is important to realize because one of my key arguments in this dissertation is that by pulling back on this drive to clarify, in

[4] On the difference compare Cover "Violence and Word" and Hart *The Concept of Law*. In Anglo-American legal theory this distinction is roughly tracked by the divide between scholars like Hart, Finnis, Raz on the one hand and Critical Legal Scholars on the other like Cover, Kennedy, and Tushnet who seek to expose law as the imposition of violence.

[5] Nothing about this impersonality makes law necessarily just, as critics of the liberal rule of law have been careful to point out.

[6] See Peter Euben, *The Tragedy of Political Theory* (1990) for a discussion of theory's origin in the impersonal.

allowing law to disclose itself a bit muddled, other stories about law and its relationship to the familiar, the personal, the intimate rise up that modern legal theory makes it hard to appreciate.[7]

Anyone who has travelled along America's roadways is well acquainted with the experience of law's impersonalism. The New York and South Carolina seat belt signs I mentioned above are good examples.[8] Like the Maryland sign, the New York sign commands passersby to "Buckle Up!" yet the force of this command stands alone, abutted only by the apparent inexorability of "New York Law." You are commanded to "Buckle Up!" when entering New York State and left alone to imagine the alternatives of non-compliance with the law. The sign does not address you personally or appeal to any familiar relationship to support its command. The South Carolina sign is even more blunt and impersonal in its formulation: "State Law: Fasten Seat Belts." You are presented with the law and with what it commands in objective, terse statements of fact.

The Virginia sign is more complicated, but also attests to the contemporary experience of law's impersonalism. It reads: "Buckle Up Virginia! It's A Law We Can Live With." Unlike the New York and South Carolina signs, the Virginia sign not only addresses the passersby with a proper name, "Virginia,"[9] but it also appears to make a

[7] Donna Haraway makes a similar point about resisting the urge to clarify and clean up the muddle in *Staying with the Trouble* (2016).

[8] There are numerous more critical examples of the experience of law as impersonal reason and particularly impersonal violence than the rather benign and privileged example of driving a car and being legally required to wear a seat belt. One only has to think of split immigrant families navigating the rationalities of immigration and visa law, or the bloodied impersonal body stilled after a legal arrest in the back of a police vehicle distinguishable only for its blackness.

[9] Louis Althusser has argued that this "hailing" ought to be read as an impersonal movement of law in its attempt to create legal subjects. Once situated as subject of Virginian law, you have objective reasons to obey the law rather than subjective motives. See following footnote for more in-depth discussion.

claim for why the individual should *personally* fasten his or her seat belt: "It's A Law We Can Live With." Yet upon closer reflection, it seems this sign is just as impersonal as the New York and South Carolina signs. While the latter may be more blunt or violent in their impersonalism—perhaps more an example of what Meyer and Umphrey call law's "impersonal violence"—saying something like "Fasten Your Seat Belt. Or Else You Will Feel the Impersonal Violence of the Law in the Form of Monetary Fines, Arrest, Etc.," the Virginia sign appeals to a rational-utility calculation that is ultimately just as impersonal. You should "Buckle Up!" not just because the Virginia law has the violence behind it to force you to do so, and certainly not because Virginia personally cares about you, but because upon rational calculation you will see that compliance with the law can prolong your life. As the Virginia sign puts it, the seat belt law is "a law we can live with."[10]

Care's Intimacy

But let me return to the Maryland sign because it complicates and muddles all this in illuminating ways. On the one side of the conjunctive statement sits "law." Modern legal theory—and here legal positivism and natural law theory are in agreement—generally

[10] This would be a weak version of law as impersonal reason. It is law as rational utility. And as the Utilitarian legal theorists like Jeremy Bentham and John Austin and their modern-day followers like H.L.A. Hart have argued, just because a law does not contribute to utility does not make it any less forceful, it just opens it to social criticism. Yet the Virginia sign also suggests a stronger reading of law as "impersonal reason." At first glance, the sign's command is no different than the command issued on the Maryland and New York signs, although qualified by "Virginia" as if perchance the passersby did not know where they were. Yet maybe something more is meant with the inclusion of "Virginia." Maybe as Louis Althusser has argued in his theory of interpellation, the Virginia sign is not simply issuing a command, but also calling a subject into being. "Buckle Up!" not just all you diverse forces and winds and animals and collections of cells and narratives who pass this sign, but "Buckle Up Virginia!" The hailed passerby in passing would thus become by virtue of the hail a Virginian subject of law. The passerby now has a reason or *logos* to buckle up: she is Virginian (even if just passing through) and she has been called by name.

understand law as an "impersonal" force. This is validated by our experience of the New York, South Carolina, and Virginia seat belt signs. Yet the Maryland sign seems to problematize—or rather muddle—these understandings of law in its conjunction of "law" and "care." In contrast to law's "impersonalism," care is often thought of as eminently *personal* although not necessarily anthropocentric.

Care is generally thought of as something soft and warm, the way a parent may care for a newborn or hatchling through diaper changes, swaddling, and feeding—this is true whether the food is heated in a microwave, regurgitated from a gullet, or produced in mammary glands it seems—and a grown human might care for an elderly parent through acts of grooming that enfeebled hands can no longer perform.[11] Yet care also, and this point is crucial, readily *crosses* traditional species boundaries: in the way pet-owners may care for their cats or dogs or birds with feeding and exercise and shepherds may care for their sheep by bringing them to fresh pasture and chasing away predators. Care even readily extends to the non-animal, think here of the gardener, and inorganic. A marble statue may require relatively little care compared to a newborn baby or dog or even organic art installment—whether it be a live performance or a sketching on vellum—but the marble statue nonetheless requires certain care that amounts to more than routine

[11] The care relationship is never easy to solidify in any unidirectional way. The care a parent may bestow in diaper changes or late night rockings upon a newborn child frequently has a way of rebounding upon the parent in gestures as simple as an arm reach or midnight smile after a trying day apart. Those who care for pets and other nonhuman animals probably know this even better than the human parent who is quick to describe this phenomenon with a rhetoric of filial attachment rather than care. Yet the ambivalence or rather muddled directionality of the care-relationship also crucially distinguishes it from the conventional understandings of law. Conceived as either "impersonal violence" or "impersonal reason" law moves unidirectionally beginning with the state and imposing itself downwards. Of course, there have been important critiques of this understanding of law coming particularly from the anthropology of law. See Sally Falk Moore*, Law as Social Process* (1977).

upkeep if the statue is to endure. The statue, just like the newborn babe, has its own vulnerabilities, that require the attentiveness of a care-giver.[12]

In minute ways, acts of caring constantly defy the many boundaries that seem pertinent to the maintenance of social and political life. Care, then, belongs at home, in the homeless shelter, in church, the art gallery, or in the barroom toilet. Care happens among good friends, between physician and patient, man and domesticated animal, teacher and student. Care requires us to get up, close and personal, sometimes with very impersonal things. Care is hard to place as it constantly blurs, or rather crosses and recrosses boundaries.[13]

Care engages our entire body. Even when the care is directed toward the *cared-for's* mind or soul we generally speak in bodily metaphors. The teacher thus "nurtures" the mind or is "midwife" to thought, as Arendt in her lectures on Kant puts it. And the

[12] The statue is an interesting example and it will resurface in Chapter Three. Severin, the main character in *Venus in Furs* passionately loves a stone statue. One of the reasons he gives for preferring the love of a statue to the love of an organic body is the lack of vulnerability. Yet this is not so clear. Stone is certainly vulnerable to the decay of the elements even if this usually happens on a timescale much longer than humans can recognize. Interestingly, this points to another vulnerability of stone statues that is more pertinent although it takes Severin the entirety of the novella to realize it: stone statues are vulnerable to being forgotten unless attentively cared-for. Sacher-Masoch does not explore whether this caring-for must be done by humans or not. It seems likely that a family of birds nesting in the crook of the statue's arm also develops a care-relationship with the statue that tends the statue's wounds of forgettability. Perhaps lichen does too.

[13] Reflecting on love, but in a way that seems pertinent to care too, the philosopher Jean-Luc Nancy gives us a reason why care may be so hard to place. Nancy writes, love and care are "impossible to confuse and yet ineluctably entangled: charity and pleasure, emotion and pornography, the neighbor and the infant, the love of lovers and the love of God, fraternal love and the love of art, the kiss, passion, friendship... . Love is not their substance or their common concept, is not something one can extricate and contemplate at a distance. Love in its singularity, when it is grasped absolutely, is itself perhaps nothing but the indefinite abundance of all possible loves, and an abandonment to their dissemination, indeed to the disorder of these explosions. The thinking of love should learn to yield to this abandon: to receive the prodigality, the collisions, and the contradictions of love, without submitting them to an order that they essentially defy" (1991, 82-83). Nancy's point helps explain why care is so hard to place. Care, like Nancy's love, cannot be explained with any simple stock account. Caring is in care's "prodigality," in the overflow or superabundance. Care gives freely.

pastor is literally s/he who shepherds souls.[14] Care breaches the boundary between the noble senses of sight and hearing we typically claim we use to interact with other, often eliciting the "less" noble senses of touch, smell, and taste.[15] One rarely, after all, first sees a dirty diaper or tumor. Care is an eminently embodied activity: sniffing, palpitating, licking.[16] In fact, the only place care seems emphatically not to belong is in the public realm—behind the veil of ignorance where the senses and body are blocked and veiled—which Meyer and Umphrey remind us is conventionally the placed reserved for law.

—*and*: Wound-ability

Yet it seems to me that it precisely care's attentiveness to embodiment and the material-semiotic boundary crossings embodiment enables and depends upon that returns us to the experience of law. This is what makes the Maryland sign so interesting. The Maryland sign conjoins "care" and "law," bringing them together in the same breath using the conjunctive "and," yet it also emphatically signals that there is something strange or unusual about doing so that requires a full stop dash, a change in font, and italics. The emphasis of the sign after all is neither on "care" nor "law," but on the "and" and the dash. What does the dash and this emphasis signify or illuminate about our experience of

[14] This does not mean that the teacher may not develop a genuine interest in caring for the bodily aspects of the student or that this interest may not in some cases precede the desire to nurture the mind. It would be ridiculous to assume that just because we speak of the teacher-student or pastor-soul relationship using bodily metaphors of care these relationships are barred from expressing themselves in bodily ways too. I have received too many meals from the beneficence of my teachers to think they have cared only for my mind.

[15] See Aristotle on this distinction, *De Anima* II.5.

[16] We all have the experience—usually with some older man in our life—licking the fluid he finds on the underside of a car in his act of caring for car, rider, and oil.

law? At an obvious level, it may simply signify the necessity of keeping "law" and "care" separate even as we acknowledge some similarities between them for the purposes of convincing people to "Buckle Up!". Indeed, as I have just suggested, today the distinction between law and care is often formulated as one necessary and good to maintain lest paternalistic visions of law and state take root as others like Robin West have been particularly apt in demonstrating (1999). West deftly points out that not all care relationships establish good connections. The Maryland sign's dash and italics certainly seems to illuminate this tension between care and law, with the emphasis standing guard as both an acknowledgment and warning of the dangers of the violence inherent and possible in all care relationships.

Yet the dash and italics illuminate more. The dash and "and" is uncomfortable. The sign reads: "We care," full stop dash, change of fonts, emphasis, "—*and*," remove emphasis, return to text, "it's our law." This discomforting formulation I want to suggest, betrays our own bodily and material as well as semiotic discomfort when law and care are brought into relationship or asked to cross one another.[17] The sign makes us uncomfortable because it brings together in one breath two things that we experience today as uncomfortably similar.[18] In other words, it is *not* that we never think about or experience "law" and "care" together because they are *so different*, but that the experience of their *similarity* makes us uncomfortable.

[17] On material-semiotic connection see Donna Haraway.

[18] See Kaja Silverman *Flesh of My Flesh* (2009) for a brilliant discussion of the uncomfortability modernity has in thinking about "similarity." Silverman explores "similarity" through the trope of the analogy which is central to my reading of Aquians.

When we start thinking about "law" and "care" together everything gets muddled. Not only does the once-exorcized specter of paternalism come back to haunt us with a vengeance, but legal theory as a clarificatory endeavor gets turned on its head. The body, the personal, the intimate navigation of a material world come rushing back to the surface of our experience of law. Law, like care, we uncomfortably realize, begins and ends with a body, more so than other traditional disciplines like theology and philosophy which can more thoroughly escape the body in their claims. Law, like care too, may have other aspects, like a linguistic one. However, what the care-relationship demonstrates and uncomfortably reveals for the law-relationship is that to be enmeshed in these relations one is required to have a body which means that one is wound-able. Ultimately, what this italicized dash and conjunction illuminates are co-dependent relations of vulnerability, or literally wound-ability, that facilitate as well as limit the care and operation of law.[19]

Care and law, the Maryland sign illuminates, are thus way too co-contaminant for our modern sensibilities of sanitation. Pull out the full stop dash, raise the italics, care is breaching our law and we are getting uncomfortable. Everything grows dim, murky, viscous, swampy, muddled when we look in that direction. Yet earlier times did not have such weak stomachs for studying law, embodiment, materiality, and nature. This dissertation is an attempt to recover some of these occluded stories of law, nature, embodiment, and materiality that earlier times told, but which are barred from our modern accounts of law due to sanitation regulations.

[19] Think here of medical staff caring for patients during epidemics like the recent Ebola virus outbreak in western Africa. The care the medics could provide was certainly limited by their vulnerability.

A Brief Roadmap

Chapters One, Two, and Three compose the heart of the dissertation. They are presented as a series or cycle of stories about natural law. The goal of these chapters is to begin the work of recovering and disclosing an understanding of law and nature that I argue is obscured today, yet has been effectively articulated in the past in a tradition of natural law. I am not interested in telling the story of why or how or even when this understanding of law and nature became obscured or lost. This is the story of the rise of modernity and the Western world's progressive disenchantment and it has many tellers and versions.[20] Rather, my interest in these "story" chapters is to attempt to tell the story of what is occluded by these conventional narratives of disenchantment particularly in our thinking of law. Specifically, my interest is with what possibilities for law and nature we close ourselves off from when we tell ourselves stories about the loss of the natural law today or the "disintegration of natural law theory," as one scholar of natural law puts it (Westerman 1997).

Each of these chapters thus turns to a specific historical moment and text in the Western natural law tradition to reconsider its possibilities and ultimately pursue a "path not taken," or a minor tradition of natural law thought so to speak. Chapter One

[20] Max Weber is perhaps most famous for his account of disenchantment, but many Western thinkers tell stories about what makes the modern distinctly different. A tale could be told using Thomas Hobbes and the breakdown of ecclesiastical authority and morality in the early modern period that required the institution of the social contract. Martin Heidegger tells a much older tale stretching back to ancient Greece and the birth of Western metaphysical thinking. See Bruno Latour, *We Have Never Been Modern* and Jane Bennett, *The Enchantment of Modern Life* for a critical analysis that are both much closer to my approach here. My goal is not to avoid the questions of why or how or when natural law thought was hijacked, but rather to suggest that this type of storytelling is part of the problem to seeing alternative visions of law. Mark Antaki begins to pursue a similar line of inquiry in "The Turn to Imagination in Legal Theory: The Re-Enchantment of the World?" (2012), although his interests are exclusively with contemporary legal thinkers and he does not explore the possibility of natural law as one of these alternative visions.

"Antigone's Misstep?, or, How Natural Law Became Higher Law" turns to Sophocles' tragedy *Antigone*. *Antigone* has often been read as an early, perhaps foundational, expression of the view that natural law is a "higher law" which takes precedence over man-made or positive law, a view that has come to dominate most interpretations of natural law. Composed by Sophocles during the height of the *nomos-phusis* debate that occupied Greek intellectual discussion in the fifth century BCE, interpreters from Aristotle to Hegel to Judith Butler read the play according to an "oppositional logic" that pits the two main characters against one another. I tell a different story. I argue that this oppositional logic enables the "natural law as higher law" interpretation of natural law by framing natural law and positive law as opposite or competing sides of the same coin contending for supporters. However, this oppositional logic occludes an alternative interpretation of natural law. We can discern this interpretation when we read the play with a *compositional logic*.

Sophocles does not bury this alternative deep in the play or make it hard to find. Indeed, I show that he makes it as evident as possible—literally refusing to bury it. This alternative interpretation of natural law is underscored in the play I argue as the rapport that emerges between Ploynices' actively (de)composing corpse and the other characters of the play. Drawing on other recent interpretations of *Antigone* that have focused on minor characters of the play—rather than the major oppositional struggle between Creon and Antigone—I tell the story of this alternative natural law.

Chapter Two, "Aquinas's Eco/Analogical Vision of Law," focuses on the medieval Scholastic thinker widely considered to be the capstone of natural law thought: Saint Thomas Aquinas. This chapter reaffirms Aquinas's preeminence in the natural law

tradition, yet in a non-conventional way. I show that what makes Aquinas such a profound natural law thinker is his approach to natural law as a way of approaching questions of relationality and embodiment, *not* morality. One of the major modern critiques leveled against Thomistic natural law is that it derives normative-legal statements from factual statements. I argue that this modern framing at best misses and at worst occludes the task of natural law thinking for Aquinas. This task was never an "epistemological-normative" one; Aquinas did not prescribe the derivation of ought-statements from is-statements. Instead, it was a jurisprudential task. Aquinas's project was to attend to the boundaries between the natural and its others, and to consider how these boundaries are produced and multiplied across time and space.

In Aquinas's time, Aquinas framed this project in terms of an analogical account of being, meaning that he attended both to the relations and interconnections between things as well as their fundamental differences and the boundaries-between. This analogical account contrasted sharply with a univocal vision of being that saw all of reality as fundamentally interconnected. Ultimately, for Aquinas natural law was about caring for and maintaining boundaries without which Aquinas did not think "friendship" and "justice" between human beings, between man and God, and between human communities and the more-than-human realm were possible. I argue in the conclusion that this Thomistic story of natural law is crucial to reanimate today when univocal accounts of reality dominant in critical environmental movements (Schutz 2011; Smith 2001).

Chapter Three "Sacher-Masoch and the Character of the Contract" turns to a modern, but less well-known natural law thinker, Leopold von Sacher-Masoch.[21] Sacher-Masoch is primarily known as the nineteenth-century author of the lurid *Venus in Furs*, yet he was also a historian of political thought and a lawyer. Moreover, although he wrote after the heyday of classical social contract theory, Sacher-Masoch was deeply interested in the idea of the contract and articulating a natural law version of contracting. In Chapter Three, I read *Venus in Furs* as a story about what we miss when we think of the contract primarily in legal positivist terms. In such terms, contracts are preoccupied with securing an indefinite future. When the contracts in *Venus in Furs* are read this way, the story is one of failure; the contract between Wanda and Severin is eventually broken and Severin's attempt to secure Wanda as a possession through his own subjugation is futile. But *Venus in Furs* repeatedly criticizes this notion of contract. Early on in the novella, Wanda likens the legal positivist type of contract to the traditional marriage contract and heaps scorn upon it for its vain attempts to "bury woman like a treasure" (19). Throughout the novella Severin lists between a desire to secure the future and a commitment to the moment. I show how *Venus in Furs* tells an alternative story of what it means to contract that is not oriented toward the future, but towards being mindful—sometimes painfully mindful—of the present and embodiment: of flesh contracting in the cold, under the lash of the whip, and in arousal, of hands literally con-tracted (drawn tight) to the bedpost with rope.

Both types of contract are present in *Venus in Furs* and Sacher-Masoch shows us that both types of contracting are ways of navigating uncertainty. Yet the latter, although

[21] Indeed, Ernst Bloch groups him with J.J. Bachofen as one of the most important modern natural law thinkers (1987).

rarely acknowledged, is more radical according to Sacher-Masoch. It reasserts the always fleshy and always vulnerable relationality of law at the epicenter of modern social contract theory's attempt to make law artificial and the product of a fleshless body (Hobbes, *Leviathan*).

Chapter Four concludes the dissertation. It is titled "Animals on Trials: Reconsidering the Natural Law Tradition for Troubling Times." It begins with a description of the once commonplace phenomenon of animal trials and takes them as an opportunity to explore the "pay-off" of the stories I tell about natural law in this dissertation.[22] Most scholars dismiss the animal trials as superstitious mumbo-jumbo or childish pre-rationality. Those few who do take the trials seriously read them through a utilitarian-legal positivist lens as part of the West's progressive drive to control and regulate nature. The stories I have told about natural law suggest an alternative reading. I argue that the animal trials need to be appreciated as the serious, thoughtful, and communal work that these earlier Western communities put into giving themselves a place within the wider more-than-human world (Serres 1995).[23] Like Antigone's care for Polynices's corpse and Severin's emphasis on the embodied present, the trials display an attentive, observant awareness of material particularity and embodied life. I argue that the institutional work that went into these animal trials needs to be read as an example of the ligaments or "connective tissue" Aquinas talks about which holds together the sublunary realm. The Chapter turns then to explore the "pay-off" of the stories I tell about natural law for the broader fields of legal theory and environmental studies.

[22] Walter Benjamin notes that in contrast to the novel, all stories are practically-oriented. Stories provide counsel or advice about continuation. See, "Nikolai Leskov: The Storyteller" in *Illuminations*.

[23] Michel Serres calls this "the celebration of our pact with the world" in *The Natural Contract*.

Chapter One

Antigone's Misstep?, or, How Natural Law Became Higher Law

Composed in Athens during what classicist W.K.C. Guthrie has dubbed "the fifth century enlightenment"—when Greek thinkers first began to distinguish between *nomos*, or roughly what is done by convention, and *phusis*, or what happens by nature—Sophocles' *Antigone* was written and performed in the same milieu that gave rise to the occidental natural law tradition (1977). The play thus provides a point of access for me in my attempt to uncover aspects of a natural law tradition that I argue have been occluded in modernity. Where can natural law be found in the play? Can it be found in the play at all? Readers of *Antigone* are hotly divided on this question; largely, I hope to show, because they are looking in all the wrong places.

Since at least Aristotle's time, the play has been popularly associated with an influential interpretation of the natural law tradition that equates natural law with "higher" law: universal, position-less standards of non-human origin capable of superseding, even nullifying, posited laws and social conventions of immanent human origin (*Rhetoric* 1373b-10). On this reading, the law Antigone is said to appeal to and the positive law Creon promulgates are mutually opposed as competing *theories of law*, or "epistemological claims" about law—an "irresolvable conflict between natural (or ancient or divine) and positive (or modern or state) law" locked in a millennial stalemate

that has come to characterize Western legal philosophy as diverse scholars have argued (Lavi 2011, 811-813; Culbert 2010,766).

I argue that this conventional interpretation of *Antigone*—Carol Jacobs has called it the "oppositional" interpretation because it sets in opposition or conflict the two main characters and their claims—actually occludes more than it reveals particularly when it comes to thinking about law (1996, 910). In particular, what is occluded by this oppositional interpretation is the chance to make sense of another story about law and nature circulating in the play that takes its cues from the *compositional logic* that emerges between Antigone and Polynices' corpse.[24] According to this story, law is not a regulatory force that manages or controls the things of the world, bringing order to a world in flux, but a compositional force co-making a world that is constantly becoming with vast and diverse material and semiotic vitalities.

In Section One I briefly review the conventional oppositional interpretation of *Antigone* and document how it is has organized readings of the play and our conceptions of natural law and positive law from Aristotle to Hegel, Luce Irigaray, and beyond. Recently, disheartened by the millennial stalemate Creon's and Antigone's opposition bequeaths us, some scholars have been looking to the "minor characters" of the play for more promising advice. These turns to minor characters introduces my "compositional reading" of the play in Section Two. Here I ask what happens when we read Polynices' corpse not only as a prop or part of the background scenery, but as an active minor

[24] On the importance of seeing law's compositional logic see James Boyd White, "The Judicial Opinion and the Poem: Ways of Reading, Ways of life" (1984). In my reading of *Antigone*, I use Bruno Latour insights about composition to expand White's understanding of the compositional logic of law to include nonhuman materialities and forces, like Polynices's corpse, Tiresias's birds of augury, and the dust storm that accompanies Antigone's appearance alongside the corpse. See Bruno Latour, "A Compositionist Manifesto" (2010).

character that enters into interactions not only with Antigone but also with dust, birds, pollution, hearths, and seers. Unlike other readers of *Antigone* who turn to minor characters though, I do so *not* to move my reading of the play away from a conventional focus on natural law and positive law, but to disclose another story about natural law, positive law, and their relationship.

In Section Three, therefore, I turn to the visions of law circulating in the play. There are at least three: Creon's edict (7), Antigone's appeal to the "unchanging and unwritten law" (455), and Antigone's invocation of her unique material-semiotic relationship with the corpse of Polynices (900ff). Most interpretations set the first two of these visions of law in opposition and reject the third. Some have tried to reconcile all three. Others have exploited the tension between them to teach a lesson about law. Yet all agree that the third vision is problematic and needs explanation (Butler 2001). I argue that the play can be read as dramatizing the seductiveness of the first two visions which Sophocles shows us share a common image of law. Sophocles dramatizes this seductiveness by suggesting that the second vision is a misstep Antigone is lured into by her uncle. Yet while Antigone recovers from this misstep in articulating the third vision, the critical lesson of the play seems to remain that many of us have not. My reading of Polynices's corpse as a minor character attempts, however, to recover this third vision of law.

I Oppositional Readings of *Antigone*

As I mentioned above, Sophocles' *Antigone* was composed in Athens in the formative years of what would become the occidental natural law tradition when Greek

thinkers began first distinguishing between *phusis* and *nomos* or roughly what happens by nature versus what is done by convention (Segal 1964,63; Voegelin 379; Hayek 1973; Strauss 1950; Heinimann 1949).[25] While the play never explicitly mentions the term

[25] Prior to the fifth century BCE as numerous scholars have demonstrated, Greek thought, from which both Sophocles' *Antigone* and the occidental natural law tradition emerge, did not distinguish between nature on the one hand (*phusis*), and law and custom on the other (*nomos*) (Strauss 1950; Bloch 1991; Heidegger; Bernard Knox; Paul Sigmund; Nussbaum; Douzinas). Consequently, understanding how fifth century Athenian thinkers began to differentiate between nature and law is crucial to understanding the shared milieu in which Sophocles wrote *Antigone* and natural law thought developed.

As classicist Victor Ehrenberg puts it, for the archaic Greeks, "nature was divine, physis [*sic*] was nomos" (35). Intimately bound up the divine unfolding of the cosmos (*phusis*) and what Martin Heidegger has called "the overpowering structure of Being," custom, law, and traditional authority (*nomos*) were not conceived in archaic Greece as human-made social conventions. Unlike what we might today call artificial constructs and which because of this artificial constructedness might be otherwise and so are open to criticism and questioning, the *nomoi* of archaic Greece were an unquestionable part of the physico-cosmic order (see Heidegger, *An Introduction to Metaphysics*; Bloch 6-13; Hayek 20; Laroche). Or, put slightly differently, nature and law were not conceptually differentiated in the archaic Greek mind, but combined in a divine cosmography rooted in ancestral authority, the traces of which one can still find in the works of archaic Greek poets like Homer and Hesiod (Laroche 1949). Yet contemporaneous with Sophocles' writing of *Antigone*, several thinkers and writers in Athens were beginning to question this archaic Greek view of the cosmos.

These thinkers, generally referred to as Sophists but also associated with the nascent Hippocratic medical tradition as both Heinniman and Hadot point out, began to develop and deploy a new concept of nature (*phusis*) that was universal, rationally knowable, and, most importantly, could be set against law and custom (*nomos*)—now conceived as purely human-social constructs—as a *critical standard* by which law and custom could be evaluated and criticized (Hadot 19). Often associated with a discontent younger generation ill-at-ease with traditional authority and opinion, these Sophists sought means by which they could expose traditional beliefs and customs (*nomoi*) to rational criticism (Douzinas 27; Hadot 17-28). *Nomoi*, they argued *contra* the archaic view, were not part of nature and the divine unfolding of the cosmos (*phusis*), but conventions grounded only in human authority.

As something separate, nature (*phusis*), these fifth century thinkers reasoned, might be appealed to in order to evaluate these socially constructed customs, laws, and conventions (*nomos*). But to make this move, not only did nature and law have to be unthreaded from the archaic Greek cosmology and from each other, but more importantly nature had to be reconceived as an abstract standard, or what Pierre Hadot has called an "absolute" in the etymological sense of *something set apart from*, that was both universal and knowable through rational inquiry (19). Absent this transformation, *phusis* as nature would have remained ill-fit to serve as a standard from which rational criticism might be mounted against traditional customs. This was a momentous development in Greek thought that, as Leo Strauss has shown, paved the way not only for classical Greek philosophy (Socrates, Plato, Aristotle, and their heirs) as self-conscious rational inquiry distinct from traditional opinion, but also for a natural law tradition that appealed to a higher standard discernable in the structure of nature which was both universal and knowable and could be used to evaluate the positive laws of a community (1965).

Euripides, also a playwright and a contemporary of Sophocles, gives us some insight into how this new concept of nature was being employed. In his play *Hecuba*, Euripides suggests that slavery is a purely conventional matter, and that the distinctions between slave and master, foreigner and Greek—so crucial to Greek thought—have no grounding in the natural order, but are the result of human conventions. Through our use of reason, Euripides argued, we can come to appreciate the order set forth by nature. On Euripides' account then, the practice of slavery itself can be questioned precisely because nature

"natural law" as Tony Burns points out (2002), it nonetheless occupies a pivotal moment at the genesis of occidental natural law thinking and dwells upon many of same themes that would become central to the natural law tradition—*e.g,* law versus convention; divine authority versus state authority; nature versus man; Homeric virtue versus democratic legality, etc—as numerous interpreters have pointed out (Aristotle; Hegel; Steiner 1991; Connolly 2010; Honig 2013). What unites these accounts is the "clear oppositional struggle" that frames all these debates and has influenced the vast majority of subsequent interpretations of the play regardless of which side of the struggle the interpretation favors, as Jacobs has pointed out (1996, 910).

The play dramatizes the confrontation between Antigone (the heroine) and her maternal uncle Creon, the regent king of Thebes. Prior to the play's beginning, Creon issues an edict (*kerugma*) forbidding the burial of Polynices, Antigone's recently slain brother, as punishment for his part in rallying a foreign force against Thebes. Antigone, nevertheless, proceeds—or so she later claims—to bury Polynices.[26] When caught and

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constitutes an independent (Hadot's absolute) and universal standard that we have access to through rational inquiry and which we can use to evaluate and judge inherited conventions. Other contemporaries like Antiphon the Sophist in his fragment *On Truth* and Alcidamas—who Aristotle cites as having argued "nature has made no one a slave"—make similar arguments distinguishing what is by nature and what is merely conventional and so open to criticism and reform (*Rhetoric* 1373b 5-20; Burns 2002; Waterfield 59; see Heinniman for a detailed overview).

What is evident is how far this concept of nature departed from the archaic Greek view. Not only are nature and law now opposable in a way that they were not for pre-fifth century thought, but nature is ordered in such a way that its order can be known by human-rational inquiry. Thus nature in its universality provides a blueprint or standard upon which human laws and customs might pattern themselves (Segal; Douzinas), *even if*, importantly, this natural standard is not yet conceived as law, *i.e.*, a natural law theory, something which would have to wait for Aristotle (Douzinas 26). The crucial point is, however, we see here for the first time in occidental thought the beginnings of a concept of nature as critical standard opposed to law as human-social construct, a higher or universal standard, which would give birth to the dominant reading of natural law as higher law as well as legal positivism's corollary reduction of law to human-social construct.

[26] There is vigorous scholarly debate on how Polynices' corpse actually gets "buried." As I discuss in detail below, the burial is a little more than a light dusting. When confronted, Antigone owns up to having done it, but no one actually witnesses her in the act. Antigone's sister Ismene claims to have taken part but

confronted by Creon, Antigone confesses both to knowing that Creon had prohibited the burial of Polynices and to burying Polynices. Asked by Creon how she "dared to transgress these laws," Antigone responds: "for it was not Zeus Who proclaimed these things to me / Nor was it She, Justice, Who dwells with the gods below / Who defined these laws for human beings; / Nor did I think that such strength was in your / Proclamations, you being mortal, as to be able to / Prevail over the unwritten and steadfast lawful conventions of the gods" (449-455).

These lines, which I refer to as *Antigone's first formulation of her law* since they come "first" in the text of the play (the second formulation comes at lines 905ff), are well known. They are arguably the most repeated lines ever written by Sophocles (Steiner 1984). Taken with Creon's justification of his edict for leaving Polynices unburied, they stage a conflict or opposition between a temporally- and geographically-specific posited law—what I call a *positioned law*—enacted by a sovereign's will or a community's recognized legislative procedures (Hart 1961) and a higher, unwritten *positionless law*. This higher law is capable of nullifying posited law and may justify actions that the posited law forbids or deems illegal.[27] Creon brandishes his edict and demands a response: "You, however, tell me—not at length, but briefly—did you know that an edict

Antigone explicitly denies her sister played a role. (Most interpreters accept Antigone's denial, as Bonnie Honig has recently pointed out.) Carol Jacobs suggests the corpse could have gotten covered in dust by a windstorm either brought about by the gods or bad weather, but the play effectively dramatizes the seductiveness of our desire to read the burial as pitting Antigone and Creon against one another.

[27] See George Steiner, *Antigones: How the Antigone Legend has Endured in Western Literature, Art, and Thought*, Yale UP (1984) for an impressive account of Antigone's popular and intellectual reception. Also see Bertolt Brecht's 1948 adaption of the play and Ron Jenkins' 30 March 2003 article in the *New York Times*, "Theatre; 'Antigone' as a Protest Tactic," for some of the more radical ways *Antigone* has been deployed. Bonnie Honig's recent *Antigone, Interrupted* (2013) draws on reception theory to argue for *Antigone's* continuing importance.

had forbidden this" (450). Antigone counters, opposing Creon's edict with the unwritten laws of the gods.

Even competing interpretations of the play concur in reading this oppositional struggle between Creon and Antigone as the motor of the play. Aristotle and Hegel provide good examples of this agreement over the oppositional structure of the play. Aristotle develops his reading of *Antigone* in his *Rhetoric*. Here briefly Aristotle parses Antigone's appeal to the "unwritten laws" as an appeal to "the general law of nature…a certain natural and universal right and wrong" (1373b-10).[28] Aristotle compares Creon's edict forbidding the burial of Polynices to the Sophist Euripides' account of the institution of slavery: a matter of convention that needs to be judged according to universal standards discernable in nature.

Others—notably Hegel—have contested this "natural law" or "higher law" reading of *Antigone*. They argue that nowhere in the text does Antigone associate her law with nature (*phusis*), claiming it simply to be the "laws of the gods" (450ff; Burns 2002). These commentators maintain that it is not until much later, around the first century BCE, that a natural law as higher law theory emerges in the writings of Stoic philosophers like Cicero and Seneca (see Burns 2002 for an overview). What we see in *Antigone*, they maintain, is not the synthesis of a radical fifth century BCE Sophist conception of nature as critical standard into an account of natural law, but rather *the exact opposite*: an explicit rejection of the emerging Sophist concept of nature. "Far from pointing forward" to a radical account of nature as a critical standard that may be used to upend traditional authority, these commentators maintain that Antigone actually "points back—to the age-

[28] This is the first recorded instance we have of natural law or a "law of nature" being equated with higher law.

old reverence for the dead and their protecting gods," or what Hegel calls the warm maternal "law of shadows" in contrast to the emerging paternal law of the state or "law of the day" (Knox 97-8; Hegel 266-290; Bloch 120-130). These interpretations of *Antigone* thus read the play as a negation of the Sophist *phusis-nomos* dichotomy.

Hegel is, of course, an influential member of this second camp. Hegel reads Sophocles' *Antigone* not as a conflict between a forward-looking and anti-traditional authority and customary conventions or traditional authority, but as the first instance of the "ethical world divided," a division that allows for the first unmediated appearance of *Geist* in his *Phenomenology of Spirt*. Yet just as in Aristotle's natural law reading of the play, opposition is central to Hegel's reading of *Antigone*. Hegel subscribes to the view that the play concerns an opposition between the divine and the human. However, according to Hegel, the laws of the gods govern the family and chthonic elements in a matriarchal order represented by the girl Antigone and the laws of the government or state in an emerging patriarchal order represented by Uncle Creon and brother Polynices (*Phenomenology* #451). In a Hegelian vein, Luce Irigaray writes of Antigone, "[s]he reminds us that the earthly order is not a pure social power, that it must be founded upon the economy of the cosmic order, upon respect for the procreation of living beings, on attention to maternal ancestry, to its gods, its rights, its organization" (*Difference* 69-70E). Hegel and those of his ilk thus read the play as something like the last stand of an archaic, matriarchical, family-based Greek cosmology against a growing Sophist-Hippocratic assault (Sigmund 1972) that draws strength from the highly local and organic (thus "unwritten," as Sophocles puts its) "religious and ceremonial law" of each polis (Sigmund 10).

A diverse range of scholars have noted that these readings of *Antigone* lead to a stalemate (Jacobs 1996; Weber 2004; Honig 2013). In recent years some have thus begun to look to the "minor characters" of the play to offer alternatives to the "oppositional struggle" of the two main characters, arguing we can still find in the play a "prudent perspective" that is politically relevant for contemporary life (Jacobs 910; Kirkpatrick 2011). The minor characters turned to are various. William E. Connolly turns to Tiresias in his invocation of a seer's relevance for contemporary politics (2011).[29] Derek Barker and James Tully both turn to Haemon whose impassioned plea to his father to heed the plurality of reasonable positions is particularly suited, they argue, for our contemporary plural society (Tully 1995; Barker 2009).[30] Jill Frank, Jennet Kirkpatrick, and Bonnie Honig all turn to Ismene whose "unmanly" nonviolent resistance and desire for solidarity offer a nice counterweight to her sister's individualistic and rash actions (Frank 2006; Kirkpatrick 2011; Hongi 2013).[31] Margaret Kitzinger, Rebecca McCarthy, and Larissa Atkison turn to the Chorus whose plural composition mirrors well, they suggest, our political condition, one in which we always find ourselves with others (Kitzinger 2008; Atkison 2016).[32]

[29] See William E. Connolly, "The Theorist and the Seer" in *A World of Becoming* (2011).

[30] See Derek W.M. Barker, *Tragedy and Citizenship* (2009) and James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995).

[31] See Jill Frank, "The Antigone's Law" in *Law, Culture, and the Humanities* 2 (2006); Jennet Kirkpatrick, "The Prudent Dissident: Unheroic Resistance in Sophocles' *Antigone*" in *The Review of Politics* 73 (2011); Bonnie Honig, *Antigone Interrupted* (2013).

[32] See Margaret Rachel Kitzinger, *The Choruses of Sophokles'* Antigone *and* Philoktetes*: A Dance of Words* (2008) and Larissa Atkison "*Antigone's* Remainders: Choral Ruminations and Common Sense" *Political Theory* 44:2 (2016).

II A (De)compositional Reading of *Antigone*: Polynices's Corpse as Minor Character

I now turn to offer what I call a compositional reading of the play that looks to Polynices' corpse as a minor character. Acknowledging Polynices' corpse as a minor character has consequences for how we understand the place of law in the play which I discuss in the following section. In brief, to preview, when Polynices' corpse is acknowledged as an active minor character, law begins to look much more like a compositional force co-making a world that is constantly becoming with vast and diverse material and semiotic vitalities.

When the play begins, Polynices is already dead.[33] Throughout the whole play we never see the corpse, but only hear it being talked about. Antigone references the corpse in the opening scene in her exchange with her sister Ismene. The corpse is referred to by the Chorus in its first ode where it recounts both Polynices' and Etoycles' death. Yet it is only around line 250ff that we get a description of the corpse and this description is more of a non-description as it details what was *not seen*. One of Creon's men who had been tasked with guarding the corpse comes to report to Creon. However, as none of the guards saw anyone approach the corpse and there is no evidence of digging in the earth, the conclusion that Creon's edict has indeed been violated is not self-evident.

Listen to how the guard puts it when Creon asks "who" violated his edict:

> I do not know. For there was there no mark/of axe's stroke nor casting up of earth of any mattock; the ground was hard and dry/unbroken; there were no signs of wagon wheels./The doer of the deed had left no trace./But when the first sentry of the day pointed it out/there was for all of us a disagreeable/ wonder. For the body had disappeared/not in a grave, of course; but there lay

[33] As Samuel Weber (2004) points out, in Greek tragedy the action always occurs before the opening of the curtains. Greek tragedies focus on effects rather than causes. According to Weber, this is one of the things that makes them so enduring and timeless.

> upon him/a little dust as of a hand avoiding/the curse of violating the dead body's sanctity. There were no signs of an beast nor dog/that came there; he had clearly not been torn./There was a tide of bad words at one another/guard taunting guard, and it might well have ended/in blows, for there was no one there to stop it./Each one of us was the criminal but no one/manifestly so; all denied knowledge of it (248-63)

The guard's report is brimming with intrigue and loose-ends, one of which is a point that is almost universally overlooked: Polynices' body has *not* been buried, but "there lay upon him a little dust" (256).

Toward the end of the play, the blind seer Tiresias locates the crux of Creon's failing and the crisis of the play in Creon's arrogant inversion of earth and underworld. Tiresias says to Creon, "you have thrust one that belongs above below the earth, and bitterly dishonored a living soul by lodging her in the grave; while one that belonged indeed to the underworld gods you kept on this earth" (1068ff). In burying Antigone alive and at the same time refusing Polynices, who is dead, burial or a spot below the earth, Tiresias claims that Creon's edict and punishment of Antigone violates the ordering of earth and underworld. Yet if Creon's intention is to keep Polynices from burial, from being placed below the earth, then the guard informs him that his edict has not been violated. Again, the guard only reports that "the body had disappeared," not that it had been put below the earth (255). And even this is not quite true, for the body still appears to the guards, but it is just now covered in "a little dust" (256). How might recognizing Polynices' non-burial affect our telling of the story?

Carol Jacobs in her reading of *Antigone* is one of the few commentators who acknowledges the non-burial of Polynices. In the essay, "Dusting Antigone," Jacobs argues the dusting "tells the story of another economy," one that does not conform to

Creon's, the guard's, and Tiresias's economy of buried or unburied. Consequently, dusting is misunderstood when read as a burial (1996, 900). In her reading of the play, Jacobs compares the strangeness of the guard's report of the "traceless" dusting with the Chorus's famous "Ode to Man." In the "Ode to Man," which follows on the heels of the guard's report, the Chorus praises man's capacities to chart courses across the sea and make marks on the earth. "Wonders are many, and none more wonderful than man. This being goes with the storm-wind across the foamy sea, moving deep amid cavernous waves. And the oldest of the gods, Earth the immortal, the untiring, he wears away, turning the soil with the brood of horses, as year after year the ploughs move to and fro" (332ff). According to the Chorus, man's wonderfulness comes from his ability to plow the earth, to literally "wear [it] away" (335).

For Jacobs, the Ode is a sharp foil for the traceless non-marks of the scene the guard reports. "When Antigone works the earth, or fails to," Jacobs says, "she does so differently from this universal man turned male [of the chorale Ode to Man], plowing neither for possession of the earth nor of the other. She leaves the ground unmarked, unbroken" (1996, 900). Thus, the dusting scene "tell[s] the story of another economy" (1996, 900).

Jacobs' reading of the dusting scene is important to help us see what happens when we start to focus more on the corpse of Polynices. When we do so, we must admit that we cannot be certain that Polynices was ever buried, for instance. But Jacobs does not go far enough as she is certain that it was Antigone who performed the traceless dusting. How can Jacobs be so certain? If we return to the description of the corpse, there is no sign of the doer of the deed, or even of a "doer" at all. Again, "The doer of the

deed had left no trace…there was there no mark of axe's stroke nor casting up of earth of any mattock" as Jacobs points out (249-252).

Interestingly, Sophocles provides a second dusting scene and this time Antigone is sighted by the guards near the corpse. Yet even in this second scene, it is impossible to say Antigone did it. Who or what or what assemblage might be responsible? I think it is important to dwell on this question because the effort to answer it leads us to broaden the field of possible suspects.

After a berating by Creon, the guard returns to his post and with the other guards brushes the dust off the corpse and resumes watchful guard. This time the corpse is physically described: It is "moist" and the guards leave it "naked" (410). The guards also take up their watch "on the brow of the hill, to windward, that we might shun the smell of the corpse" (411-12). In other words, the corpse is damp and stinky. These are important observations if we are going to appreciate the corpse as an actor. For the dampness suggests that the corpse is in what forensic scientists call the third stage of decomposition or "purge." Depending on factors like temperature, cause of death, and exposure to the elements, this stage usually begins a couple days after death (Costandi 2015). As its internal tissues are liquified and seep out, the corpse becomes moist.

As forensic scientists now know, decomposition is a process that corpses both actively participate in and undergo. In fact, the first stage of decomposition is even known as "autolysis" or literally "self-digestion." Only minutes after death enzymes in cells build up to toxic levels (Costandi 2015). In normal human functioning and cellular life these enzymes are a routine product of cell metabolism. However, when they are deprived of oxygen, cells can no longer remove the enzymes and at a certain point,

usually after only a few minutes, the enzymes begin to devour the cell membranes, leaking out into the flesh in a process of self-cannibalism (Costandi 2015).

The breakdown of cell walls allows the vast number of bacteria that inhabit our bodies—something both us and not us—to begin spreading through the body. Trillions of bacteria make their home on the typical human body—on average roughly one for every human cell—from our eyelashes and tongues to skin, gut, and genitals. All of them begin to consume what they find. Eating their way out of the intestines and systematically through the rest of the internal organs, anaerobic gut bacteria play a leading role in decomposition. Once the white blood cells of the immune system become defunct in the process of autolysis, nothing keeps this gut bacteria in check. Gut bacteria are so foracious and systematic in their eating practices, that forensic scientists can actually use their presence or absence on certain organs to help determine time of death (Costandi 2015).

When thinking about the disappearance of Polynices' corpse, the question of who or what is acting is clearly important to the unfolding of *Antigone*. However, most answers to this question fail to consider the active role Polynices' corpse might be imagined to have played in its disappearance. Forensic scientists agree that when enzymes build up to toxic levels they eat through cell membranes in what they describe as an "in-house activity" (Costandi 2015). It is described this way because the cells are auto-destructing. The enzymes carry the same DNA as the cells they destroy; they are of the same stuff. Gut bacteria are different. Collectively these critters are made up of thousands of different species that inhabit the human gut in varying and diverse compositions throughout an individual's life. Still, it is hard to say that these bacteria are

"outsiders" without literally turning the stomach inside out. Without them, digestion and life as we know it would be impossible. The self depends on them for its vital functioning just as much as it depends on its human cells (Mol 2008).

If we are not quite willing to see these bacteria as wholly "other" in life, why should we in death? If we say, "I digest my food" or "I eat an apple" as Annemaria Mol (2008) has pointed out and mean something by it—all the while having to recognize it is never the self who digests food but a complicated network of human organs and bacteria—should we not also say "*I* decompose"? "*I* partake in the process of turning internal organs into liquid that then seeps out into the soil making my flesh moist." And as I am active in the process of putrefaction, should we not also say that "*I* help make the stench that draws the flies and maggots and that sends the guards windward"? Do *I* not help make the tacky fluid that perhaps dust might stick to?

My suggestion is not that Sophocles had a modern theory of bodily decomposition, but that he was surely not ignorant of the process of bodily decomposition.[34] Polynices' corpse was a stinky, oozing, bloating and deflating active mess. And it seems more our modern sensibilities that want to strip the corpse of any agency. Yet Polynices's corpse was active, and in collaboration with diverse gut bacteria, producing the tacky fluid Sophocles describes. Then, in the hot noonday sun—imagine the stench of the baking corpse emitting its liquids—

[34] For the recognition of the material agency of corpses in premodern times, see Margaret Schwartz, "An Iconography of the Flesh: How Corpses Mean as Matter" (2013), Ingrid Fernandez, "Necrolife" (2012), and Reza Negarestani "The Corpse Bride: Thinking with Nigredo" (2008) which through a reading of the *nupta cadavera* emblem argues for the prevalence throughout antiquity and early modernity of a lively conception of the corpse. Also see Gorgio Agamben, *The Use of Bodies* (2016) for a critical historical analysis.

> a squall lifted out of the earth a storm of dust/a trouble in the sky. It filled the plain/ruining all the foliage of the wood/that was around it. The great empty air/was filled with it. We closed our eyes, enduring/this plague sent by the gods. When at long last/we were quit of it, why, then we saw the girl (417-423)

This second dusting scene is no less problematic than the first, despite the fact that the guards are paying attention this time and the corpse is not shrouded in the darkness of night. However, on this occasion the guards close their eyes! It is not fatigue that causes them to close their eyes though. It is a dust storm. According to the guard who recounts this second scene to Creon, the dust fills the entire sky. And when the dust settles Antigone is espied standing over the corpse. The guard continues his account:

> She was crying out with the shrill cry/of an embittered bird/that sees its nest robbed of its nestlings/and the bed empty. So, too, when she saw/the body stripped of its cover, she burst out in groans/calling terrible curses on those that had done the deed/and with her hands immediately/brought thirsty dust to the body; from a shapely brazen/urn, held high over it. (424-431)

As the dust settles, Antigone wails unintelligibly like a bird bereft of its chicks. It is tempting to read this as the response Antigone has to her brother's stinky, naked, oozing corpse. The guards, of course, have already responded to the corpse in what might be considered a more reasonable fashion, "moving windward" to escape the stench. By contrast, Antigone seems to be driven towards the corpse, drawn by it. Polynices is her brother, and although dead and stinky, Antigone's drawing to Polynices might be understood in terms of the social norms of her society's customary treatment of corpses (Allen 2000). Yet Antigone is not the only sister of Polynices who is socially situated. Why does Ismene not respond like Antigone?[35] And who does? Who else besides

[35] As Bonnie Honig has recently pointed out, Ismene does claim to have acted with Antigone. We just all ignore her claims.

Antigone responds to Polynices' corpse as one being drawn by the corpse? Attuning ourselves to the seemingly minor detail that the corpse also elicited unintelligible bird noises from Antigone I think can help answer this question.

Recall that Tiresias' birds of augury also fall into "shrieking and unintelligible frenzy" when they encounter the corpse of Polynices. Tiresias ominously recounts "our altars and hearths have been defiled, every one, by birds and dogs, with carrion from the son of Oedipus who lies in miserable death [Polynices]. And hence the gods no longer accept sacrificial prayers from us, nor blazing thigh-bones, nor does any bird scream out intelligible cries, for they have consumed a stream of dead man's blood" (997ff). In Tiresias' recounting, the birds of Thebes, like Antigone, find themselves drawn to Polynices' corpse and their response is eerily akin to Antigone's.

This correspondence suggests we acknowledge Polynices' corpse as acting in this scene (Edwards 2009).[36] As I have pointed out, Polynices' corpse is constantly acting: it stinks, it becomes moist, it disappears, it draws people to it, it induces madness. Focusing on Polynices' putrid, disintegrating body as a minor character in the play—as a character whose affects can be just as dramatic and influential as those of living bodies in the play—has significant consequences for how the place of law in understood in the play as I show now. After all, it around the corpse of Polynices that all the visions of law in play gather.

[36] Erin Edwards has recently drawn similar attention to corpses as characters in her analysis of 20th century American literature and film. See "Extremities of the Body" in *Modern Fiction Studies* 55.4 (winter 2009). Also see her PhD dissertation *Corpse and Character*, UC Berkeley (2009).

III Three Visions of Law Circulating in *Antigone*

At least three visions of law circulate in the text of *Antigone*. Two are readily recognized by nearly all readers even though they are often read as diametrically opposed. I argue that this is because they both share and operate under what Alexandre Lefebvre has called "the dogmatic image of law" (2008, 3). Not only does this sharing in the dogmatic image of law make the two visions easy to recognize as "law" for most people, but it also allows us to see them as opposed or opposites. Like the two sides of a coin, opposites must always share some common ground otherwise the oppositional relation would never take hold.

In this section, I lay out the three visions of law circulating in Antigone. That there are three and not a nice round two, has been a troublesome point for centuries, especially for oppositional readings of the play. Goethe, for example, pled with any "apt philologist" of his day to prove that the passage which contained the third vision was spurious. He thought it was too great a "blemish" to coexist with the artistic genius of the likes of Sophocles. Others try to write the third vision off, not as a vision of law, but as a womanly outburst. More recently, Judith Butler, surprisingly taking a somewhat similar tack, has attempted to ignore the third vision too, claiming its irrationality and singularity deny it the status law (2001).[37] By contrast, Julen Extabe does not attempt to cross out or ignore this vision of law, but he does suggests we can read it as expounding on and claiming legitimacy for the second vision.

[37] Butler's interpretation is worse than Goethe's it seems to me. Goethe just wants the passage out, like a painful splinter. Butler does not criticize the manuscript but the character, Antigone, for her irrationality. Women may speak about law but they should only speak about law in the terms given to them by men and once a man has initiated the conversation, as, for example, Creon initiates the conversation here.

Seeing Polynices's corpse as an actor allows us to appreciate the third vision of law as a robust account of law in its own right: a compositional force co-making a world that is constantly becoming with vast and diverse material and semiotic vitalities. This point differentiates my reading from Extabe's then too. The second and third visions of law cannot be read together as supporting one another, but are in disaccord. The play, I thus suggest, tells the story of how Antigone was lured into the "misstep" of the second vision and the difficulties in recovering the third vision.

A. First Vision of Law: Creon's Positioned Law

The first vision of law is advanced by Creon. Antigone alludes to it in an early dialogue with Ismene: "And now what is the *proclamation* [*kerygma*] that they tell of made lately by the commander [Creon], publicly, to all people" (8-9). In simple terms, this is a vision of law as "proclamation" or command. It issues "publicly" from a "commander." And it has a time and place; it is "made lately" to "all the people [of Thebes]."

Creon fleshes out this vision in his inaugural speech as the king of Thebes. Addressing the leaders of the city, Creon outlines the elements of good governance and rule of law he hold as essential:

> Anyone thinking another man more a friend than his own country/I rate him nowhere. For my part, God is my witness/who sees all, always, I would not be silent/if I saw ruin, not safety, on the way/towards my fellow citizens. I would not count/any enemy of my country as a friend—/because of what I know, that she it is/which gives us our security. If she sails upright/and we sail on her, friends will be ours for the making/In the light of rules like these, I will make her greater still. (182-191)

In this passage, Creon places the good of the state above all particular goods, relations, and institutions—especially friendship.[38] In this context, law has a very specific function or purpose: "In light of rules like these, I will make her greater still." In other words, Creon is clear about the utilitarian purpose of law. Law is not made for personal gain, nor for emotional reasons. Law is made for the strengthening and making "greater still" the state.[39]

The purpose of law is to secure the state. By securing the state, law makes the state's citizens secure as well. Samuel Weber calls this element of Creon's vision "containment." In his reading of *Antigone*, Samuel Weber focuses on the ship of state metaphor that is recurrent in Creon's speech. This metaphor surfaces when Creon describes for his audience the conditions of their city: "Gentleman: as for our city's fortune, the gods have shaken her, when the great waves broke, but the gods have brought her through again to safety" (163-5). The "great waves" Creon mentions include, of course, the rise and fall of Oedipus, as well as the conflict between Oedipus' sons, and Polynices' attack on Thebes. Weber's term "containment" is helpful because it has been used before and has rich critical capacity.[40] It also emphasizes how a ship not only contains its cargo—the diverse cohort of seaman, passengers, livestock, and freeloaders, from rats and viruses and plague to human stowaways on board—but how the hull that

[38] Creon's explicit antinomy between the state or rule of law [note that "the state" and "the rule of law" are not synonyms] and friendship may not seem that provocative today in the liberal West. In Chapter Three on Aquinas I will argue that friendship is the root of law for the natural law tradition I am disclosing here.

[39] I do not think it is much of a stretch to read Creon here in line with H.L.A. Hart's own interest in rehabilitating utilitarian legal philosophy (1958, 593).

[40] See, for example, William Connolly's criticisms of Martha Nussbaum's "concentric image" container theory of culture in favor of an "ec-centric image" in *Neuropolitics*, 190-191. Also see Derrick Denman, *Scales of Political Life* (2015).

holds this motley collection of human and nonhuman passengers is all that stands between them and dissolution at sea. Indeed, because the ship contains a multitude, the captain's priority is to keep the ship intact. In other words, the captain is less concerned with what the ship contains than the integrity of the container. As Weber writes, a well-ruled state, "provides a vessel capable of containing the various elements that make up a *polis* and, by so containing them, imparts a certain unity and duration to them" (2004, 130).

A third and final element discernable in Creon's speech is even more intimately bound to the ship metaphor and has to do with good navigation. "If she sails upright and we sail on her, friends will be ours for the making," Creon says. Not only must good laws protect the container but they must also help the ship "sail upright." The state must not just hold its citizens secure, but it must do so over time and in different, sometimes dangerous, conditions. In his reading of *Antigone*, Weber parses this as "continuity" (2004, 130). As Weber puts it, "as a vessel, [the state] navigates the obstacles that time places in the path of any entity seeking to maintain its identity" (2004, 130).

Creon's vision of law is marked, first, as a positioned vision of law. It is both geographically and temporally locatable. "I *here* proclaim to the citizens…," Creon says. It is this positioned-ness that makes law, second, directable to a certain use-value—the making "greater still" the city of Thebes. Third, using the ship of state metaphor, Creon argues that the viability of the state depends on good governance.

I turn now to the second vision of law offered in *Antigone*. This vision is presented by Antigone. I show that while it differs on some points from Creon's vision, it is remarkably similar.

B. Second Vision of Law: Antigone's Misstep and Position-less Law

The second vision of law comes at lines 450ff. It is this vision of law that I want to suggest we consider as a misstep. It is a misstep Antigone corrects in the third vision of law, but not before dramatizing how seductive the misstep is and how wide its path. It is a misstep that I believe modern legal theory continues to take to this day which is one of the reasons the third vision of law is so hard to see.

At the beginning of this second vision, Antigone has literally been dragged before Creon by the guards who were charged with preventing the burial of Polynices a second time. Creon confronts Antigone: "You there, that turn your eyes upon the ground/do you confess or deny what you have done?" (441-2). Creon does not ask Antigone for her version of events, but demands a confession or denial. "I do not deny a thing" Antigone responds, at first neither confessing anything nor denying anything. For Antigone's self-proclaimed nature, we must remember, is "not to join in hate, but in love" (524). So far, so good. Antigone seems to hold up an option Creon does not offer her and one I believe she finally finds a formulation in the third vision of law.

But Creon keeps pressing. Creon then demands to know if Antigone acted with knowledge of the law: "tell me shortly and to the point, did you know the edict against your action?" (446-7). Creon assumes Antigone acted but he does not want to know anything about the circumstances. He is confrontational and insists that Antigone respond in kind. To this question, Antigone responds directly and indignantly: "I knew it; of course I did. For it was public" (448). Yet Creon's interrogation is not over. Perhaps he can smell the weakness in his prey because now he has her on his ground, on the terms of

his edict and his vision of law which she openly ("publicly") acknowledges. "And did you dare to disobey *that law*?," Creon says, going for the kill. Weak, weary, on enemy ground, Antigone missteps, her foot faltering she flees to the bosoms of her gods:

> Yes, it was not Zeus that made the proclamation/nor did Justice, which lives with those below, enact/such laws as that, for mankind. I did not believe/your proclamation had such power to enable/one who will someday die to override/God's ordinances, unwritten and secure/They are not of today and yesterday/they live forever; none knows when first they were/These are the laws whose penalties I would not/incur from the gods, through fear of any man's temper (450-459)

In this passage, Antigone articulates the play's second vision of law, a vision which I have attempted to describe as a misstep. This vision has often been read as opposed to the first one articulated by Creon.[43] One reason for this is that Antigone describes here a law that is "unwritten." Thus, it is not located in any particular place. Nor is it located in any particular time, for the "none know when first they [God's ordinances] were." Indeed, these laws "are not of today and yesterday, they live forever." In brief, these laws are *positionless*. This is in marked opposition to law that is geographically and temporally delimited, as law is in Creon's vision discussed above.

Nevertheless, this vision of law is remarkably similar to Creon's vision in several ways. After all, as I showed above, Antigone has been cornered on Creon's ground, and this second vision is thus forced into the same framing as the first in many crucial aspects. First, like Creon, Antigone envisions law as something that is dangerous to

[43] This is a very abstract theoretical account of opposition. I really doubt anything like it exists in the world outside theory. Things might get close to opposing one another, but there is always a little space, or rather a little hiccup of matter or grit in the machine that prevents the "maximal facial exposure" necessary for opposition. Skewed ever so slightly off-kilter any opposition we encounter is probably better described as "composition" even if the destructive forces of this "composition" are so absolute and totalizing for some species and ways of life that we can rightly say things like, for example, capitalism is opposed to human existence on earth. Of course, another way to say this is that capitalism is composing a world where humans no longer exist.

ignore. For Creon, law helps us traverse turbulent times in relative safety. Antigone does not fear turbulent times as much as the displeasure of those who make times turbulent: "these are the laws whose penalties I would not incur from the gods" (458).

Second and more significantly, both of these visions of law seem to suggest law serves as something like a yardstick for determining the *legality* of actions. Law is something that is *imposed* or "placed upon" something else (OED). Law is "placed upon" an independent reality to measure and evaluate it. Law (*nomos*) and the things of the world (*phusis*) that law evaluates or measures exist independently just as the yardstick and object measured exist independently of each other. Law comes ready-made to be *placed upon* things—a world of bodies, affects, and actions. Law is *imposed* as a ready-made tool to evaluate the "legality" of certain actions in the world. It is not an active component in the building or *composition* of the common world (Arendt 2006; Cover 1983; Latour 2010; Tully 2013).

Concern with legality may be identified with what Robert Cover calls "jurispathic" law (Cover 1983).[45] According to Cover, the jurispathic judge asks: to what extent does a certain matrix of past actions approximate the established legal standard which I must only "assert" in this particular instance (53)? Like yardage, legality is a

[45] Linda Ross Meyer has also recently drawn a similar distinction in her address to the Eastern Law, Culture, and the Humanities section. Meyer asks: "What if injustice and law-as-insidious-power sticks out for us, precisely because the background in which we live is so full of *lawfulness* as care for each other, so full of pointfulness and trajectory?" (my emphasis, 2013: 11-12). I think Meyer's provocative question helps us see through the mist of the commonplace to some of the ways law functions in our everyday lives in underappreciated ways. Both Meyer and Cover, however, associate lawfulness and jurisgenesis with the human capacity for narrative and language. This I suggest still remains too bound by the Sophist opposition between the human and normative and the non-human and physical, and so obscures the possibility of thinking law (*nomos*) not only in terms of a human "hermeneutic impulse—the *human* need to create and interpret texts" as Cover puts it (40), but also in terms of matter, bodies, affects, and the more-than-human, or that which has often been theorized on the *phusis* side of the dichotomy.

specification added to an activity or object within the world rather than a quality inherent to it.

Cover contrasts jurispathic law with jurisgeneratie law. Jurisgenerative law is, in Cover's words, "'paedic'…[or] world-creating" (12). It "proliferates…legal meaning," rather than standardizes it. Consequently, its "discourse is initiatory, celebratory, expressive, and performative, rather than critical and analytic" (12-13, 40). Stemming from what Cover calls "the hermeneutic impulse" or "the human need to create and interpret texts," jurisgenesis is a "creative…social process" that results in the fecund multiplication of legal meanings or normative worlds.

In this light, I find it useful to draw a distinction between *legality* and *lawfulness*. The first two visions of law are framed in terms of *legality*. *Legality* is a matter of measure, some imposed standard. The modern jurispathic state, as Cover notes, seeks a clear unitary standard and characterizes the judge as the person who applies this standard (42). *Lawfulness* pushes against *legality's* standardization of actions, focusing instead on whether actions have the quality of composition or world-building. But lawfulness can be very hard to see in a world of legality. Lawfulness is most closely related to the third vision of law.

C. Third Vision of Law: Entering into Rapport with Corpses

Polynices' corpse adds a layer to Cover's jurisgenerative law that Cover and his compatriots do not consider. Despite his expansive account of law, Cover nonetheless operates on an account of law that restricts law to the human, the normative qua narrative, and cultural. For Cover, law remains a "hermeneutic impulse—the *human* need

to create and interpret texts," as he puts it (40).[47] But acknowledging Polynices' corpse's vitality, seems to suggest something more—a third vision of law, a correction in step, and an alternative path for natural law. It is a vision of law as a compositional force co-making a world that is constantly becoming with vast and diverse material and semiotic vitalities.

According to Bruno Latour, "composition takes up the task of searching for universality," that is, "the task of building a common world but…without believing that this universality is already there, waiting to be unveiled and discovered" (Manifesto 474). For Latour, unlike Cover, this composition includes nonhuman actors. This is an important point when considering corpses.

This vision is again Antigone's but it is not the vision she invokes when she speaks of the "laws of the gods" (450) or some higher standard. Instead, it is a vision of the social and affective obligations that bond her to the corpse of her brother Polynices (980ff). "For a husband who had died there would be another for me / And a child from another man, if I had been deprived of this one / But with mother and father covered over, in Hades / There is no brother who could ever grow up / By such a law [nomos] indeed have I given you [Polynices] preeminence in honor" (904-920). On this occasion Antigone is not confronted by Creon or opposed by Creon into giving an account of her law, but freely gives one of her own accord. This is crucial I believe because it is here we

[47] Cover and Latour disagree over the role of the material world in this compositional process. Cover (and Meyer as well as other 'world-building' theorists like Arendt) tend to think of the composition or building of a common world in humancentric terms. Latour chastens this humancentrism with his own account of compositionism, and consequently is more in line with the goal of this chapter which is to disavow the dichotomy that makes Cover's humancentrism possible (Latour 2010). For a formerly humancentric 'world-building' theorist who has moved closer to Latour, see some of James Tully's recent work on Gaia citizenship (2013).

can see Antigone regain sureness of foot. If the second vision was framed by Creon's first vision, literally drawn out of Antigone on enemy ground, here Antigone unfoots Creon and walks an alternative path.

For centuries scholars have either ignored or dismissed this third vision of law, focusing instead on Antigone's more popular and standard first formulation (second vision).[49] Judith Butler's recent dismissal of the third vision as an account of law at all is characteristic. Butler dismisses the third vision as "a law of the instance and, hence, a law with no generality and transposability, one more mired in the very circumstances to which it is applied, a law formulated precisely through the singular instance of its application and, therefore, no law at all" (2000: 10). This critique attests to the dominance of what Alexandre Lefebvre has called the "dogmatic image of law" (2008). For Lefebvre, a "dogmatic image" is "dogmatic" because it is drawn from opinion and common sense, and it is an "image" because "it is rarely, if ever, directly thematized" (2008, 3). Creon's vision and the ship of state metaphor is a "dogmatic image of law" I believe. And in a tit for tat way, under the pressure of opposition, Antigone adopts this "dogmatic image" at line 450ff it seems.

The dogmatic image is an image of law that brings standardization, regularization, knowability, and order to an otherwise anarchic and unknowable flux of bodies, affects, and actions. It is an image of *legality* as I described above in contrast to *lawfulness*. But this assumes a very particular account of the world, one that is essentially lawless and to which law must be added as a corrective, "subsuming" as Lefebvre puts it, the things of the world (3). There is thus a deep connection between the dogmatic image of law I am

[49] See Martin Cropp, "Antigone's Final Speech" (1997) for a nice overview.

criticizing and a dualist image of reality characterized by a division between a fecund and recalcitrant but dumb physical world and an active, intelligent world of culture and law.[50] First, *phusis* or matter is conceived as the dumb background upon which the physicist must impose laws (or discern the laws imposed by the Creator God) in order to make the physical world a regular and knowable object of scientific inquiry. In a similar fashion, the legislator must impose laws upon the equally dumb movements of the social-human world whose original condition is lawlessness and disorder.

Consequently, law assumes the active role: the fatherly role of reason and language, ordering and regulating only after passivizing an unruly but dumb material world, the world of *mater*, affect, and bodies, as psychoanalytic theory might put it. Law comes from without or above *to correct a problem*: the anarchic flux of the material, bodily world of desire. Law is not an aboriginal feature of our belonging to one another and the world, but prescribes boundaries, external limits. These prescriptions are given by a correcting father or Pater Noster. The dogmatic image thus makes it hard to see both how law itself is composed[52] and how law might be conceived as an interactive material process (i.e., lawfulness) working with and as bodies, affects, and actions, both human and more-than-human, to compose and disclose the contours of a common world—the lineaments of our material belonging.[53]

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[50] See Lorraine Daston and Michael Stolles's excellent edited volume on the connection between law and conceptions of physical reality, *Natural Law and Laws of Nature in Early Modern Europe* (2008). Also see Jane Bennett's influential critique of this conception of reality in *Vibrant Matter* (2010).

[52] There have been many, especially in anthropology, who have plumbed the question of law's composition. See Sally Falk Moore, *Law as Social Process* (1977), for a start. Also see Bruno Latour's more recent *The Making of Law* (2010).

[53] There have been attempts in recent years to theoretically explore the way law builds our common material world. See *Material Worlds: Intersections of Law, Science, Technology, and Society* the March 2012 special edition of the *Journal of Law and Society*. Such attempts have frequently focused on

Conclusion—Footsteps of a Compositional Account of Natural Law

As I have suggested, the dogmatic image of law underwrites both Creon's positive law (first vision) and Antigone's higher law (second vision). I believe *Antigone* tells the story of why this dogmatic image is so seductive. What accounts for the hold this dogmatic image has had on Western legal philosophy? I suggest it is an attitude toward matter. Matter frames the opposition between natural law and positive law. This is apparent in so far as natural law and positive law are distinguished from one another by their source, reducing legal phenomena to this theoretical disjunctive (Lavi 2011).

One "theory" or "school," represented by Creon, is what we often identify today as legal positivism: law is simply what the sovereign says it is. On this theory, law's matter is immanent and positive, not only in the sense that it is posited by a sovereign but also in the sense that it is content-specific. We can find it promulgated in the law-books, we can trace its movement through the legislative houses, and we can study its effects on the bodies and things it governs. To paraphrase H.L.A. Hart's influential account of legal positivism: law is the geographically- and temporally-specific outcome of community's recognized legislative procedures. Law is a human-social construct (1961).

The other *theory*, represented by Antigone's appeal to the gods, holds that law is otherworldly and universal; it is not created or posited here on earth, but discovered and employed as a negative concept to assess the validity of specific posited law (Blackstone; Boorstin 1996). On this theory law is not what a sovereign says it *is*, but what *ought* to be no matter who says so (Hart 1958). The positive laws that govern human communities

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regulatory law and zoning law that material practices such as architecture must adhere to. The problem with these attempts is that law retains the crucial active feature it has on the standard model, relegating bodies, materials, and affects to the passive background.

are only law in so far as they reflect this higher law. On this reading, Antigone rejects Creon's edict because it is *not truly law*.

These two *theories* are presented as at odds with one another; one is either a legal positivist who thinks law is just what it is (although this does not mean we should not be critical of it and seek to change it), or a natural law theorist who thinks that law is only that which can be grounded or found to accord with some higher law or natural law. Of course, this is a rough sketch and over the centuries legal theorists in both camps have nuanced their accounts with insights from the other.[55] Yet Sophocles offers an alternative, a "third vision" rooted in a natural law tradition.

Early modern legal positivists like Jeremy Bentham criticized natural law as "nonsense upon stilts," an utterly content-less and airy-fairy concept akin to belief in "witches and unicorns" that can be pulled out of some metaphysical bag of tricks to avoid real argument (Bentham 1843; MacIntyre 1981). Rather than focus energy on the criticism and improvement of posited laws, these early modern legal positivists worried that natural law theory blurred an important distinction between law and morality, between what law is (an analytic inquiry) and what law ought to be (a normative question), and so detracted from the necessary work of advancing careful analytic arguments against unfair posited law in an attempt to get them repealed. Natural law theory, they argued, risked both the modern anarchists who in the garb of Antigone says "this ought not to be law, therefore it is not and I am free not merely to censure but to disregard it," (yet who stops short of the more challenging but more socially constructive

[55] Hart's influential version of non-command legal positivism is a good example. So are the "new natural law" accounts that have been articulated in response to Hart's account of legal positivism. See Finnis (1980); George (1995). Neil MacCormick provides a nice overview (1996).

task of pursuing the bad law's repeal), and the reactionists who retort "this is the law, therefore it is what it ought to be, and thus stifles criticism at its birth" (Hart 598). In place of this natural law as higher law, Bentham and other early legal positivists argued for a strict separation between what law is and what law ought to be. Only the former, they argued, had the critical purchase to actually change unfair posited law. While natural law theory concerns itself with the metaphysical, otherworldly, and phantastic, legal positivism turns its cool analytic eye to the realities of law and its violence in our shared social world.

Yet the rejection of higher law by the early modern legal positivists as "nonsense upon stilts" leads to a reduction of this-worldly law to an all-too-human nihilistic process of social control and power relations or what Linda Ross Meyer has called "law-as-insidious-power" that has come to dominate most late 20th and 21st academic studies of law (2013: 11).[56] Philippe Nonet and his students have developed piercing critiques of modern legal positivism and its attendant "sociological law," revealing the nihilistic and reductive elements of contemporary legal studies in their divorce of law (an immanent fact) and justice (a transcendent aspiration) (Nonet 1990; Constable 1994, 2014; Meyer 2010; Berkowitz 2010). Yet what Nonet and his students leave unturned is the

[56] As others like Constable have noted (1994), the legal realism of the mid-20th century and contemporary sociological studies of law is the natural outcome of legal positivism's rejection of natural law as higher law. Roger Berkowitz, for example, has shown how rejection of higher law by legal positivism has led to the transformation of law into "social rules" and justice into "a knowable product of science." Berkowitz writes, "it is a mistake to think positive laws are without reasons [because they are sourced in an immanent will rather than transcendent reason]. Rather, positive laws are precisely those most in need of reasons; in other words, positive law must be justified" (xiii). My claim is that we must understand this contemporary condition of law, i.e., "the increasingly normalized divorce of law from justice" (Berkowitz xiii), in terms of legal positivism's rejection of a peculiar albeit dominant conception of natural law as higher law. The antidote to this "divorce" is not marriage counseling, but an annulment that disavows the very oppositional pairing of *phusis* and *nomos* in the first place in order to imagine an alternative account of law and nature ulterior to narrative that allowed law qua immanent standard to be opposed to justice qua transcendent virtue in the first place.

assumption that natural law must be identified with a higher law, and so they leave unexplored what I take to be the animating question of any alternative account of law: the relationship between law (*nomos*) and nature (*phusis*) when nature is understood as the particularities of bodies, affects, and actions.[57] The result of the failure to reconsider this assumption about natural law, as more than one commentator has noted, is that these accounts "present an idealist investigation into law" that turns away from the real ways law cuts across bodies and works in this immanent world, preferring to explore law's "metaphysical underpinning" and "transcendental virtues" rather than its "power, effects, and consequences" (Blank 666; Frank 2006).[58]

Again, Sophocles' insights and Antigone's rapport with Polynices' all-too-material yet vital corpse seems to provide help. Sophocles' play I believe dramatizes the seductiveness and danger of considering natural law theory and legal positivism as two sides of the same dogmatic image of law. Reduced to two competing "theories," law is either a human-social product or it is universal and transcendent. One either studies law

[57] Nonet's senior colleague and friend Philip Selznick did explore the promise of natural law in an early essay "Sociology and Natural Law" (1961).

[58] Philippe Nonet comes close to my own argument: to return to Antigone's law is to return to *phusis* and to turn away from dominant readings of law as command or pre-existent standard. See Nonet, "Antigone's Law" in *Law, Culture, and the Humanities* (2006). However, whereas Nonet roots Antigone's law in the Heideggerian "unsayable," I want to root it in the call and agency of material bodies, a move Nonet would surely criticize as falling back into the model of rooting law in something pre-existent rather than the surging forth into light of *phusis*. Yet this criticism seems to me to miss that the material interactions I chart are not pre-existent, but ongoing, open, and exploratory. In fact, I see my reading as bridging some of the tensions between Nonet and some of his respondents such as Andrew Norris and Jill Frank. See once again *Law, Culture, and the Humanities*, vol 2.3, Oct 2006. Frank in particular criticizes Nonet for being too abstract and failing to see the role of law and justice in particular, immanent human-institutional practices. Frank thus turns from Nonet's Antigone's law to a more "prudent" perspective on law and justice that she pulls out of the minor characters. My reading begins the work of immanentizing/materializing the "unsayable" of Nonet's Antigone's law along the lines Frank suggests, but refuses to make law and justice humancentric, seeing law's activities not just as the practices of humans, but sundry materialities both human and non-or-no-longer human such as Polynices' corpse.

analytically or normatively, but not both. One either delves into the ins and outs of law's pervasive hold on bodies (Cover 1986) or dreams an alternative and "hold[s] out the possibility that law might actually *be*—that it might actually have an existence—outside of its posited existence in rules, norms, and conventions" (Berkowitz xvi). It is this opposition, a product of a shared dogmatic image, itself that structures legal philosophy and organizes it into competing schools and theories that I believe we find an alternative to in non-oppositional or *compositional* reading of *Antigone*. For in *Antigone*, I claim, we can find the seeds of an alternative approach to law and nature unbeholden to these disjunctives and dichotomies and which can help us begin to appreciate many of the often under-acknowledged ways law works in our shared immanent and material world.

Chapter Two

Aquinas's Eco/Analogical Vision of Law

There is a legend told about Thomas Aquinas. Large of stature and slow of tongue, his fellow students at the University of Paris called him the "Dumb Ox." Yet, his teacher, Albert the Great, who at that time held the Chair of Theology at the College of St James, rebuked the chides, reportedly saying: "You can call him a Dumb Ox; but I tell you that the Dumb Ox will bellow so loud that his bellowing will one day fill the world."[59] Albert was apparently prophetic. Today, Aquinas's "bellowing" literally echoes to all corners of the world. His name marks all six inhabitable continents, from schools and churches to universities and roads. He is the patron saint of students and all universities, and one of just a handful of named Doctors of the Roman Catholic Church. Revered for his classic synthesis of Greek philosophy—particularly Aristotle's natural philosophy which was virtually unknown in the Latin West until Aquinas's time—and the Augustinian-inspired theology of the Roman Church, Aquinas's thought has become a cornerstone of Roman Catholic theology.

Yet it is in the realm of natural law thought today that Aquinas is usually considered to be the most influential both inside and outside the Christian churches.[60] Widely considered to have given the definitive account of the Western natural law

[59] For a fuller account of the legend see Chesterton (1956).

[60]For Aquinas's influence in developing a secular liberal account of natural law see Jacques Maritian (1958) and Sadry Dury (2008).

tradition, Aquinas gave the topic of natural law extensive and systematic treatment in his *Treatise on Law* which forms part of his magnum opus the *Summa Theologiae*. This chapter focuses on Aquinas's natural law thinking to argue that there is discernable in Aquinas's thought an account of natural law that we do not often appreciate today. I call this Aquinas's eco/analogical vision of law and distinguish it from dominant normative-epistemological images of law that figure law as a normative system providing "reasons for action" (Hart 1958; 1961).

As I show in Section One, these normative-epistemological images of law circulate widely today in both legal positivist and natural law theories and obscure Aquinas's eco/analogical vision of law. The unwieldy phrase "eco/analogical vision of law" helps me stay as close as possible to Aquinas's meaning. At root and flower, law for Aquinas does not give "reasons for action," but composes the strands—Aquinas's word is "ligaments" or "connective tissue"—of belonging-together in an interactive community that includes all those things dwelling below the moon in the "sublunar realm" (ST I-II 90.1). Consequently, Aquinas's account of given reality, of the "natural world," is much closer to our modern usage of "ecology" than "Nature." Yet for Aquinas it is insufficient to talk about this "ecology" without also talking about the requirement of "friendship." As Aquinas points out, law does not merely reveal our relatedness or interconnectedness, but actively works towards "the establishment of friendship" (ST I-II 99.2). As such, the connections Aquinas draws between law and nature (ecology) are always mediated by analogy. Yet this does not make them any less "real" or important for Aquinas. For Aquinas, as I point out in the conclusion, being itself was structured analogically or what he called the *Analogia Entis*.

It is this alternative story of law and nature that this chapter shows Aquinas's account of natural law to disclose. This alternative story is occluded by the dominant story told today of natural law as a normative system of moral rules that ultimately provide "reasons for action" rather than shape or guide our belonging to one another and the more-than-human world.[61] For certain natural law theorists, these reasons for action exist within the fundamental metaphysical structures of the cosmos or human nature. Natural law theorists then give an account of law as providing reasons for action and give some account of nature as securing or undergirding those reasons. Aquinas's own examinations of law and nature do not map easily on to this schema as I show in Sections Two and Three respectively.

To begin with, I show in Section Two Aquinas does not approach law as a normative-epistemological system, but as boundary-work. A normative-epistemological account of law approaches law as primarily something to be known. By contrast, Aquinas defines law as the "ligaments" or "connective tissue" that bind and bound a community in belonging-together. Like the ligaments that both tie together and separate the elements of an organism or the connective tissue that composes an ecosystem, law joins and relates disparate elements in a gathering. Even in the Garden of Eden—and this is where Aquinas departs quite radically from the Augustinian tradition—law is necessary because God alone cannot transcendentally produce belonging-together or what Aquinas calls "friendship." Friendship requires give and take between one and another. It also requires care and concern for boundaries and connections. Such care is what Aquinas understands to be the work of law.

[61] While Aquinas's alternative may sound simply like habits or customs I will show below that he crucially distinguishes law from custom by its ability to bind or its "ligament" quality.

In his most sustained work on the nature of nature and the animal, Jacques Derrida calls a focus on the multiplicity and heterogeneity of structures and boundaries "limitrophy" (599). Limitrophy, for Derrida, is an investigation of "what sprouts or grows at the limit, around the limit, by maintaining the limit" (601). For Derrida, limitrophy is missing from the entire Western philosophical tradition. I disagree in so far as I believe Aquinas's approach to law, reflected in and informed by his interest in exploring the boundaries and limits of nature, raises many of the same concerns and strategies as limitrophy but centuries before Derrida coins the term. Aquinas wrote just as Aristotle's natural philosophy was being reintroduced to the Latin West via Islamic and Jewish sources. The reintroduction of natural philosophical enquiry, or what we might today liken to scientific observation and study, created a stir in a society where the dominant explanation for all activity in the cosmos from the most mundane sprouting of the oak seed to the most divine splitting of the Red Sea was attributed to God's direct, miraculous activity. Working with Aristotle's newly reintroduced and translated texts, Aquinas along with some of his contemporaries differentiated between the natural and the supernatural, and struggled to frame the relationship between the natural, the supernatural, and those mysterious phenomena like freak comet showers or children born with six fingers in such as way that "natural" was still a meaningful term.[62]

Aquinas envisions the relation between nature and law as two independent melodies played at the same time. To theorize this relationship, I elaborate on Aquinas's analogical vision of reality, what he called *analogia entis*. I conclude the final section of this chapter with a recapitulation of what I call Aquinas's "eco/analogical" vision of law.

[62] The contemporary tendency of certain "post-nature" critics to call everything natural is a case in point here.

I Law as "Reason for Action"

In this section I use H.L.A. Hart to illuminate a dominant image of law that circulates today in natural law theory. While Hart is a famous legal positivist, he describes natural law as a normative-epistemological system that provides "reasons for action" in his account of what is known as the "separation thesis" (1958).

In a widely read and influential essay from 1958 titled "Positivism and the Separation of Law and Morals," Hart offered a defense of what he called legal positivism's "separation thesis." For Hart, the separation these was closely connected to the debate between legal positivism and natural law theory. Hart defined the separation thesis as "the need to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be" (594). According to Hart, legal positivism affirms the separation thesis, while "natural-law thinkers…blur this apparently simple but vital distinction," which ultimately leads to all types of confusion (594).

Hart presents his argument "as part of the history of an idea" about law stretching back to the eighteenth and nineteenth centuries. That history tells the story of how early legal positivist thinkers like Jeremey Bentham and John Austin developed David Hume's distinction between is-statements (or positive statements typically employing the verb "is") and ought-statements (or normative statements typically employing the verb "ought").[63] Until Bentham's and Austin's development of legal positivism, the distinction

[63] In *A Treatise of Human Nature*, David Hume famously remarks: "In every system of morality, which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surprised to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it should be observed and explained; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a

provided by the separation thesis was blurred by the dominance of natural law theory.[64] Hart argues that the separation thesis is "vital" to legal theory's proper study of law. In this regard, Hart's history is told as a salvation narrative.

According to Hart, it is crucial to distinguish between law and morality. It is crucial for the study of law as well as for the life of society. First, if we fail to make the distinction, Hart maintains there is no defense against the reactionary conservative who claims: 'X is law, X has been law, therefore X is moral.' Hart insists that a thing's legality and it morality are two separate questions and keeping the two separate is crucial not only for clear legal thinking, but also clear moral thinking. Second, without the distinction between law and morality the anarchist can argue: 'this law Y is immoral; therefore it is not a proper law, and I am consequently not bound to follow it.' The solution to both of these potential problems is to keep separate questions of fact (or what Hume famously calls is-statements) and questions of morality (Hume famously calls these ought-statements). A law may factually be a law, but this does not necessarily make it morally good. For Hart, these are two separate spheres of questioning (598).

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deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention would subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceived by reason" (III.I.1). Historians of philosophy have called the distinction between is-statements (positive statements) and ought-statements (normative statements) which Hume raises Hume's law or Hume's guillotine.

[64] This of course seems to be how Bentham, Hart's inspiration, approaches the relationship between natural law theory and legal positivism too. Bentham famously ridiculed natural law theory as "nonsense upon stilts" and advocated legal positivism for it clarity. Hart seems to realize a progressive narrative of salvation from superstition is too simple and perhaps too limited by the second half of the twentieth-century. Yet the Christological framing is still in Hart.

Another aspect of the conventional appreciation of natural law that Hart clarifies is the role of commands.[65] Against Bentham and Austin, Hart argues that there is much in legal systems that cannot be explained in terms of command. While it is true that "some laws require men to act in certain ways or abstain from acting whether they wish to or not," Hart writes,

> other legal rules are presented to society in quite different ways and have quite different functions. They provide facilities more or less elaborate for individuals to create structures of rights and duties for the conduct of life within the coercive framework of the law. Such rules, unlike criminal law, are not factors designed to obstruct wishes and choices of an antisocial sort. On the contrary, these rules provide facilities for the realization of wishes and choices. They do not say (like commands) 'do this whether you wish it or not,' but rather 'if you wish to do this, there is the way to do it.' Under these rules we exercise powers, makes claims, and assert rights. (604)

Hart elaborates here what he means when he claims law provides "reasons for action" (2010, 79-85). Law is about moving people to act, either as they will or against their will. In the case of criminal law, a person is provided with punishment, or the threat of punishment, as a reason to act in a particular way. In other areas of law, a person is provided with the opportunity to realize something they would like to have—"wishes and choices"—as a reason to act in a particular way.

Hart's success, and he was the first to note this, came not from his originality, but from his ability to give a certain freshness to an old narrative about law: that law is fundamentally a normative-epistemological project, or a legitimated system of reason-giving and reason-receiving. What distinguishes natural law from positive law is the kinds of reasons given and received for action. Hart criticizes natural law theory for

[65] "It is possible to endorse the separation between law and morals and to value analytical inquiries into the meaning of legal concepts and yet think it wrong to conceive of law as essentially a command" (601).

providing reasons for action that are themselves based on metaphysical claims about the world or human nature, that is in violating the is-ought distinction.

In the past fifty years the dominant debate in natural law theory has been whether natural law actually does provide reasons for action that are based on metaphysical claims. On one side, there are those who claim Aquinas and the classical natural law theorists never confused is-statements (stating what is the case based on logic or observation) with ought-statements (stating what should be the case based on supernatural conjecture). This scholarship often goes by the name New Natural Law Theory (NNLT); the philosophers most closely identified with it are the French-American Thomist philosopher Germain Grisez and Hart's student John Finnis. According to Grisez, Finnis, and their compatriots, for the premoderns, speculative reason and practical reason are two completely separate spheres. In addition, law is a matter of practical reason. Natural law therefore did not start from propositions derived by speculative reason about the metaphysical structure of the world or human nature but was based instead on practical self-evident goods that were identified as such through a process of self-reflection.

The other main camp of natural law interpretation denies that Aquinas and the classical natural law theorists distinguished the way modernity finds necessary between is- and ought-statements. For this camp of what might best be called Neo-Scholastic interpreters, Aquinas's "failure" to distinguish between these kinds of statements is not a problem as the distinction is a modern one and overdrawn in any case. Neo-Scholastic interpreters also argue the NNLT waters down its account of natural law to make it fit with modernity.

The tension between the NNLT and the Neo-Scholastic interpreters of Thomistic natural law gets to the heart of why I have spent this first section elaborating Hart's separation thesis. Even those who deny the validity of Hart's separation thesis like the Neo-Scholastics still make the question of drawing a distinction between is- and ought-statements central to their accounts of natural law and to their reconstructions of Aquinas. For the Neo-Scholastics, as much as for the NNLT and Hart, law is a reason for action, or what might be called a normative-epistemological project. The only question open for dispute is whether these reasons for action are discovered in structures of the cosmos (Neo-Scholastics), is a function of practical rationality (NNLT), or is established via a set of secondary rules (Hart). It is this story of law that obscures another one that I believe Aquinas offers. I turn to that one now.

II Law as Friendship and the "Ligaments" of Community

Aquinas advances several claims about law in the *Summa* that when considered together reveal a peculiar conception of law. This conception is of law as the connective tissue—Aquinas's word is "ligaments"—or stuff of our belonging-together in community (ST I-II 90.1).[66] Aquinas's claims about law draw into question the image of law as "reason for action" I discussed in the previous section.

The first claim Aquinas makes is that law was not just present, but was a necessary good in man's original state of paradise (ST I 96.4). This is a crucial point for Aquinas

[66] See Aquinas's first definition of law, *The Summa Theologica of St. Thomas Aquinas*, trans. Fathers of the English Dominican Province (New York: Benziger Bros., 1948), I-II90.1. Translations of Aquinas are drawn from the standard *Opera Omnia* Leonine edition of 1882. I relied heavily on earlier English translations, particularly the translation by the Dominican Fathers cited above and Alfred Freddoso, *Aquinas's Treatise on Law* (South Bend: Augustine's Press, 2009).

that differentiates him from many other Christian thinkers and their heirs who held law to have merely remedial functions as a consequence of sin.[67] In the *Summa* this claim appears in the "Treatise on Man" when Aquinas sets out to consider the "authority" (*dominio*), "dominion," or "mastership" proper to human beings prior to the Fall. In article 4 of question 96 Aquinas makes a crucial distinction between the "authority" one wields over a slave and political or legal authority. Aquinas writes,

> Authority has a double meaning. First, against slavery, in which sense the authority of the master means one to whom another is subject as a slave. In another sense authority is referred in a proper sense to any kind of subject; and in this sense even he who has the office of governing and directing free persons, can be called a master. In the state of innocence man could have had authority in the latter sense only. (ST I 96.4)

Two things are important to note in this passage. First, in distinguishing between the authority appropriate to the master-slave relation and the authority appropriate to the governor-free person relation, Aquinas makes a distinction between that which is essential to authority insofar as it is authority at all, namely "governing and directing," and that which merely accrues to authority in our fallen world, "coercive domination."[68] According to Aquinas, the master-slave relationship is a product of our fallen world. There were no slaves or masters in Eden. The same is not true of the governor-free person relation though. While both relationships contain elements of authority, only the

[67] As others have pointed out, the claim that law attended man in his paradisiacal condition appears to be tightly bound up with Aquinas's Aristotelian premises of the naturalness of politics against the establishment Christian views of his day, such as those espoused by Augustine, which held law to be a consequence of sin and therefore containing merely remedial or corrective functions. See Robert Markus, "Two Conceptions of Political Authority," *Journal of Theological Studies* 16 (1965); Paul Weithman, "Augustine and Aquinas on Original Sin and the Function of Political Authority," *Journal of the History of Philosophy* 30:3 (1992), pp. 353-76; Phillip Cary, *Augustine's Invention of the Inner Self* (New York: Oxford University Press, 2000).

[68] This penchant for making distinctions is often criticized by modern readers of Aquinas as a scholastic splitting of hairs. Below I will suggest that this is crucial for contemporary environmental thought.

master-slave relationship contains an added element, an element made possible only because of sin. The point is important because it allows us to appreciate the non-coercive essence of authority Aquinas sees, even if that kernel is often obscured in our fallen world.[69]

Second and perhaps even more importantly for my purposes here, Aquinas's distinction between kinds of authority suggests something profound about law's purpose or end and ultimately it seems to me law's relationship to justice. Following the biblical tradition, Aquinas held Eden as a state of innocence and perfection. Consequently, justice also perfectly obtained there. In other words, for Aquinas as for nearly every Christian thinker, in Eden justice was not simply striven for but was obtained, it was an accomplished fact. But that means, however he theorized law, it had to have a function in excess of, or "superabundance" to the attainment of justice.[70] If law was an affirmative primordial feature of a state of perfect justice, then law could not be said to properly intend or be directed towards the realization of justice or any of the other conditions that already obtained perfectly in Eden—peace, virtue, felicity, etc.—in any simple means-ends way. This claim troubles the image of law as reason for action directed towards even the common good (ST I-II 90.3). In fact, Aquinas severely problematizes any attempts to think of the common good as something we might act for. Let me explain.

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[69] Moreover, the point confirms recent environmental Christian readings of God's original grant of "dominion" and "authority" over all creation to human beings (see, *Genesis 1:26-29*) in stressing that the original or *deepest* meaning of dominion is something more akin to governing free person than possessions or slaves. For example, see Pope Francis's recent encyclical *Laudato Si'*.

[70] Charles De Koninck, "On the Primacy of the Common Good," *The Aquinas Review* 4 (1997), 3rd ed June 2015, p. 27.

In the same article concerning law and authority in Eden, Aquinas raises a discussion of the common good. After affirming that law and authority were present in the state of innocence, Aquinas proceeds to tell us why: "because man is naturally a social animal in the state of innocence he would have lead a social life. Now a social life cannot exist unless the intending of the *common good* itself presides" (ST I 96.4).

When Aquinas turns to discuss the relationship between law and the common good in his "Treatise on Law," Aquinas uses a peculiar, but illuminating example: the relationship between fire and heat.

> Now in every genus, that which belongs to it chiefly is the principle of the others, and the others belong to that genus in subordination to that thing: thus fire, which is principal among hot things, is the cause of heat in mixed bodies, and these are said to be hot in so far as they participate in fire. Consequently, since the law principally intends the common good, any other precept in regard to some individual work, must needs be devoid of the nature of a law, save in so far as it regards the common good. Therefore every law intends the common good. (ST I-II 90.2)

Aquinas calls the relation between fire and heat one of "participation." To the extent that something is "hot," it "participates in"—or "has a share in"—fire. Hot things, Aquinas here explains, are *not* the means to the goal of fire or directed towards something outside or foreign to them—what the seventeenth-century Thomist John of St Thomas called "alien goods."[71] Rather hot things participate in fire or have a direct share in the doings of fire. It follows, Aquinas thinks, that law is not directed towards the common good as a goal outside itself—as one might say perhaps money is directed towards purchasing things—but is rather a way or mode of our participation in the common good. And this

[71] John of St Thomas, Curs. Phil. 5.3.87a.

means, for Aquinas at least, the common good is not a goal at all, not something to be obtained. It is a doing or mode of "participation," the doing of which Aquinas calls law.

Law and justice for Aquinas are not so much different things or means to achieve one or the other, but diachronic and synchronic explanations of the same phenomenon of belonging-together. When Aquinas talks about justice he is taking a synchronic view. When he talks about law, the view is necessarily diachronic.

Aquinas offers a more sustained discussion of the common good and its relationship to law in *De Caritate* that helps us see how the relationship of law and justice. Here he explicitly rejects the idea that the common good might be something possessable by individuals:

> To love the good of a city in order to appropriate it and possess it for oneself is not what the good political man does; for thus it is that the tyrant, too, loves the good of the city, in order to dominate it, which is to love oneself more than the city; in effect it is for himself that the tyrant desires this good, and not for the city. But to love the good of the city in order that it be conserved and defended, this is truly to love the city, and it is what the good political man does, even so that, in order to conserve or augment the good of the city, he exposes himself to the danger of death and neglects his private good. (2.17)

Aquinas makes clear here that the common good in contrast to private goods can never be possessed. The common good is of a different quality entirely from private goods. The common good is not something that can be *had*, but an activity that is itself "diffusive," as the twentieth-cenury Thomist Charles De Koninck puts it (36). In fact, the more one attempts to possess or have the common good, the more elusive it becomes. If, as Aquinas seems to be suggesting here, the common good's essential quality is to love another (figured as someone other than oneself or as the city), then there is no reason to

wonder it cannot be possessed. To possess the common good is to alter its essential nature.

An attempt to possess the common good is exactly what Aquinas criticizes tyranny for. The tyrant desires the common good all for himself, but fails to see how his appropriation of the common good destroys the element of the common good that attracted him to it in the first place: its diffusive communality (*De Regno* c.1). This quality is palpable and real. Consequently, it can be "conserved," "defended," and "augmented."[72] Aquinas writes:

> Just as the principal intention of human law is to create friendship between human and human; so the principal intention of the divine law is to establish friendship between human beings and God. (ST I-II 99.2)

As Paul Weithman has argued, this passage is full of insight on how Aquinas understands law (372). Here the name Aquinas gives law's principal intention is "friendship" and this very Aristotelian choice of words is illuminating for two reasons.

First, in the *Nicomachean Ethics*—on which Aquinas wrote a lengthy commentary—Aristotle makes the claim that "friendship seems to hold states together, and lawgivers care more about it than justice" (1155a22). The pairing of law and friendship over justice is similar to the conclusion we drew above in point one. Friendship, like law as participation in the common good, is an ongoing activity, the end of which lies not in completion, but in its ongoing-ness. It is a give-and-take relationship.[73] Friendship like law requires work. This is why, I believe, it is hard for

[72] Aquinas, Caritate, 2.17.

[73] See Koninck, *Primacy*; Sibyl Schwarzenbach, "On Civic Friendship," *Ethics* 107:1 (1996), pp. 97-128.

many to theorize an aboriginal function or non-coercive quality distinctive to law: work, it seems, should be absent from paradise. Yet this is not how Aquinas understands paradise, nature, work, and embodiment.

Here Aquinas takes an Aristotelian line against the more Neo-Platonist trends that dominated medieval Christian interpretations of the Eden narrative.[74] These trends prioritized the role of the spirit over the body and so excluded from paradise the more bodily acts of existence. For Aquinas though—and he is adamant here—eating, defecating, sex, the work of "dressing and keeping" the Garden, and even natural death were all attendant aspects of our original paradisiac condition.[75] "Every bodily power is finite," Aquinas reminds us (ST I 97.4). The bodily work of caring for the land, for our bodies, and the friendships between us is not considered by Aquinas to be a curse foisted on us by the vengeful God spiteful of our original disobedience, but a part of paradise and an intimate delight. This work which includes the work of law is an aboriginal feature of our human existence.

I close this section by outlining the Thomistic picture of law that I believe emerges here. In affirming law's presence in Eden, Aquinas conceives law outside any simple means-ends ordering. Nevertheless, law intends or participates in the common good. Thus, Aquinas identifies the common good not as an object or possession or goal, but as an ongoing activity—in De Koninck's phrasing, "communicability."[76] The medium of community and belonging-together for Aquinas is law. As Aquinas says,

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[74] Aquinas, STI76.5; Mark Jordan, *Teaching Bodies* (2017).

[75] See Aquinas, STI94-102.

[76] *Primacy*, p. 27

law's "principal intention is the establishment of friendship" (ST I-II 99.2). Put less formulaically, law's intention (but not purpose) is the connective tissue or "ligaments" that twist through our coexistence with others, transforming, with work, that coexistence into the being-together of friendship.[77]

III *Natura*: Nature's Rhythms and Refrains

How Aquinas conceives nature (*natura*) is also problematic for contemporary interpretations of natural law. These interpretations, whether Neo-Scholastic or NNLT, conceive nature as a normative foundation: a source from which reasons for action can be derived. But Aquinas's discussions of *natura* were of a much different sort. Listen to how Aquinas approaches the concept of nature in his *Summa contra gentiles*:

> Nature is in keeping with that which usually happens for the most part, but is not in keeping with what always occurs: because many natural causes produce their effects in the same way usually, but not always; since sometimes it happens otherwise, either due to a defect in the power of an agent, or to the unsuitable condition of the matter, or to an inferior agent with greater strength—as when nature gives rise to a sixth finger on a human. (III.99)

Nature, Aquinas here suggests, is "what happens usually, but not always." Indeed, Aquinas seems emphatic, repeating it three times in this short passage: nature is *neither* universal *nor* controlling, but shot through with contingencies. Nature is what happens for the most part—contextual, historical, and shot through and through with the

[77] Charles Peirce called this "Thirdness" and also identified it with law and mediation. For the connection between Peirce and Scholasticism which I do not have time to develop, see John Boler, *Charles Peirce and Scholastic Realism* (Seattle: University of Washington Press, 1963).

contingencies of defective agents, "as when nature gives rise to a sixth finger on a human."

But the really interesting point is not simply that Aquinas does not use nature here in a typical modern fashion to denote a universal determinative realm. What is interesting is that for Aquinas there is nothing normative at all about nature. The child born with the sixth finger is "natural" but not "normal."

This account of nature is in stark contrast to how many of Aquinas's modern readers interpret him. These readers understand Aquinas to offer a list of moral rules derived from a universal nature.[78] For these modern interpreters, Thomistic nature provides a normative foundation applicable to all peoples and all times. Of course, as I showed in the previous section, Aquinas has his modern apologists who have attempted to show that Aquinas did not run afoul of modernity's is-ought distinction and other modern philosophical sensibilities.[79] My point is different though. I am claiming that Aquinas's question was different. The question posed by nature for Aquinas did not discuss morality on this basis. Instead, he was concerned with boundaries, such as the boundaries between the natural and its others, and questions about how these boundaries are produced, generated, and even multiplied. What Aquinas is concerned with is not the normative conclusions that may be deduced from these boundaries but rather in how the natural divides itself and generates difference.

Drawing on Estonian biologist Jakob von Uexküll's "musical laws of nature," Elizabeth Grosz has recently argued for a conception of nature reminiscent of Aquinas

[78] George, *Natural law*; Drury, *Aquinas*.

[79] John Finnis, *Natural Law and Natural Rights* (New York: Oxford: University Press, 1980).

(2008). Developing Uexküll's notion of how there is something like "law" that binds "together the development, or, rather, coevolution, of the spider and the fly, the tick and the mammal, the wasp and the orchid, the snapdragon and the bumblebee," Grosz paints a picture of nature as "counterpoint with which the living being must harmonize if it is to survive" (2008, 40). Grosz concludes,

> If nature can be seen as the contrapuntal relation between at least two biologically connected musical themes, the harmonious note-by-note connections between at least two different melodies, then milieu or environment is not entirely separate from or outside the living organism: it is already mapped or composed in terms of the musical cadences available to the body (2008, 44)

Grosz's and Uexküll's focus on the musical laws of nature and counterpoint is helpful for explaining Aquinas's account of *natura*. Like Aquinas, Grosz's and Uexküll's conception of nature appears more *ecological* than normative. Their concern is more about how things co-exist harmoniously in an ecosystem, how species develop a place of home and co-evolve. In other words, like Aquinas, they stay close to the idea of nature as a set of relations structuring and composing a house or an abode (as the etymology of *ecology* suggests.)[80] Importantly, the elements of the composition possess their own vitality and always have the capacity to change the overall structure or relationship. A change in the orchid may affect a change in the wasp, just as a change in the soprano voice of a contrapuntal fugue may elicit a change in the alto voice. These changes operate immanently to the system and are funded, so to speak, by immanent sources.

Even though an ecosystem has its own vitality, there is nonetheless a certain law-quality or "contrapuntal" character to its activity that Uexküll thinks can be observed and

[80] The term "ecology" is of relatively recent origin. It was not coined until the 19th century by the German zoologist Haeckel from the classical Greek terms *oikois* for "house" and the common suffix *logia* for "study of."

studied. Although not governed by an external hand, nature's activity is not radically contingent or reducible to blind chance, but suffused with lines of commonality or communication just as the voices of a contrapuntal fugue, depend on and relate to one another.[81]

In the *Summa*, Aquinas describes nature similarly. Nature is a space of indeterminate free play that, nonetheless, contains tendencies, lures, and leanings. Listen to how Aquinas puts it:

> Not every power of created nature, however, is known to us. Therefore, when something happens outside the order of nature insofar as it is known to us, through a natural power unknown to us, it is a preternatural marvel with respect to us. Thus, when demons act by their own natural power, they are not properly called miracles, but they are miracles, or marvels, with respect to us. (ST I 110 4.2)

The English translation here seems to suggest an epistemological uncertainty, a limit to human knowing or even just an "unknown" that with study may become a known. Aquinas's language actually suggests something else. "Know" is usually a translation of *cognosco*. The Latin word Aquinas employs is *noto*, not *cognosco*. *Noto* indicates a "mark," "sign," or "hint." Nature, Aquinas is arguing, *marks* or *hints* at its own indeterminacy. This is not a failure of human knowledge to grasp nature's working, or what we would more properly call uncertainty, but a feature of the world, an indeterminate quality of reality, a movement of nature oblique to itself, as Aquinas

[81] For the connection between counterpoint and Aquinas see Erich Przywara, *Analogia Entis: Original Structure and Universal Rhythm*, trans. John Betz and David Hart (Grand Rapids: Eerdmans, 2014); Alex Novikoff, *The Medieval Culture of Disputation* (Philadelphia: University of Pennsylvania Press, 2013). It has been persuasively argued that Renaissance and Baroque contrapuntal music emerged from the Scholastic back-and-forth tradition of disputation.

himself defines it.[82] Aquinas and his Scholastic contemporaries called these oblique or tangential phenomena "preternatural" to distinguish them from the "natural." But by this, Aquinas also meant to distinguish them from the "supernatural," "unnatural," and "artificial" as well. In fact, as I began to show and claim above, the boundaries of Aquinas's *natura* are always in question.

As Aquinas conceives *natura* then, nature is a limit concept. Derrida is useful to think with here because he can help us see that the idea of the limit radically changes when we no longer approach it as a "single indivisible limit" (601). Derrida's concern is with the limit or boundary drawn between the human animal and all other animals. Derrida argues more attention could be paid to the differences and boundaries within as well as between the groups that are distinguished from one another. Indeed, the goal of limitrophy is to "multiply the limit's figures, to complicate, thicken, delinearize, fold, and divide the line precisely by making it increase and multiple" (601). Aquinas's own focus on the multiplication of limits and boundaries is similar to Derrida's project of limitrophy.

As I have already suggested, Aquinas in his day proliferated nature's boundaries along the artificial, supernatural, and preternatural, each with their own distinctive characteristics.[83] Central to Aquinas's notion of nature is the ongoing question of how to

[82] This is where I disagree with Daston and Park (1998) who seem to suggest that the praeternatural for Aquinas is simply a failure of human knowledge to grasp the underlying causes. As I've argued and as I develop more below, I think this misses Aquinas's openness to creativity in nature. Aquinas's defense of a natural realm existing alongside the supernatural should not be read only as a knowledge-greedy move that sought to render the world explainable in human terms and pave the way for modernity as Daston and Park suggest, but primarily as an attempt to reign back in the omnipotent all-sustaining divine will monotheism in its Augustinian formation unleashed.

[83] For a full account of this see Lorraine Daston, "The Nature of Nature in Early Modern Europe," *Configurations* 6:2 (1998), pp. 149-72; Caroline Bynum, *The Resurrection of the Body in Western*

draw, complicate, and multiple the boundaries between nature and its others. Boundary-drawing practices particularly interested Aquinas. In the *Summa* for example, Aquinas writes "human nature is changeable, thus that which is natural to a human may sometimes [*aliquando*, lit. "at any time"] fail [*deficere*, lit. "fall off"].[84] For Aquinas the task was not one of categorizing the world into categories, but attending to how the boundaries between categories are drawn, redrawn, and multiplied. *Natura* is constantly on the move. Its boundaries are multiplicitous and heterogenous.

We can see how this Thomistic interest in boundary-drawing plays out in a letter Aquinas wrote to an unnamed knight titled "On the Occult Workings of Nature."[85] Here Aquinas plumbs the natural/supernatural divide that was a particularly thorny issue in the late Middle Ages.[86] The reintroduction of Aristotle's pagan natural philosophy to the West via Islamic sources in the late twelfth century put Western Christianity on edge—an edge Aquinas was particularly attentive to. The dominant Christian view of Aquinas's day held that God's will alone held all creation in existence from moment to moment.[87] On this view, there was thus no definable difference between a supernatural miracle and a natural occurrence. As Augustine observed, "how can anything done by the will of God

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Christianity (New York: Columbia University Press, 1995); Robert Bartlett, *The Natural and the Supernatural in the Middle Ages* (New York: Cambridge University Press, 2008).

[84] Aquinas, STII-II57.2.

[85] Aquinas, "On the Occult Workings of Nature," trans. J.B. McAllister (Washington: Catholic University Press of America, 1939).

[86] For a detailed discussion of the late medieval distinction between natural and supernatural see the account by the medieval historian Robert Bartlett, *The Natural and the Supernatural*, particularly chapters 1 and 3.

[87] Bartlett, *The Natural and the Supernatural*; Robert Pasnau, *Thomas Aquinas on Human Nature* (Cambridge: Cambridge University Press, 2002).

be contrary to nature, when the will of so great a Creator constitutes the nature of each created thing."[88]

The establishment Augustinian tradition denied that any knowledge about the cosmos could be had except through divine revelation or illumination.[89] Any regularity or tendency that might be observed inhered in God's continual maintenance of it, rather than a "natural" relationship between created things. For example, the regular germination of plant-life was not attributed to a relationship between seed, soil, water, and sun, but directly to God's will. If God so happened to will a seed to sprout in a vacuum, this occurrence would be no less natural or more miraculous than God's willing of a seed to germinate in warm, moist soil. The consequences of this tradition of thought were extreme for natural philosophy. Any knowledge of nature had to proceed by direct dispensation from God.[90]

By contrast, Aquinas pursued a budding natural philosophy which sought to come to terms with the workings of the cosmos through research into the relations between created things independent of God's immediate causation.[91] And in the letter to the unnamed knight, Aquinas probes the boundary between the supernatural and natural as it was being drawn by his contemporaries. Aquinas concerns himself with scriptural texts, and nonhuman occurrences like meteor showers and seasonal anomalies, those "occult" or "secreted happenings," the "preternatural marvels" or indeterminate free play of nature

[88] St. Augustine, *City of God*, Book III.

[89] Robert Pasnau, *Theories of Cognition in the Later Middle Ages* (New York: Cambridge University Press, 1997).

[90] Ibid.

[91] Daston and Park, *Wonder*, p. 120.

we encountered in the earlier passage that proliferate along the supernatural-natural fault line. These proliferations complicate any simple attempt to define a natural realm in opposition to a divine realm.[92] The establishment, of course, had an easy answer to these preternatural happenings: God in his omnipotent perfection willed them.[93] But on the cusp of Aristotelian natural philosophy, this solution was hard to swallow and Aquinas rejected it.

Aquinas and the natural philosophers maintained there had to be some room for natural enquiry. Contrasting God's "supernatural" healing of the sick "upon contact with a saint's relics" in which the occurrence "is not attributable to a form implanted in these bodies but only to the divine power which uses the bodies for these results," Aquinas argues "it is clear that not all the workings of natural bodies manifesting indeterminate operations are like this."[94] If they were, Aquinas points out, it would be impossible to explain *any* unusual occurrence without an appeal to God's supernatural activity. Even something as simple as a magnet's attraction of iron despite iron's natural tendency to move towards the earth—what we today usually think of in terms of gravity—appears problematic unless nature has some free play of its own Aquinas thinks. Aquinas chastises his correspondent for suggesting that unless an occurrence can be explained in a determinate fashion the only alternative explanation is God. No, Aquinas counters, nature includes marvels and preternatural occurrences. Aquinas concludes this is precisely what

[92] Aquinas, "Occult."

[93] Bartlett, *The Natural and the Supernatural*.

[94] Aquinas, "Occult."

makes a keen and ongoing consideration of the boundaries between the natural and its others so important.

Aquinas's conception of *natura* thus proves problematic for contemporary accounts of natural law that see nature as a normative source. It is not simply that nature was a historical and contingent concept for Aquinas, but that it was wholly wrong to think of it as a list of norms. *Natura*, for Aquinas is a mode of happening, the "material media" or "meshwork" out of which emerges the interactions of planetary life.[95] Aquinas's word for this is "sublunary"—the realm under the moon—denoting both the earthy-mundane aspect of our creaturely existence and its temporal character bound as it is by earth rotations, solar revolutions, tides, and lunar cycles.[96] Conceived as such, nature is first and foremost something we live in—the tendencies, rhythms, and refrains which pattern our creaturely lives—before we know it in any abstract way. Yet *natura* is also something more, as these comments about rhythms and refrains remind us and point us back to the contrapuntal structure of Uexküll's musical laws of nature. Neither a universal normative foundation nor chaotic maelstrom of chance interaction, nature for Aquinas appears to be something closer to the web or tissue from which our joint interactions emerge.

IV Aquinas's Eco/Analogical Vision of Law: Befriending Nature

In what remains of this chapter I show how Aquinas's accounts of law and nature that I sketched separately, form an eco/analogical vision of law. I use the term "ecology"

[95] Timothy Ingold, *Lines* (New York: Routledge, 2007), pp. 80-82.

[96] Aquinas, *De Pot*, 5.4

to suggest that Aquinas's term *natura* is in many ways better captured by our contemporary usage of that word than "nature." To describe the structure of reality or how ecology is organized—which for Aquinas is crucially more than mere chance interaction and development—Aquinas uses the term "analogy." To remain close to Aquinas's vision of law and nature I thus refer to an "eco/analogical" vision of law.

This eco/analogical vision can be observed in the way Aquinas theorizes natural law as well as Aquinas's claims about friendship. When discussing natural law, Aquinas never parses "law" and "nature" as isolable terms—the former belonging to the domain of ethics or politics and the latter to natural philosophy or science—but presents them holistically, one might even say "ecologically" and yet also "analogically." This is a crucial point. In light of this point, a Thomistic student of natural law should attend to the relations between and co-constitutions of terms, to the *law-quality of nature* and the *nature-quality of law* (this is the ecological element). Yet, nature can never be reduced to law nor law be reduced to nature. Nature and law each retain their own integrity (this is the analogical element). In how Aquinas theorizes natural law, just as in friendship, there is thus an emphasis on relatedness (ecology) that nonetheless remains not just respectful of boundaries, but also fundamentally interested in and animated by boundaries (analogy).

Aquinas refers to this method or eco/ way of thinking relationality *eco/analogically* with the technical Scholastic term *synderesis*. For Aquinas and his contemporaries, *synderesis* was the "characteristic disposition" of practical, as opposed to speculative, reason.[97] In contrast to the disembodied demonstration of speculative *first*

[97] Aquinas, STI79.12. Following Greek philosophy, the medieval Scholastics distinguished between practical reason (*praxis*) and speculative reason (*theoria*). While speculative reason was rooted in an

principles (principles human beings shared with angels and spiritual beings), the medievals likened *synderesis* to the creaturely vision of eagles.[98] *Synderesis* was distinguished by two features: it was a participant-perspective, but one balanced by critical distance or respect for boundaries (Kries 2002). In contrast to speculative reason, *synderesis* guided human beings in their practical navigation through the landscape—in their relations and "friendships" with one another and the more-than-human practical world. Aquinas's *synderesis* or ecological vision is profoundly embodied.

In short, rather than offering a God's (or angel's) eye view, a view from nowhere and everywhere, *synderesis* offered what the medievals describe as an eagle's eye view, an embodied view. There is thus a deep creaturely vulnerability in how Aquinas describes our practical dealings with the world. Our dealings occur as an ecological give-and-take that lacks any guarantee of symmetry. In marked contrast to the angel for the medievals, the eagle may miss its mark and careen into a cliff-side, or a "death spiraling" pair may fail to disengage their talons and crash into the bramble. *Synderesis* opens up to a material world of interactions and interrelationships—a world of "dark ecology" as Timothy Morton has put it—that no one or thing can master, but with which each must engage (2010).

Alongside attentiveness to connectivity and embodiment, the practice of eco/analogical vision also respects and takes pride in building and maintaining practical boundaries and conceptual distinctions. The Scholastic metaphor of the eagle is important

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instinctual grasp of indemonstrable "first principles" (*intellectus principorium*), like the principle of non-contradiction, practical thinking found its source in *synderesis*.

[98] See Jerome's gloss on *Ezekiel*.

here too. Aloofness and a certain "pathos of distance" are cultural features readily associated with eagles.[99] For the medieval Scholastics, this aloofness was particularly appropriate because *synderesis*, in contrast to *conscience* (*conscientia*) was at a step removed from the hubbub of interaction (ST I 79). Whereas repeated wayward acts could dull, even extinguish, one's *conscience*, they could not effect *synderesis* which was insulated and set apart even as it remained a practical capacity. While one's *conscience* acts in the thick of interaction, *synderesis* operates at a distance, offering a vision or partial *overview* of the milieu in which interactions occur. Like an eagle on wing, *synderesis* offers a mezzo-level perspective—an embodied in-between position—a perspective from which one might discern action and contemplate practical alternatives.

As a mezzo-level perspective, this vision helps us to recognize the radical extent of our entwinement with the natural world—with a milieu that is, as Timothy Ingold has put it, "the ground upon which the [very] possibility of interaction is based" (Ingold 2008, 213). Eco/analogical vision names the capacity to sense the profound relevance of nature as *the necessary conditions of interaction*, and not merely a "hybridity" of inter-actants as Bruno Latour, Timothy Morton, and Jedidiah Purdy among others have recently argued. Grasped as a complex whole by eco/analogical vision, nature is not one inter-actant alongside others, but the "meshwork" or reticular tissue that makes life, agency, and belonging-together possible in the first place. What the mezzo-level perspective reveals to Aquinas is the possibility for friendship and belonging with nature—possibilities which are missed by post-nature accounts unwilling or unable to adopt a mezzo-level perspective.

[99] See Friedrich Nietzsche, *Beyond Good and Evil*, 257.

Aquinas charts a non-binary, non-universal account of nature that is certainly sympathetic to contemporary critiques that correctly problematize modernity's Nature-Culture dualisms as artificial, gendered, and imperialistic. Nevertheless, Aquinas decidedly retains, or rather, remembers for us, a concept of nature, reminding us what we lose when we jettison nature, that is, when we go "post-natural." What we lose when we go "post-natural" is a certain care and respect for practical boundaries that make friendships possible. This care, for Aquinas, is central to the human capacity to belong and work for friendship with the more-than-human ecological processes we cohabit and which make our creaturely lives possible and meaningful. Ultimately this friendship, like any friendship, goes beyond merely acknowledging interconnectedness—as important and difficult as that in itself may be—and requires a certain care for and respect for boundaries. It is this task of retaining and continuing to care for boundaries in a world that has rightly begun to move away from modernity's Nature-Culture binaries which Aquinas theorizes for us today and presents as a task important for contemporary politics.[100]

Coda: Timothy Treadwell and the Brown Bears

I conclude with a brief illustration from contemporary environmental politics. On October 2003, in Katmai National Park on the Alaska Peninsula Timothy Treadwell, Amie Huguenard, and a brown bear were all killed within hours of one another. After

[100] To be clear, I think Aquinas would look much more approvingly on post-nature accounts of ecology than modern accounts of Nature. The rigid pre-set binaries of Nature/Culture stifled human-more-than-human friendship even more than the lack of boundaries in post-nature account squash them.

thirteen summers of living with the bears—"of seeking a primordial encounter"—Treadwell and Huguenard were attacked and eaten by a bear. The bear was later shot and killed by park rangers.[101] Controversy ensued. Critics of Treadwell faulted him for the bear's death. Defenders of Treadwell claimed he was "out there" protecting the bears from poachers, although there was no evidence of bear-poaching within Katmai. In a documentary made from footage filmed by Treadwell and later directed by Werner Herzog, an indigenous Alutiiq comments: "Timothy crossed a boundary we've [Alutiiq] lived with for 7,000 years. An unspoken, unknown boundary, but when we cross it we pay the price." This indigenous remark resonates with Aquinas's counsel regarding care and respect for boundaries. Treadwell, Huguenard, and the bear paid "the price" with their lives, others paid with the imposition of restrictions on camping in Katmai, others paid with the loss of loved ones, and yet others paid with crushed dreams of human-bear harmony.

Aquinas, like the Alutiiq, theorizes a place for conceptual distinctions and care for boundaries which I believe is crucial for contemporary environmental politics. Aquinas would have no problem censuring Treadwell's attempt to live amongst the bears as *unnatural* (*contra naturam*). This is not because Treadwell's actions transgressed some immutable species-boundary or because Treadwell's actions violated the park's rule about maintaining a distance of fifty yards between humans and bears. Rather it is because Treadwell's actions jeopardized friendship. Friendship, as Aquinas points out, depends on boundaries. There is something to be gained by human animals and other-than-human-animals alike in maintaining both connectedness and boundaries. This is

[101] See the documentary by Werner Herzog *Grizzly Man* (2005) and an Animal Planet Channel miniseries.

precisely what Treadwell's actions in regard to the bears failed to appreciate. Serendipitously though, Treadwell may also offer us a model for appropriate human-other-than-human-animal friendship in his filmed interactions with the red foxes.

Along with his interactions with the bears, Treadwell captured extensive footage of his interaction with several red foxes. Both bear and fox are "wild" animals, yet their filmed relationships with Treadwell are marked by contrast. Footage includes a fox chasing Treadwell only to catch him and then roll onto its back "begging" for belly-rub; a pup "stealing" Treadwell's hat with Treadwell cursing, hot in pursuit; a mother bringing her pups by Treadwell for a "pet" when Treadwell is trying to film a bear; and an adult lounging on Treadwell's tent as if it were a hammock. Species boundaries, human-wild boundaries are all certainly being transgressed here as readily as in Treadwell's interactions with the bears. Yet I cannot conclude as certainly that Aquinas would unproblematically censure this relationship as *unnatural* or destructive of friendship. This inability, this faltering is as illuminating for my interpretation of Aquinas's account of natural law as it is problematic.

Brown bears and red foxes are different, and drawing these distinctions is crucial. That which is appropriate for the maintenance of friendship between humans and bears is different from that which is appropriate for the maintenance of friendship between humans and foxes. Treadwell *could* be doing great harm to both fox and himself by acclimating the foxes to humans. Then again, as some scientists and anthropologists have recently noted in the case of human-wolf domestication, it is not clear which way the causal arrow points or who domesticates whom.[102] Perhaps the foxes were taming

[102] Brian Hare, "We Didn't Domesticate Dogs. They Domesticated Us.," *National Geographic* (March 2013); Ed Yong, "The Origin of Dogs," *The Atlantic* 2 June 2016.

Treadwell to their presence. Perhaps over time these relationships could bring human beings to a new stage of development just as wolves may have once done. Whatever this stage would be, one thing is certain; it would now possess elements of the vulpine alongside the lupine. And perhaps it would not be a bad thing to breed some sly wit and anti-hierarchy vulpine sensibility into our hierarchized, and at times seemingly all-too lupine world. What I can conclude with more certainty is that in Aquinas's time this conceptual distinction-drawing was vital. How these practical boundaries got drawn and redrawn were at the forefront of his account of natural law. It is this vision of natural law, an eco/analogical vision of law, that I believe is occluded today.

Chapter Three

The Character of the Contract: Scenes of Contract and Bondage in Sacher-Masoch's *Venus in Furs*

This last "story" chapter is concerned about what it means to contract and promise in relation to natural law thinking. It adds a piece to the puzzle of the non-universal natural law tradition I have been attempting to uncover. This puzzle piece concerns the binding or obligatory character of law and it has been missing from the first two chapters. I turn to the writing of the lawyer, historian of political thought, and storyteller Leopold von Sacher-Masoch—remembered overwhelmingly for his sex and bondage novellas—to investigate this binding character of law. I show how Sacher-Masoch recuperates a concept of contracting that is directed not towards securing a more stable or predictable future, but being mindful of the present and embodiment.[103] This concept of contracting is useful because it gives us more resources and a richer vocabulary for speaking about law in terms of "bonds" that are not only directed to conventional legal positivist functionalist arguments about law.

Sacher-Masoch is less well known as a natural law thinker than Sophocles and Aquinas, yet Ernst Bloch ranks him, along with his teacher J.J. Bachofen, among the

[103] See Elizabeth Povinelli, *Economies of Abandonment* for a similar distinction that rejects task-orientation in its analysis of aboriginal Australian communities.

most important modern natural law thinkers (1987, 97-109). However, what concerns me primarily in this chapter is not proving Sacher-Masoch was a natural law thinker, but recuperating his concept of contract. My argument in this chapter is that Sacher-Masoch's novella *Venus in Furs* (1871), tells a story about what we miss when we think of the contract exclusively in terms of securing the future or establishing what Arendt called "islands of predictability" in the uncertain sea of human action and time's unfolding (Arendt 1958). For Sacher-Masoch, I argue, contracting is not about wresting spots of certainty out of uncertainty, but a commitment to the present moment.

This Masochian vision of the contract is an important final story chapter in my story of an alternative tradition of natural law. It provides this story with something it has been lacking or only vaguely gesturing toward—an account of what gives law its binding force. If the natural law I have sketched in the previous chapters via Sophocles and Aquinas is non-universal and proceeds neither from the unchangeable structures of the cosmos, the imperatives of reason, nor the eternal commands of God, then what gives this law its binding quality? If law is the bonds and connections between people and things what does law actually do or look like? Sacher-Masoch's own interest in bondage and contracting is illuminating here.

There is a lot to say to introduce Sacher-Masoch to a political and legal theory audience. Sacher-Masoch was trained as a lawyer and political theorist, only later in life opting for the role of storyteller after retiring very young from his university post.[104] His

[104] English biographies of Sacher-Masoch are very few and far between. For most of these details I am relying on James Cleugh, *The First Masochist* (1967). Michael O'Pecko's "Afterword" to his translations of the first volume of the *Legacy of Cain* and *A Light for Others* also include important biographical information on Sacher-Masoch. I have benefited greatly from personal communications with Michael O'Pecko regarding the life and writing of Sacher-Masoch.

most published tale, *Venus in Furs*, abounds in legal and political themes. Yet today, he is almost entirely overlooked by theorists. When Sacher-Masoch is remembered he is overwhelmingly remembered for "the sexual perversion" his contemporary, the Austro-German psychiatrist Richard von Krafft-Ebing, used his name to denote: Masochism. I devote Section One to a brief biography of Sacher-Masoch.

Section Two briefly recounts the dominant legal positivist narrative of the contract using Hobbes's account in *Leviathan* and Sacher-Masoch's own account of it in *Venus in Furs*. Section Three shows how Sacher-Masoch recuperates an alternative concept of the contract in the same book. Contracting remains a way of navigating an uncertain world, and this is precisely what makes the contract such an important concept for the non-universal account of natural law I am attempting to uncover. Rather than secure a *terra forma* in a sea of uncertainty, the Masochian contract works to commit us to the moment in all its uncertainty.

For Sacher-Masoch, I show, contracting is not about securing a predictable future, but about drawing together (literally con-tracting) in the present, and loving where one is at. Another way to put it could be, loving "the trouble" with which Donna Haraway suggests we stay (2016). Sacher-Masoch describes the process of contracting in vivid terms of flesh contracting under a mistress's whip, and nipples contracting in the cold. In Section Four, I briefly consider the radicalness of Sacher-Masoch's account of contracting and what it means for how we might analyze law.

I Introducing Leopold von Sacher-Masoch and *Venus in Furs*

Today, Sacher-Masoch's *Venus in Furs* is rarely read—especially by political theorists—despite having been popular in Sacher-Masoch's own day. And Sacher-Masoch is never listed among political theorists. It is not that no one has heard of Sacher-Masoch; on the contrary, Sacher-Masoch is overlooked as a theorist because everyone has heard of masochism and has all sorts of colorful ideas and stories associated with the term.[105]

While it is true that Sacher-Masoch's writing and personal life testify to diverse desires and a certain predilection for authoritative female figures, Sacher-Masoch was a lawyer and political theorist before he started writing stories. Sacher-Masoch's first publications were academic manuscripts on the history of political thought and he was professor of history at the University of Graz. Born in 1836 in Lemberg, Galicia (modern-day Lvov, Ukraine) on the frontier of the Austro-Hungarian Empire to a semi-noble family, Sacher-Masoch had both a poetic bent and a deep passion for political philosophy from an early age. He excelled in school and as a reward his parents allowed him to stage theatrical performances at the family house. He pursued a law degree at the Universities of Prague and Graz, and by 1856 was already lecturing in German history. When we think of masochism and dream of leather and whips, this professional academic is not the Sacher-Masoch we remember. Or is it?

The tension between Sacher-Masoch the dry academic and Sacher-Masoch the lurid fiction writer is reflected in *Venus in Furs*. Specifically, it is reflected in the tension

[105] It was Sacher-Masoch's contemporary, the Austro-German psychiatrist Richard von Krafft-Ebing, who in 1890 first coined the term "masochism" to name a "sexual perversion" he found exemplified in Sacher-Masoch's fiction.

between the contract understood as the means to secure the future or possess something and the contract understood as an embodied experience.

Venus in Furs tells the story of an affair between a young and aimless Galician nobleman, Severin von Kusiemski, and an even younger widow, Wanda von Dunajew. Severin describes himself as "a dilettante in life" and Wanda repeatedly calls him a "dreamer." Wanda is stern, even despotic.[106] Their affair begins at an idyllic Carpathian health resort. Severin is obsessed by Wanda whom he almost immediately begins to call "Venus" after both the goddess of love and a marble statue of the goddess in the resort's garden. When he arrived at the resort, Severin fell in love with the statue; he finds something both thrilling and chilling in transferring his affections from a stone statue to a flesh and blood human being. Wanda, the human being, can "take pity" on Severin in a way he never experienced with the marble statue. Yet the fact that she is flesh and blood also makes Severin's relationship with her less certain which terrifies Severin.

Severin's solution to the uncertainty he feels in his relationship with Wanda is marriage. Wanda ridicules him saying she could never love a man for more than a month. She derides the marriage contract as nothing but an attempt by man to "bury woman like a treasure" (19). Severin confesses he is tormented by the thought of losing Wanda and shifts the terms of his proposition: "If you can't be mine, all mine and forever, then I want to be your slave, serve you, tolerate anything from you" (27). Wanda agrees to this arrangement and a contract is drawn up and signed. Now in Florence, Severin (now known as Gregor) rides in third class and Wanda (referred to as Mistress) rides in first. Other features of their lives together include episodes of bondage and whipping. Wanda

[106] This trope of a relationship between a dreamy man with his head in the clouds and a practical woman is recurrent in Sacher-Masoch's writings. For example, see *Harsa Raba*, *The Love of Plato*.

also frequently orders Severin to procure contact information for her on prospective lovers.

A thread that runs through the novella is the longing expressed explicitly by Severin for permanence in a world of growth and decay. A provocative illustration of this thread comes around the middle of the novella: Wanda is bathing and Severin is serving her. While he attends his mistress he can, "watch her dipping up and down in the crystalline liquid, watch the small waves agitated by her and amorously playing around her" (90). At this point, Severin himself dips into reflection. "Our nihilist aesthetician is right," Severin claims, obliquely gesturing toward Nietzsche, "A real apple is more beautiful than a painted one, and a live woman is more beautiful than a Venus of stone" (90). Given that up to this point the entire novella has been driven by Severin's striving after "a Venus of stone," something stable and unchanging that can never be taken from him, Severin's reflection takes on greater significance. Before the water has even dried on Wanda's skin however, Severin and Wanda have already agreed to hire an artist to idealize and preserve her. Severin insists, "the artist's hand should wrest you from destruction. You must not perish like the rest of us forever and always, without leaving behind some trace of your existence. Your pictures must live long after you have crumbled into dust, your beauty must triumph over death" (91).

Early on Sacher-Masoch piquantly illustrates an alternative mode of dealing with the tension between the beauty of "a real apple" and a painted one. When he first arrives at the resort, Severin recalls, "Actually I had very little interest in the beautiful woman up there, since I was in love with another—indeed, very unhappily in love, far more unhappily than Sir Toggenburg or the chevalier in *Manon Lescaut*, for my beloved was

made of stone" (12).[107] Yet what makes Severin unhappy in love is also the very thing that he prizes most in this relationship: The fact that his love is stone gives her a permanence no flesh and blood might provide. Not only will she remain the same forever, but also he can possess her like one possesses treasure, and do with her what he wishes. He frequently goes to the garden where she stands to adore before her (13). But of course she can never caress him, and this makes Severin unhappy. Then, one night in the moonlight, he sees "white as stone" the statue come alive. "The beautiful marble woman had taken pity on me and had come alive and followed me," Severin recounts with terrified rapture (13). But instead of being overjoyed, instead of running to the woman and embracing her, his body literally *contracts* in fear: "I was seized with a nameless fear, my heart was ready to burst, and instead of—Well, I was a dilettante after all" (13).

Throughout the story we see Severin grapple with both the desire to arrest the flow of time and the allure of flesh made vibrant only in organic cycles of time. What is more, we see contracts for both temporalities. The marriage contract fixes a moment, the moment of possession of the other, and promises this relationship will endure without change. Other contracts however, like those realized with pain or pleasure in the body, the fibers of the body responding to organic stimuli, make no promises but offer instead exquisite, fleeting sensations, a lifetime contracted to a moment.

II Contract as Securing the Future: Hobbes and Sacher-Masoch

As we can see from Wanda's response to Severin's marriage proposal in *Venus in Furs*, the contract is one way people attempt to create certainty and stability when they

[107] This is not the only time Severin recounts falling in love with a stone object. Later in his Confessions he tells of a childhood love affair he had with a marble statue in his father's library.

otherwise experience a lack of these things. The contract is here figured as a supplement or corrective to the way things are given. This is an old narrative about the contract in legal and political theory. According to this narrative, the contract is envisioned to secure the future, to make conditions more predictable in an otherwise uncertain world. The contract is produced to supplement or fix something wrong in the present—the fact that the present is open-ended.

Thomas Hobbes presents a famous account of contracting in his text *Leviathan* that matches up with this vision of contract as an attempt to securing the future.[108] According to Hobbes, contract is "the mutual transferring of right" (XIV). This "mutual transferring of right" is introduced into the social world with nothing else but "the security of a man's person, in his life, and in the means of so preserving life as not to be weary of it" as its end (XIV). Yet to understand why this introduction of security is necessary, we need to step back for a moment and consider the character of the given in Hobbes.

Famously, according to Hobbes, life prior to the social contract is "nasty, brutish, and short" (XIII). Hobbes was the first to define this pre-contract life as the "state of nature" and so equate the pre-contractual with the natural in the terms of given.[109] For Hobbes, the natural is a base. This view of the natural was in sharp distinction to the

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[108] Hannah Arendt and Jacques Derrida tell two contemporary versions of this account of contracting. As Bonnie Honig (1991) has pointed out, their accounts are crucially different in regard to how they theorize the "given," but similar in the accounts of contracting they offer. For Arendt contracting and promising are key to navigating the realm of action or politics. Because human action is always unpredictable and open-ended, human beings make to create "islands of predictability" (THC). Without these "islands of predictability," we would be adrift not only on our own unbound capacity for action, but also in a world of the merely given. Action allows us to transcend the merely given .

[109] This is telling and has had profound consequences on how future generations conceive the given and the natural as co-terminate terms.

Aristotelian teleological view of nature for example that held nature to be an end in itself. Hobbes called on the contract as a means to allow us to escape our base conditions in the state of nature. In other words, the contract came to supplement nature and the given where they failed. Hobbes, of course, argued that the state of nature failed in providing human beings with adequate "security." Yet others have argued differently about where and how nature fails us. Nonetheless all agree that somewhere nature fundamentally fails us or is fundamentally incomplete and the contract comes as the remedy. In all these cases, the contract comes to fix something that is wrong.

The *world itself* is deficient, or a condition of lack pervades like atmospheric conditions as Hobbes put it (*XIII*). Hobbes's use of an atmospheric metaphor to describe the state of nature is helpful in illuminating how the contract works for Hobbes and how it compares with Sacher-Masoch's understanding. Hobbes writes

> "during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre…warre, consisteth not in Battel onely, or the act of fighting, but in a tract of time, wherein the Will to contend by Battell is sufficiently known: and therefore the notion of Time, is to be considered in the nature of Warre; as it is in the nature of Weather. For as the nature of Foule weather, lyeth not in a showre or two of rain; but in an inclination thereto of many dayes together: So the nature of War, consisteth not in actuall fighting; but in the known disposition thereto" (88-89)

Hobbes's state of nature has often been understood as a theoretical device for deducing man's originary or "naturall" characteristics: his selfishness, fear, lupine proclivities, etc. Yet here Hobbes's description of "warre" as a "condition" foremost defined by its awelessness or lack of wonder and his refusal to equate "warre" with "actuall fighting," and, finally, his comparison of this aweless condition with heavy hanging atmospheric conditions, all seem to suggest the state of nature is a type of mood or temperament

similar to the listless "despairing" mood that hangs over the beginning of *Venus in Furs* (9-11). The similarities do not stop there. Both Hobbes and Sacher-Masoch also understand the primary problem to be an awelessness or despairing sense of disenchantment. And both suggest that this mood or atmosphere is simultaneously fed and supported by our inability to connect with others. This problem, of course, Hobbes fixes with the contract. Sacher-Masoch does as well, but he envisions a radically different kind of the contract, one that does not aim to secure the future or make it more predictable but disclose our present relationality and bondedness.

III Contracting and Bonding in *Venus in Furs*

To contract means literally to draw together or bind (OED: Serres 1995, 103). This sense of the word is central to Sacher-Masoch's alternative conception of contracting. To see how Sacher-Masoch fleshes out this conception, I look at three scenes of contract in *Venus in Furs*.

A. Slave Contract

About half way through the novella, Wanda and Severin draw up and sign a contract (73). This contract makes Severin the "unconditional slave" of Wanda. And while the contract seems to work by securing a future in which Severin is dominated by Wanda, Sacher-Masoch describes its effects differently. Thew slave-relationship (based on the slave contract) is presented as Severin's alternative to the marriage-relationship.

In this scene, Sacher-Masoch compares the slave contract and the marriage contract in ways that prefigure the work of Carole Pateman and other feminist critiques of the marriage contract (1988). Both the slave contract and the marriage contract feature

different ways of navigating uncertainty. As noted above, Severin first proposes a marriage contract to Wanda to alleviate his fear of losing Wanda. Wanda turns down his proposal and mocks him, "It is merely the egoism of the man, who want to bury a woman like a treasure. All attempts at using vows, contracts, and holy ceremonies have failed to bring permanence into the most changeable aspect of changeable human existence…Nature knows of no permanence in the male-female relationship" (19). As Wanda understands full well, Severin 's desire is to secure the future as an eternal present moment.

After Wanda rejects his marriage proposal, Severin reformulates his proposal and, in doing so, reworks the contract in an interesting way. Severin now proposes: "If you can't be mine, all mine and forever, then *I want to be your slave*, serve you, tolerate anything from you" (28). He continues: "if I can't enjoy the full and total happiness of love, then I want to drain its torments, its tortures to the dregs; then I want the woman I love to mistreat me, betray me, and the more cruelly the better. That too is a pleasure" (29).

The contract Wanda and Severin sign does not prohibit Wanda from choosing to love and give herself to anyone she pleases. She can dismiss or retain or even kill Severin at her whim.[110] Certainty about the future is given up. Revised by Severin, the contract becomes a tool for expunging the desire to have security, certainty, or predictability. Rather than secure the future, the contract reworked by Severin allows him to live only in the moment.

[110] Along with the contract, Severin signs an undated pseudo suicide note in case Wanda desires at some point to kill him.

The other thing to note about this written contract is the emphasis Sacher-Masoch puts on its drafting. The contract is drafted and re-drafted various times. It is almost signed and then delayed. Sacher-Masoch shows us how the writing or drafting of a contract is a material process. It requires pen strokes, that come to replace or stand for the whip strokes that otherwise bond Severin to Wanda.

B. Contracting Flesh

The second instance—and really they are multiple—of a contract scene in the novella that illuminates the alternative contract Sacher-Masoch provides in *Venus in Furs* occurs whenever Wanda abuses Severin. At first blush, it may seem ridiculous to describe these scenes of bondage as contract scenes, yet this is precisely the language Sacher-Masoch uses to describe them. However, he uses this language to describe how the body is literally bound or drawn together, bringing other bodies and body parts in unexpected relation to one another.[111]

For example, one of their first fierce embraces causes Severin to faint (45). Fainting is the effect of the contracting and "seiz[ing]" of the capillaries around the heart, a phenomenon that may occur in moments of intense fear (13) or of other powerful feelings, such as cold and "tingling" (22) caused by arousal or by being pinioned to a bedpost (113). These contracts leave marks such as those left by pen when it strikes paper (73), or by a plow when it is pulled by a man being whipped by three women (83-4).

This last scene is one of the most evocative of the entire novella. In this scene Severin is harnessed to plow and made to till a field of maize while Wanda watches (83-

[111] Deleuze and Guattari develop this theme in Sacher-Masoch in "Bodies without Organs" in *A Thousand Pleateaus*. There they note, but do not develop, how this drawing together is a literal contracting.

4). The imagery reminds us that bound up in what it means to contract and contracting are not only human beings, but also other-than-human animals, as well as tools and other inanimate objects. The whole scene, from the three African women whipping the European male as he, tied in a harness to a farm implement, makes furrows in the earth, unsettles the dominant narrative of the contract. This is a stunning scene and it merits Sacher-Masoch's further inclusion in a wide range of critical literature exploring contract theory.

C. A Contract's Organic Cycles

A different whipping scene provides another insight into the contract Sacher-Masoch offers us to think. After this whipping scene, Severin and Wanda part. Consequently, many readers of Sacher-Masoch, like Deleuze, claim that their contract is broken, and this marks the end of the Masochist fantasy (1988). However, if a contract is not oriented toward the future but is rather focused on bringing human beings (as well as nonhuman animals, fields, plants, plows, history, statues, etcetera) into relations with one another in a sensational moment, what it means for the contract to "fail" must also be reconsidered. In fact, in the final whipping scene that many read as the dissolution of the contract Severin claims not that his fantasies are destroyed but that they are "surpassed" (115).

The problem with this final whipping scene according to most readers is that in it Severin is not whipped by Wanda but by Wanda's new Greek lover. The problem is not that Wanda does not live up to her end of the bargain—there are no stipulations in the contract preventing Wanda from engaging in multiple sexual relationships—but that the contract has failed to secure Severin a future with Wanda. Wanda leaves with the Greek.

What is more, after being whipped senseless and raw by him, Severin does not pursue Wanda (117).

Yet this reading seems insufficient on many levels. Most notably, the relationship between Severin and the Greek is overloaded with homoerotic elements. Severin expressly admits to "lusting" after Wanda's new love interest (95). Describing the Greek, Severin exclaims:

> He was a handsome man, by God. No more: he was a man such as I had never seen in the flesh. He stands in the Belvedere, hewn in marble, with the same slender and yet iron muscles, the same face, the same rippling curls…and that strange line around his mouth, the leonine lips that revealed a bit of the teeth and momentarily gave the face a touch of cruelty—Apollo flaying Marysyas…Now I understood male Eros and admired Socrates for remaining virtuous with Alcibiades. (96)

Even in this introduction to the Greek at the moment when Wanda is first falling for him, it is clear that Severin is too. And just as whipping fantasies sustained his relationship with Wanda, by comparing the Greek to "Apollo flaying Marysyas" Severin seems to be setting the stage for his own submission to Wanda's lover. Indeed, during the actual whipping scene, Severin begs the Greek to wear fur just as he had once begged Wanda (115). And again, Severin claims this whipping "surpasses" his fantasies.

Thus, it seems to me what we have here is the passing away of one assemblage or grouping (Severin-whip-Wanda) and the coming into being of another (Severin-whip-Greek-laughing Wanda). This new assemblage ends up dissolving too, but that is not important. Sacher-Masoch's contract is more than fulfilled. For the contract is not concerned with the certainty of the future but with the experience of the present.

Conclusion: An Account of Contracting for Natural Law Theory

Throughout *Venus in Furs* we see Severin grapple with both the desire to arrest the flow of time and the allure of flesh made vibrant only in organic cycles of time. What is more, we see contracts for both temporalities. The marriage contract fixes a moment, the moment of possession of the other, and promises this relationship will endure without change. Other contracts however, like those realized with pain or pleasure in the body, the fibers of the body responding to organic stimuli, make no promises but offer instead exquisite, fleeting sensations, a lifetime contracted to a moment.

Sacher-Masoch recuperates this latter vision of contracting and its connection to the present and embodiment. This is important for the stories I have been telling about a non-universal natural law tradition because it provides an account of law's binding force that does not require law to take either universal form or the form of the decisions of a community to secure the future.

Chapter Four

Animals on Trial: Reconsidering the Natural Law Tradition for Troubling Times

"Through exclusively social contracts, we have abandoned the bond that connects us to the world, the one that binds the time passing and flowing [*temps*] to the weather outside [*temps*], the bond that relates the social sciences to the sciences of the universe, history to geography, *law to nature*, politics to physics, the bond that allows our language to communicate with mute, passive, obscure things."
Michel Serres, *The Natural Contract*, 48

"In urgent times, many of us are tempted to address trouble in terms of making an imagined future safe, of stopping something from happening that looms in the future, of clearing away the present and the past in order to make futures for coming generations. Staying with the trouble does not require such a relationship to times called the future. In fact, staying with the trouble requires learning to be truly present, not as a vanishing pivot between awful or edenic pasts and apocalyptic or salvific futures, but mortal critters entwined in myriad unfinished configurations of places, times, matters, meanings"
Donna J. Haraway, *Staying with the Trouble*, 1

Of Vintners and Weevils

In the late sixteenth century, the weevils of the commune of Saint Julien in southern France were taken to court.[112] Weevils are a type of beetle. They are usually small, measuring less than six millimeters, and are generally considered a "pest species" because of their ability to reproduce quickly and wreak havoc on human crops when conditions are in their favor ("Weevil," *Encyclopedia Britannica*). The weevils of Saint Julien had done just that, decimating the commune's highly prized grape crop. Sober

[112] See Edward Evans, *The Criminal Prosecution and Capital Punishment of Animals*, pp. 38-49 for a full account. Evans documents nearly 200 examples of nonhuman animals and "inanimate things" being tried in courts of law spanning much of Western history and lingering into the twentieth century.

human vintners decided to take legal action. Taking legal action against other-than-human animals and objects was usual practice in Europe and even the Americas prior to the twentieth century.[113] Indeed, the weevils of Saint Julien were repeat offenders. About thirty years earlier in the spring of 1546, similar destructive activity landed the weevils (or at least their forbearers) in court. At that time, the weevils' two appointed human lawyers were able avoid trial. This time however, the weevils' newly appointed lawyer, Pierre Rembaud, would not be so effective.

Rembaud first argued that the case should be dismissed, claiming that the weevils had a prior right to the vineyards in so far as God created weevils before human beings, according to the biblical narrative of creation.[114] The judge rejected Rembaud's motion for dismissal. While weevils may have been created prior to human beings, the judge reasoned, it is not clear that vineyards existed in this interim between the creation of "creeping things" and "man." The trial thus proceeded with both sides presenting lengthy and sophisticated arguments that Evans presents in some detail (1906, 39-47).

During these legal machinations, the weevils kept up their ravaging of the vineyards. Understandably anxious for a speedy resolution of the matter, the human vintners organized a public meeting to debate allocating a plot of land on the outskirts of town for the express use of the weevils. This meeting concluded with the selection of a plot named "La Grand Feisse" which the plaintiff's attorney described "with the exactness of a topographical survey" to the court (Evans 1906, 46-47). Rembaud was not happy though. On behalf of his insect clients, he countered, insisting that the proposed

[113] Edward Evans has documented nearly 200 such examples ranging from weevils and termites to sows, boat rudders, donkeys, and trains.

[114] See *Genesis* chapter 1.

plot was “barren” and therefore an unsuitable alternative to the lush present home of his clients. Acknowledging Rembaud’s motion, the judge decided to appoint a group of experts to assess the viability of “La Grand Feisse” for the weevils’ habitation and ordered that a written report be submitted to the court. We do not know the findings of this report or how the case ends, unfortunately. The next page of the records was “destroyed by either rodents or insects” or some other “creeping thing” (Grigen 104; Genesis). Girgen ironically speculates that the responsible party may have conspired with the defendants against the literacy of the plaintiff’s descendants (Girgen 2003, 104).

Today, few scholars address the prevalence of “animal trials” in the pre-20th century West. When they do, the most typical response is to reject the phenomenon as “childish” play or as a superstitious remnant of an earlier “animistic time” that positions the other-than-human animal as some curious subject of proto-liberal rights (Evans 1906; Kelsen 1967, 31-2; Sykes 2011). A few critical scholars point out the elements of cruelty and human-animal domination that the phenomenon of animal trials display to acknowledge the wider social function legal trials played then and continue to play now (Berman 1994). Others, such as Victoria Ridler, worry about the “justice” of punishment without *mens rea* or clear criminal intent as such states of mind may not easily, if ever, be established in nonhuman animals (2014). Others, among them Peter Leeson, suggest that animal trials were nothing but a thinly veiled attempt by ecclesiastical and secular courts to assert more authority over the governance of everyday social life (2013). What better way to do this than by expanding the court’s jurisdiction? When a weevil infestation becomes a legal matter, humans facing the infestation must not only work to remove the weevils but must also appear in court.

In a similar vein, Esther Cohen reads the phenomenon of animal trials as an attempt to extend or widen the net of human legal authority. For Cohen, this extension includes not only the human-social world but the nonhuman world as well. "If man was to rule nature," Cohen writes, "he must do so according to the same principles that governed his relationships with his fellow human beings" (1986, 36). For Cohen, the animal trials can thus be seen as part of Western man's progressive attempt to dominate the world, both human and nonhuman. According to Cohen, the seriousness and procedural detail of animal trials requires us to view them as something more than childish superstition à la Hans Kelsen or a subconscious cruelty à la Ridler, but as a rational desire to bring the nonhuman world under human control.

The stories I have told about the natural law tradition in the previous chapters can help us understand this phenomenon of animal trials in a productive and illuminating way. In these previous chapters I attempted to recover an obscured understanding of law and its relationship to nature, materiality, and embodiment that has a long history. In this final chapter, I explore some of the fruits or "pay-offs" of this recuperation and storytelling.[115] The first pay-off I consider is how these stories can help us better account for the phenomenon of animal trials. Understanding these animal trials is not just an academic-historical concern, nor is it simply a provocative way to highlight the relevance of the stories I have told; it is important for contemporary environmental politics. In Sections Two and Three I explore how the stories I have told contribute to two vibrant ongoing fields of research.

[115] Walter Benjamin notes that in contrast to the novel, all stories are practically-oriented. Stories provide counsel or advice about continuation. See, "Nikolai Leskov: The Storyteller" in *Illuminations*.

I Animal Trials as the Institutional Work of "Celebrating our Pact with the Earth"

How are we to understand the phenomenon of animal trials? It seems to me that Cohen is correct that there is more to the phenomenon of animal trials than superstition, but ultimately wrong in her analysis of what this more is. Clearly, animal trials were horribly ineffective attempts at governing the nonhuman world when animal defendants failed to show up for their court dates, rarely complied with court orders, and were notorious repeat offenders (remember the weevils). Nevertheless, animal trials were taken seriously and a great amount of care was expended in their maintenance. The stories I have told about natural law in this dissertation begin to suggest why. Like Antigone's care for Polynices's corpse and Severin's emphasis on the embodied present, the trials display an attentive, observant awareness of material particularity and embodied life that was part and parcel of wider vision about law, the cosmos, and human beings place within the world. The institutional work that went into these animal trials needs to be read as an example of the ligaments or "connective tissue" Aquinas talks about which holds together the sublunary realm.

Evans's detailed accounts of the animal trials support this reading with evidence. Evans shows how much care and work went into the animal trials even when it was quite obvious to the human participants that other-than-human animal participants would not show up to trial or follow court orders. For example, when animal defendants were "evicted" from certain fields or habitats, it was common that they be granted "safe passage away from the vicinity, free of possible harm from dogs, cats, or other enemies"

(Evan 1906, 18).[116] This was the case in a mole trial in Stelvio, Italy in 1519. In that case, in a move that was not unusual, the judge even went further to grant any pregnant mole or mole with young or mole for whom the move would be stressful "an additional respite of fourteen days" to undertake the relocation (Evans 1906, 111). It was also often the case that a suitable alternative habitat be provided when animal defendants were evicted. In the weevil case discussed above, a specific plot of land called "La Grand Feisse" was designated for the weevils' express use and even described "with the exactness of a topographical survey" by the plaintiff's attorney.[117] Likewise, in 1713, great care was taken in the legal proceedings determining the relocation of a brood of termites standing trial for eating away at a Franciscan monastery in Brazil (Evans 1906, 213).

When animals were punished, their punishment was meted out with a similar level of sobriety (Evans 1906). So, for example, when a sow and her six piglets stood trial in 1457 in Savigny, France for trampling and killing a small human child, no less than eight human eyewitnesses were called in order to establish "beyond reasonable doubt that the sow had killed the child" (McWilliams 2013; Evan 1906, 154). The piglets, however, were exonerated. Although they were found at the crime scene splattered with the human victim's blood, the eyewitnesses established that unlike the mother sow, the piglets were "never seen directly attacking the child" (McWilliams 2013; Evans 1906, 140). In a bestiality case from 1750 in which both a male human and female donkey were charged, careful written testimony of the townspeople submitting that "in word and deed

[116] Gunther Teubner also gives evidence for this claim in his essay exploring rights of nonhumans, "Rights of Non-Humans?: Electronic Agents and Animals as New Actors in Politics and Law" (2006).

[117] Yet this was not enough to persuade the court that the plot was a suitable alternative. The judge appointed a group of experts to assess the viability of the plot for the weevils' use and submit a written report.

and in all her habits of life [this particular donkey was] a most honest creature" procured her exoneration. The man, however, was hanged from the gallows.

The thoughtfulness, serious, and care with which these animal trials were undertaken might be explained in terms of the stories of natural law I have told as these communities' patient institutional work at maintaining their "bond" with the other-than-human world. This understanding of institutional work, community, law as bond, and other-than-human world informs natural law philosophy, as I have attempted to recover and tell in this dissertation.

In his book on the philosophy and history of law, French philosopher Michel Serres identifies natural law as the "celebrat[ion] of our pact with the world" (1995: 47). Serres suggests that this pact took institutional form in premodern natural law jurisprudence. Modernity, Serres argues, has neglected (*neg-legere*: to deny the bond or ligament) the politico-legal institutional work that went into maintaining this pact or bond. Serres does not give details on what this work looked like. But it seems to me this work would have taken many forms, from the common and serious defense and prosecution of nonhuman animals and nonorganic things in both ecclesiastical and secular courts of law, to detailed jurisprudential inquiries and tracts on the activities and functionings of bodies, and the sovereign's ritual and legal acknowledgment of his (or her) locatedness within what has come to be called "the great chain of being" (Lovejoy 1936).

That this other-than-human world was attributed legal status, was not the result of some primitive irrationalism or spontaneous animism[118]--an anachronistic reflection of modern legal positivism's assumption that only the subject has a voice in the courtroom and that consequently the premoderns must have imputed subjective proto-liberal rights to the nonhuman – but an acknowledgment that the bonds and relations that hold human communities together extend into and are even made possible by the more-than-human world. It is a modern conceit, say Serres, to posit premodernity as a time of effortless, harmonious belonging. Human communities worked to maintain the natural law which gave them and their institutions a place within an unruly, unmasterable, and at times unpredictable nature. Neglect of this natural law has, Serres thinks, allowed for the modern silencing or objectification of nature that has led to the instrumentalization and domination of bodies, nonhuman and human.

Serres exhorts us to renew this bond with a new "natural contract" and remember our symbiotic placement within the world in order to address global climate change. My interest in the natural law tradition is not to resuscitate these politico-legal institutions of the premodern occident nor to prescribe a new contract. Rather, I want to suggest that if we recall the active role the other-than-human world once played in law, we can better appreciate the role the other-than-human plays in our law today.

Animal trials can help us begin to think about the role bodies and materialities continue to and might play in our law, again, not as proto-human liberal subjects which once had legal rights (in a primitive animistic age) and which might be extended rights

[118] See Bronislaw Malinowski, *Crime and custom in savage society* (1926) for a similar criticism of Durkheimian "spontaneous solidarity." Malinowski shows all the institutional work that goes into maintaining non-Western "customary" legal systems.

once again (in an age of enlightened ecological responsibility), but as bodies and things with shared vulnerabilities, connections, and bonds that crisscross, support, and sustain the human estate. The interesting point for environmental politics today, is that recognizing these shared vulnerabilities and connections should be a goal alongside the extension of rights that others have argued for (Latour 2016). This would return us to the discussion Aquinas opened with his careful interrogation of boundaries and their maintenance that I discussed in Chapter Two.

All in all, one important function of natural law was to give human beings and human political communities a place *within* nature, rather than against or outside nature. This orientation remained a staple of Western politico-legal thought until quite recently and that this is a crucial story we miss when we ignore the seriousness attributed to animal trials or subsume it into a legal positivist narrative of domination. I turn now to explore how the stories I tell about natural law can contribute to the ongoing investigation of law's relationship to materiality in legal studies.

II Legal Materialist Enquiries into Law

Legal scholarship has not been ignorant of the fact that matter matters and that law always work in and upon an embodied, material frame. Many in Law and Society have been critically thinking about law's relationship to the objects and bodies of everyday life as well as law's own unique matter (Kang 2017). Nevertheless, Law and Society scholars tend to assume there is a thing called "law," and that it is the job of the legal scholar, using empirical and sociological research methods informed by theoretical reflection, to

explain what this thing is and its relationship to matter (Pottage 2012; Kang 2017).[119] This emerging legal materialist scholarship is as diverse as it is fascinating, so I attempt a brief survey of it here in order to make more evident how my stories about natural law can contribute.

This scholarship can be roughly broken into four groups: 1) those who investigate the link between law and physical violence exploring how law is always inscribed on and produced by physical bodies; 2) those who focus on the way law is mediated through material objects; 3) those who draw attention to overlooked aesthetic aspects of law that in their own way contain a rich, sensuous materiality, such as law's images and sounds; and, 4) those who investigate the way law constructs material worlds and knowledges through regulatory regimes. Ultimately, I see the stories I have told about natural law doing what even the best of legal materialist enquiries fail to do. While the best of this scholarship uses the imbrications, collisions, and eruptions of law and matter to disclose the beginnings of an alternative account of law that is not part of the legal positivist narrative, none of this scholarship follows through to develop their account into a rich positive story about law.

A. Law's Inscription on Bodies: Law and Physical Violence

[119] For a similar criticism of socio-legal materialist analyses of law see Alain Pottage "The Materiality of What?" in *The Journal of Law and Society* March 2012.

Robert Cover's work on the constitutive link between word and deed at the heart of law is a theoretical starting point for many materialist investigations of law.[120] In his 1986 "Violence and the Word," Cover argued that "legal interpretation is either played out on the field of pain and death or it is something less (or more) than law" (211). Writing against certain Law and Literature scholarship of the 1980s that emphasized the meaning-making capacity of law and the interpretative or literary characteristics of judging to the detriment of what Cover saw as the very real physicality law—the way law is always violently worked out on bodies—Cover sought to show that law is never just about language and interpretation, but about the material tie between word and deed. Any "'interpretations' or 'conversations' that are the preconditions for violent incarceration are themselves the implements of violence," Cover wrote, and as such cannot be thought apart from the materiality of the bodies that law is inscribed on (211).

Yet Cover's point is more subtle than it initially sounds. Cover was not simply claiming that there is connection between law and physical violence in criminal sentencing. Cover was trying to get at a more profound link between law and physicality, a constitutive relationship that weds law to physical violence as a condition of law's possibility. For Cover, law involves "the projection of an imagined future upon reality" (206). In his earlier essay "Nomos and Narrative," Cover called law the bridge between vision and reality (9). It is in the move between vision or future and reality that Cover locates law as he says, "between the idea and reality of common meaning falls the shadow of the violence of law itself" (206, 1601). In short, for Cover, our visions of the

[120] See *Law, Violence, and the Possibility of Justice* ed. Austin Sarat and the concluding chapter of David Delaney *Law and Nature* for a few examples of socio-legal scholarship that turn to Cover in order to begin thinking about law's matter.

future need require the work of violence to become real and it is here that Cover locates law. Cover thus urges us to remember that law's very possibility depends on violence—the materiality of command, inscriptions on bodies. For Cover, to think law without violence is not to think law but is rather to think literature.[121] Law works through, alters, emerges from, and is violently inscribed on physical existence.

Following Cover, but also drawing from late 20th continental philosophy, Pheng Cheah, David Fraser, and Judith Grbich's edited volume *Thinking Through the Body of the Law* (1996) highlights the formative role the body plays in law. The stated goal of *Thinking Through the Body of Law* is to overturn the last remnants of the rationalist primacy of mind over body that haunts Critical Legal Studies (CLS). Too much CLS scholarship, Cheah, Fraser, and Grbich argue in their introduction, continues to see the corporeal body as a simple substance, an object which is external to the law rather than an active participant in law (xv). The essays collected in the volume attempt to overcome these vestiges of a rationalist-redemptive project ensconced in CLS.

In their contribution, Pheng Cheah and Elizabeth Grosz cite Cover in their attempt to read between Foucault and Derrida an account of bodily or corporeal justice (25). For Cheah and Grosz, law is "ontological violence" and as such is prior to any particular material embodiment. Law is a "constitutive force which shapes the material processes of embodiment…an originary and inhuman violence operative in embodiment and which is subsequently appropriated to human action and explained in terms of social causes" (10).

[121] This is not to claim that literary activity lacks an element of violence. This recognition was one of Arendt's most cogent criticisms of Heidegger: the poet in her work effects violence. While Cover frames his account as if to suggest a non-violent aspect of literature, it only strengthens his argument to acknowledge with Arendt the violence attendant to literary production. Doing so one can acknowledge law as both "a profession of words" and simultaneously a physical activity.

Cheah and Grosz situate their theoretical account as a critique of legal positivism. According to them, legal positivism reduces law to a "*posit*ional power of the mind" (3). Cheah and Grosz argue that this view of law is uncritically wed to the rationalist primacy of mind over body. Cover was critical of this "rationalist primacy" as well, but did not go far enough; it seeped, back in in his account of law as an inscription on material bodies. For Cheah and Grosz, the "corporeal body" is problematically conceived when it is thought of as "a simple substance," an object external to law, that is then written on by the subject of law (xv). Their goal is to theorize ways to appreciate and acknowledge corporeal bodies' active participation in law. Thus, they attempt to theorize law from the ontological perspective. With Cover, they recognize the link between law and physical or bodily violence, but going beyond him, they develop an account of law itself as "ontological violence," or the messy pre-individual constitutive forces of reality that birth embodied forms.

In my opinion, Cheah and Grosz are heirs to the natural law tradition this dissertation has sketched. Unlike legal scholars who assume law is a certain evident thing—an observable "social instance" as Pottage puts it (2012)—Cheah and Grosz understand law as ontological violence, "an originary and an inhuman violence operative in embodiment and which is subsequently appropriated to human action and explained in terms of social causes" (10). Therefore, for Cheah and Grosz, law cannot be reduced to a social explanation or power of the human mind. On the contrary, *it* is the force that produces society, mind, embodiment in the first place.

While I think the ontological account of law Cheah and Grosz develop as a means of escaping the last vestiges of legal positivism actually has an odd way of reaffirming

the solidity of legal positivism's assumption that law possesses a certain self-evident existence, Cheah and Grosz make a crucial intervention when they begin to attend to corporeal bodies not just as "simple substance," but as participants of law.[122] The natural law stories I discussed in this dissertation goes further, considering how corporeal bodies—be they human bodies, other-than-human animal bodies, texts, stones, incipient coming-to-be or undoing bodies like clouds, swarms, molten rock flows, and decaying corpses, institutions, and bodies of water—actively participate in law.

B. Law's Construction of Material Worlds: Regulation and Mediation

The second group of Law and Society scholars emphasizes the way law and legal practices partake in the construction of our material worlds. Here Susan Silbey's work on law and science is exemplary. Using ethnographic methods, Silbey "examines academic research labs as examples of intractable governance sites" to investigate the ways that regulatory law structure the production of scientific knowledge ("Constructing" 158). Silbey points outs that regulatory laws stipulating the number of feet a Bunsen burner must be placed from a doorway, for example, not only affect the physical layout of the laboratory, but also have material effects upon the production of scientific knowledge. For example, such laws limit how many Bunsen burners can be present in a room of a certain size with a certain number of doors and therefore how many experiments requiring the use of Bunsen burners can run simultaneously. Not only does this limit the type of experiments that can be done in a lab, but it also structures how experiments are

[122] By appealing to the ontological and originary, Cheah and Grosz, just like the legal positivists they critique, give law a definite form: one is just social, the other ontological and originary.

performed in labs when, for example, they require more than the legally permitted number of Bunsen burners, and consequently the production of scientific knowledge.

More recently and in the same vein as Silbey's work there have been collaborations between socio-legal studies (SLS) and Science and Technology Studies (STS). One example of such a collaboration is the March 2012 issue of *The Journal of Law and Society*, "Material Worlds: Intersections of Law, Science, Technology, and Society." Spurred in large part by the English translation of Bruno Latour's *The Making of Law* and Foucauldian inspired attempts to give account of regulatory regimes, this issue continues the legal realist critique of law by "promot[ing] understanding of the ways in which legal processes and instruments interact with and produce material worlds" (2). Collaborations between STS and SLS explore both the way that law regulates emerging technologies and how "law itself increasingly depends upon contributions from scientific advances" (16). The various articles in this journal issue offer trenchant Actor-Network Theory (ANT) inspired investigations of a range of regulatory regimes from the regulation of nicotine (Rooke), nanotechnology (Stokes), and biobanks (Rial-Sebbag, Cambon-Thomsen), to forensic evidence (Toom). One of ANT's key positions is the refusal to hierarchize the social-material world, thus also refusing to give primacy to human actors alone in social interpretation of phenomena like law. These collaborations thus front the way that law not merely orders human existence, but has physical effects in the construction of the material world. The placement of a curb, a zoning law that stipulates a liquor store be at least a certain number of feet from a church or school, an environmental law that forbids the construction of human dwellings in certain protected areas, all effect and shape what the material world is and can become.

Sharing this scholarship's interest in the application of ANT to law and how law mediates its presence, is Kyle McGee's extension of Bruno Latour's Actor-Network Theory to the study of the normative force of law. McGee's interest is more theoretical than the STS and SLS approaches discussed above. McGee is not interested in investigating particular laws but in using ANT and social theory to help give an account of how law is experienced as binding. McGee argues that if we are to understand the normative force of law, we need "to take seriously the media of law's expression" (1). "Law," McGee tells us following Latour's analysis of the French Constitutional Council in *The Making of Law*, "makes technicity [the material world, e.g. the turnstile] durable as technicity makes law durable. And as such, both are deeply involved in the construction of societies" (15). Put in less Latourian lingo, it is law's objects—the turnstile, the handcuffs, the police barrier—that mediate law, that give it a physical existence. But equally it is law as a "regime of enunciation" that gives the turnstile its particular legal affectivity. Repeal or modify the legal text and the turnstile will be removed and relegated to the obscurity of some Department of Transportation storehouse or worse. Outside of a regime of signification, law lacks durability, physical force, or material existence.[123] McGee concludes, it is "not an echo of the force of law that is expressed in technical objects [such as the turnstile], but the force of law itself" (17).

Cornelia Vismann's work on the textual mediality of law also helpfully illuminates the way law works or is mediated in a material world. Drawing on the work of German media theorist Friedrich Kittler, Vismann follows Kittler in his attempt at

[123] Following Latour, McGee thinks law as a regime of enunciation. I suggest the New Materialisms push us to consider law itself as a material practice. McGee seems to want to get here, but is unsure how to do it with Latour. See McGee's recent monograph, *Bruno Latour: The Normativity of Networks* (2014).

"driving the human out of the humanities" by focusing on the "technological-media" that undergird and make possible activities we typically assume to have originated in and be maintained by the human mind. Law is the activity Vismann focuses on, and the a priori medial schemata she suggests undergirds law is the "list." "Lists," Vismann writes, "do not communicate, they control transfer operations, lists are an administrative form of literacy that stands in no relation to speech" (7). According to Vismann, an item on a list "is determined by its placement on the list [whether it is put in the left or right column for example] rather than by any outside reference" (8). Moreover, lists—and when they accumulate into records and files—have a certain raw "materiality" that outweighs "content."

Vismann seeks to show how conventional accounts of law which locate the origin of law in the oral customs of so called "pre-legal societies" (Hart 1961) are misplaced and conceal law's origin not in the human mind, but in this materiality. As the files stacked up and the tablets became codices, a certain "presence" became palpable that attracts human rulers likes moths to a lamp (xi). Expanding on Derrida's reflections in *Grammatology* on Levi-Strauss's attempt to teach the Nambikwara of the central Amazon how to write, Vismann argues that law, like writing, is not fundamentally about the communication of meaning or speech, but about something else. Vismann claims that in the case of law, this something else is the "creat[ing of] presence, to blend and impress" (xi).[124]

[124] Perhaps piquantly, Donald Trump is a good illustration here. Vismann did not live to see his presidency, but his attraction to files and siphoning of their material presence seems to speak much for her account. President Trump often invokes the raw materiality of files, usually stacked on a table next to his podium. At times, he will flip through the files, thumbing and giving vibrancy to their rich materiality, to their density and fullness of ink, but he *never* reads from them. For all intents and purposes, the files are content-less. What the files say does not matter. The files are there for their materiality alone and are

In problematizing our Western prioritization of content over media and "teasing out the mediality of texts…ground[ing] the law in files and records," Vismann draws our attention *not only* to the way that law mediates, constructs, and regulates our material world, as Latour and some Law and Society scholars do. She also suggests how law may emerge without being the product of human intention even if it is simultaneously an artifact of human societies. Like Sacher-Masoch's bonds that I discussed in Chapter Three, law is both a product of human action and excessive to that action in its outcomes and possibilities.

Lists, records, and files exist because of human societies. But Vismann shows law is not the simple list, record, or file. It is rather the material presence that is exuded by these objects when they are gathered. While humans may have intended to keep lists at some point they also realized that their accumulation garnered a certain presence and power that could then be redirected. The way we handle and use files has a life of its own that gives them a force or power that is not wholly reducible to human activity. Vismann tries to show this force does not exist in the mind. Rather, "it is all in the files themselves…[in] the profane administrative techniques [of writing lists, keeping files, and displaying binders we might add today] rather than spirt" (122). So while Cheah and Grosz use corporeal bodies and their activities to disrupt legal positivism's assumption that law possesses a certain self-evident existence, Vismann turns to lists, records, and files—to the medial schemata of law—to offer an alternative origin story for law

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then, usually, they are hastily and literally tossed aside by the President. Social media is full of memes mocking the President's ability to read and framing him as a bumbling fool upon a stage. But Vismann's account seems to suggest something different, something that stretches back to early human history, and tells the story of an astute ruler, vividly aware of the material power and presence files have and co-opting them in his rise to power.

disconnected from both legal positivism's emphasis on oral society and customs and Cheah and Grosz's ontological violence. I suggest that Vismann thus needs to be viewed as another participant in the natural law tradition I have been sketching.

C. Law and Aesthetics

A third group of Law and Society scholars draws our attention to matters of positive law often overlooked because of their tenuous connection to what we normally think of when we talk of law. This group of scholars foregrounds aspects of law, such as its visual and auditory presence, that open up other ways to talk and think about law's matter in ways similar to my own attempts to do so. These inquiries tend to be explicit that their object of interest is positive law however. This group brings to the fore certain material aspects of law often overlooked and often seen as ancillary to the real content of law.[125]

Peter Goodrich's recent work on legal emblems and the visual in law is important here. Noting that "justice has always had a theatrical presence," Goodrich bemoans the "dearth of scholarship on visual advocacy and on critical interpretations of the visibilities of power" (2). "It is necessary," Goodrich concludes, "to take a stand in support of the important of the visual" (144). Goodrich turns to investigate early modern legal emblems such as depictions of *Justitia* – many of which grace twenty-first century courtrooms and still make their affective presence felt – showing how "images enact and make present the norms that found the law" (145). For Goodrich, we touch only the tip of the iceberg of law when we think about it as a discursive system or normative order. Law is

[125] It is thus possible to place Cornelia Vismann's exploration of the medial schemata of positive law in this section too.

composed of strands of sensory and bodily experience that run on frequencies that do not always register at the discursive or normative level. The way a statue of Lady Justice and the robed judges may affect us when we enter a courtroom are all fundamentally part of law for Goodrich, just as much as if not more so than the rules that compose the content of law. Similarly, Jamie Parker turns our attention to the soundscape of justice in his exploration of the International Criminal Tribunal for Rwanda (2012). Parker chides us to be attentive to the way that sound participates in law.

D. Law and Geography

The fourth and final group of Law and Society scholars I want to consider turns its attention not primarily to the way legal regulations and positive laws structure our built worlds, but to the way material spaces influence and problematize law's operation and our theorization of law. Much of this scholarship has been done at the intersection of geography and legal studies and focuses on the spatiality of law. Lisa Pruitt's work on lawscapes and rurality and her application of the concept "urban-normativity" to court rulings has shown, for example, the way that legal decisions are often "blind" to the particularities of material space and therefore to the legal consequences of their rulings. In her recent work with Martha Vanegas, Pruitt claims the urban-normativity of the law takes "urban life as the benchmark for what is normal," and thus loads terms like "undue burden" with a peculiar urban slant ignorant of the vagaries of material space (3).

Urban-normativity has untold and insidious effects on inhabitants of rural areas. Drawing on the recent slew of state attempts to regulate abortion – attempts that have severely reduced the number of abortion clinics in rural areas while requiring multiple

visits and thus multiple trips of great distance – Pruitt and Vanegas argue that when courts uphold these regulations they expose a judicial "ignorance of rural spatiality and the very real obstacles that distance represents to many [rural] women" (5). Judges living in urban settings are "spatially privileged," Pruitt and Vanegas argue, "blind" to the "undue burden" that regulations place on rural women. In Pruitt and Vanegas's account of lawscapes, law is unjust in so far as it ignores the reality of material spatiality.

Others in Law and Geography, like Peter Sloterdijk, David Delaney and Andreas Philippopoulos-Mihalopoulos, evoke Carl Schmitt's *Nomos of the Earth* not only to reveal insidious aspects of a law intent on ignoring the vagaries of material spatiality *a la* Pruitt and Vanegas, but also to offer their own alternative accounts of law as the concrete fusion of the legal and spatial. In their own way, these accounts continue Schmitt's critique of liberalism's abstract, universalization of law, critiquing Schmitt along the way. In *Nomos of the Earth*, Schmitt sets out the legal version of his critique of liberalism. What Schmitt is looking for as an alternative to liberalism's universal, abstract, impersonal rule of law is a primordial, foundational, even chthonic account of law as the immediate form in which a people's political and social order becomes spatially evident—something literally as basic as the drawing of a line in the dirt (Schmitt 70). Such a line introduces a division between those who are inside (us) and those who are outside (them). According to Schmitt, this line—a physical drawing in the dirt—is not only the origin of law, but also the animus of all succeeding laws. While the fascist, nationalist, and wall-building elements are all evident in Schmitt's account, some like Philippopoulos-Mihalopoulos have been crucial in retrieving or at least thinking through some of the other elements of Schmitt's account.

Philippopoulos-Mihalopoulos goes the farthest in offering an account of law that sees law indeterminably "interlaced" with the materiality of space in what he calls the "lawscape."[126] One of his recent essays begins with a provocative description of the lawscape:

> You walk into a room that smells of roses. The walls are painted a stimulating combination of red and yellow. The first notes of Beethoven's *Fur Elise* are piped in the air. You touch the smooth surface of the table, you sit on a comfortable chair, you switch on your iPad and get ready to browse the internet. You feel well, at ease, energetic. You perceive the surrounding atmosphere as pleasant, familiar, protective. You take a sip from your Coke and settle in. You have entered the lawscape. Or rather, you never quite left it. (35)

For Philippopoulos-Mihalopoulos, law and matter, law and city are inextricably "interfolded." Whether the legally patented hue of red and yellow that stimulates feelings of warmth and safety, the safety regulations that prescribe the manufacturing of the "comfortable chair," the health regulations that regulate the production of your drink and – in some jurisdictions – how much Coke you may buy, or the environmental laws that govern the harvest of the roses and the disposal of your iPad battery, "every surface, smell, colour, taste is regulated by some form of law" (35). "Perhaps less metaphorically than it might sound," Philippopoulos-Mihalopoulos continues, "the law is spread on pavements, covers the walls of buildings, opens and closes windows, lets you dress in a certain way (and not another), eat in a certain way, smell, touch or listen to certain things, touch other people in a certain way (and not another), sleep in a certain space, move in a certain way, stay still in a certain way" (35).

[126] Philippopoulos-Mihalopoulos's account of the lawscape is different from Pruitt's. The point I am trying to draw out here is that Philippopoulos-Mihalopoulos's lawscape shares more with Schmitt's nomos of the earth and Delaney's interest in offering a different account of law rather than simply critiquing it.

Central to Philippopoulos-Mihalopoulos's account is what he calls "the epistemological and ontological tautology of law and the city" (2013, 36). Philippopoulos-Mihalopoulos has a broad conceptions of both "law" and "city." By "law," he writes, "I understand both standard law and regulation, as well as the generalised diffused normativity that characterises life—what Spinoza (2007) has called 'rules for living'" (36). By "city," he says, "I understand the thick spatiality of bodies (humans, non-humans, linguistic, spatial, disciplinary), buildings, objects, animals, vegetables, minerals, money, communication, silence, open spaces, air, water, and so on" (36). For Philippopoulos-Mihalopoulos "law" and "city" cannot be understood apart. "A city without law is a holy city of justice, perpetually floating in a post-conflict space where everything is light and forgiveness. Likewise, a law without a city is a law without materiality, an abstract, universal, immutable law that trammels the globe. Both the above are fantastic beasts that operate at best as horizon and at worst as cheap rhetoric" (36). Schmitt's critique of liberalism has, Philippopoulos-Mihalopoulos thinks, already alerted us to the dangers and myth of law without city; part of his goal is to point out that much of what is called "the ethical turn" in deconstruction, including work on messianic justice and justice always-to-come, is just as fantastic and dangerous in its assumption of city without law.

But this criticism is not where Philippopoulos-Mihalopoulos's main insight lies for me. It lies for me in his thinking of law and city together in a way that is irreducible to either law's normativity or the city's spatiality alone (41). In Chapter Two I argued that Aquinas does something similar, although he does not refer to city but rather to "natura." Philippopoulos-Mihalopoulos suggests the word "atmosphere." For Philippopoulos-

Mihalopoulos, atmosphere captures the relational force of the lawscape that holds law and city in tautology.

> Affects are generated in that shared urban skin, caressing, scenting, beating, biting spaces and bodies and holding them together in what I would call an atmosphere. I want to think of atmosphere as a force of attraction. As such, it is embodied by each body yet exceeding the body because it cannot be isolated. An atmosphere spreads instead through and in between a multiplicity of bodies like a sticky substance. Atmosphere is the excess of affect that keeps bodies together. And, further, what emerges when bodies (in the Spinozian/Deleuzian sense) are held together by, through and against each other. An atmosphere is affect transmitted, as well as affect directed. It is air, breath, exhalation, ozone, earth. It is room, city, book, music, soup, face, memory, storm, death. (41)

In his account of the lawscape and atmosphere as the "sticky substance" between bodies, Philippopoulos-Mihalopoulos gets to the point of superabundance Aquinas also tried to describe. It is from this excess that boundaries are generated. In other words, the hidden natural law I have attempted to disclose in this dissertation expresses itself not in ontological violence but rather, as Philippopoulos-Mihalopoulos and Aquinas suggest, in a superabundance that both distinguishes and draws together.

III Thinking the New Materialisms Jurisprudentially

I turn last to consider how the stories I have told about natural law might contribute to current work in the New Materialisms. Here I have in mind the work of Jane Bennett (2010), Timothy Morton (2010), and Brian Massumi (2015) in environmental political theory, but also the more strictly philosophical work of Graham Harman (2009) and Quentin Meillassoux (2006) which has broadly gone under the heading of Speculative Realism. New Materialist scholarship has helpfully reanimated discussions of nature and matter in contemporary social science and humanistic enquiries, which is central to my

own reconsideration of the natural law tradition. Yet the New Materialisms rarely if ever address law or jurisprudence.[127] This oversight does not appear to be intentional, but rather a matter of focus. However, I suggest that when approached through the lens of jurisprudence rather than philosophy, many of the debates internal to the New Materialisms become more intelligible and tractable. Jurisprudence has a long tradition of focusing on bodies, agencies, and on how matters come to matter (Mussawir 2010).

In a recent interview, Dana Luciano said: "The most compelling contribution of the new materialisms is not conceptual or analytic, strictly speaking, but sensory. The attempt to attend to the force of liveliness of matter will entail not just a reawakening or redirection of critical attention, but a reorganizing of the senses" (Luciano interview *Trans*). A bit later she follows up with this remark: "In re/awakening criticism to alternate sensory dimensions, it [the new materialisms] holds the potential to expand and enliven—though crucially, not to replace— 'old' (historical) materialisms." In other words, the New Materialisms do not simply help us see an old phenomena from a new angle. Rather, as Luciano points out, the New Materialisms undertake a highly politicized task, "a reorganizing of the senses." According to Luciano this task is political because it requires our collective action to undertake.[128]

Luciano praises the New Materialisms for their courage in undertaking this task, a task that is—perhaps unbeknownst to many New Materialist scholars—crucial to law as I

[127] For a similar attempt to bring new materialist insights into contact with another realm of inquiry see Kathy Ferguson, "Anarchists Printers and Presses: Material Circuits of Politics" in *Political Theory*, forthcoming. Also see Cary Wolfe, *Before the Law: Humans and Other Animals in a Biopolitical Frame* (2012). While Wolfe does not explicitly engage the new materialisms, he draws posthumanist animal studies into conversation with biopolitics scholarship in ways similar to what I do here.

[128] Luciano makes a point similar to Ranciere's distinction between the police and the political. See Ranciere,"Ten Theses on Politics."

have attempted to show in this dissertation. For the boundaries between nature and culture, between human and nonhuman are a matter of law. At a very fundamental level then, the New Materialist project of "reorganizing the senses" and rethinking the boundaries between nature and culture, human and nonhuman is a deeply law project. In this final section I want to explore three strands more or less uniting the New Materialisms in order to demonstrate how the stories I have told about natural law in this dissertation can contribute to this ongoing diverse field of inquiry.

Not all the scholars I consider under the banner "New Materialisms" in this section would take kindly to being identified this way. Some might prefer the banner of Speculative Realism, or Object-Oriented Ontology, or Eco-materialism, or Feminist Materialism, or Agential Realism. And the dissension goes deeper than nomenclature, to fundamental disagreements about how to theorize matter, things, and objects. Does agency "withdraw" into the interior of an object (Harman 2009) *or* does agency emerge in the pooled "intractivity" of "assemblages" (Bennett 2010; Barad 2006; Latour 2009)? Is the goal to see currents of subjectivity and proto-subjectivity coursing through all elements of the universe *or* to de-subjectify the human subject, curiously observing the ways our bodies—even our wills and minds—behave more with the recalcitrance of objects than traditional intentional subjects? What is the difference between an "object" and a "thing" and why might it matter? I use "New Materialisms" in the plural to capture some of this tension, while fully noting it does not go far enough.[129]

[129] Part of my argument though is that from the perspective of jurisprudence rather than philosophy, many of these tensions appear in a different light and so it does not make sense to divide the theoretical field the way the practitioners do. On the distinction between philosophy and jurisprudence see Francois Ewald's influential work spanning the past several decades to reestablish jurisprudence as a philosophy of law that developed *alongside* Western philosophy and its subfield of legal philosophy, *not* internal to it (in particular see *Norms, Discipline, and the Law* (1990). Also see Gilles Deleuze 1993: 153, 169-182. Deleuze

One strand uniting the "New Materialisms" is their insistence to get us, in the words of one practitioner, to the "*great outdoors*, the *absolute* outside of pre-critical thinkers" that has supposedly been lost to Western thought since Kant (Meillassoux 2006, 7). Or, in the words of one of their critics, the goal of the New Materialisms is "to respect the indifference of objects in themselves," a task that requires "work[ing] hard not to project the human into the heart of things" (Cole 2013, 106). A central objective that unites all those I variously group under the heading New Materialisms then, is the problematization of thinking materiality as fundamentally split between an experiencing subject endowed with agency and intentionality and a mute objective reality on the other hand which we can only say exists for the subject.

As thinkers like Bruno Latour and Quentin Meillassoux demonstrate, this "great Bifurcation" of active subject and passive object introduces a split in reality that is hard to maintain in practice. This bifurcation also activates critical philosophies which deny the subject's ability to ever access the objective in-itself or a reality that exists not for-us, *i.e.* filtered through or experiences (Meillassoux 5). One way to see the New Materialisms then is as a collection of attempts to overcome or escape this bifurcation. The New Materialisms look to and for "traces of independence or aliveness, constituting the outside of our own experience," as Jane Bennett has put it (xvi). The New Materialisms explore the myriad ways the material world itself is active and lively, and

makes several similar comments on the relationship between legal philosophy and jurisprudence. In contrast to philosophy or religion, jurisprudence has always concerned itself with the practicalities of the here and now and our lives together in a world that exceeds us. Also see A. Lefebvre, *The Image of Law* (2008) and E. Mussawir, *Jursidiction in Deleuze* (2011) for more of an elaboration of the distinction between jurisprudence and legal philosophy.

therefore not fully reducible to its correlative relationship with human agency and intentionality.

On these New Materialists' account, matter is not the inert background of human activities or passive building blocks as it is on the Cartesian bifurcated model. Matter is rather co-constitutive of human subjective projects and existence. Matter is an "enactive dance," as Timothy Morton puts it. In the words of Diane Coole and Samantha Frost, matter contains "emergent, generative powers" of its own. The New Materialists thus problematize the mind-body and culture-nature dichotomies, helping us focus on the oddity of attributing intentionality, inventiveness, agency, and meaning only to the activities of the human (or divine) mind. In so far as it can help us see that law is never only mediated by and inscribed on matter but actively participated in by matter, this problematization of the mind-body and culture-nature dichotomies is extremely helpful.

Whether it is the white noise machine the shrouds at-bench discussions from the ears of the jury, the stream environmental law seeks to protect, the turnstile that orders the flow of bodies in a subway station, or the DNA sample provided as evidence in a criminal trial, the New Materialists can help us see that the things of law are never simply inert objects used, regulated, and manipulated by law, but active participants in law. When the white noise machine malfunctions and the defense calls for a mistrial, when the stream erodes a bank and a landowner calls for a new law to take into account the material particularities of the stream's ecology, when the turnstile jams and bodies collide as they rush for a train, and the DNA sample reveals an untold story about the Middle Passage, things – organic, man-made, and hybrid – show an independence and liveliness

that exceeds human projects. In the practice of law, human beings *court* such things rather than regulate them.

It is one thing to problematize or expose a dichotomy as problematic or even false. It is another to actively theorize what the world looks like after the problematization of that dichotomy has been disclosed. The New Materialists take one of two distinct theoretical approaches to matter's independence.

The *modus operandi* of the first approach has been to shift the focus away from what a thing is *to what it does*, or what Jane Bennett calls "thing power." That is to say, one New Materialist approach is to focus on the way things both human and more-than-human "make differences, produce effects, alter the course of events" (Bennett viii). A philosophy of immanence or horizontal ontology informs this approach. It has been heavily influenced by Latour's work on Actor Network Theory, Deleuze and Guattari's work on assemblages and rhizomes, and a Spinozist sensibility of *conatus*. I take an example from Jane Bennett's *Vibrant Matter: A Political Ecology of Things* (2010) to flesh out how this approach attempts to access the "great outdoors."

In *Vibrant Matter*, Bennett gives the example of a massive electrical blackout that occurred in North America during the summer of 2003. Over the period of several days in August 2003, fifty million people over approximately fifteen thousand square miles in the eastern portion of the United States and Canada were left without electricity. Over one hundred power plants were shut down including a score of nuclear reactors. Basements flooded, stores were looted, people were left in the dark and sweltering summer heat. At first blush, an electrical blackout seems like a wholly human failure. Humans makes electricity, humans build and maintain the lines to deliver electricity, humans use

electricity, humans structure their lives around the electrical grid. Yet, rather than focus on identifying a human agent to blame, such as the directors of the Ohio power company FirstEnergy, the company whose Lake Eerie power plant's failure many argued precipitated the extensive blackout, Bennett focuses on the larger complex within which these persons acted.

The electrical grid, Bennett writes, is "a volatile mix of coal, sweat, electromagnetic fields, computer programs, electron streams, profit motives, heat, lifestyles, nuclear fuel, plastic, fantasies of mastery, static, legislation, water, economic theory, wire, and wood – to name just some of the actants" (25). "Actants" is a term of art Bennett borrows from Latour's Actor Network Theory to mean something like an actor, but not with a strong sense of agency or possessed agency. The actant, unlike the actor, does not possess their agency but rather enacts it. I will return to this point below. Bennett continues, "There is always some friction among the parts, but for several days in August 2003 in the United States and Canada the dissonance was so great that cooperation become impossible" (25). In drawing our attention to the way in which human intentionality is only one actor among others, Bennett dislodges agency from its traditional resting place in human subject or human collectivity to an interactant web. True, heads of companies like FirstEnergy and the decisions they made were certainly complicit in the blackout, as were members of the Federal Energy Regulatory Commission and other human governmental agents. But also active in the blackout was the way electricity behaves sometimes unpredictably, tree-wire encounters, and brush fires that downed lines and stressed other lines, as well as computer programs that automatically threw plants offline when overstressed. "Electricity sometimes goes where

we send it," Bennett concludes, "and sometimes it chooses its path on the spot, in response to the other bodies it encounters and the surprising opportunities for actions and interactions that they afford" (28). Bennett thus points to a world where the human being and human society is just one actor among many others.

Coming from a different angle and drawing on Martin Heidegger, but pointing to a similar account of things and objects as containing traces of independence that prevent them from being cast as the inert background of human activity, Graham Harman argues that all things contain an element of withdrawal or self-withholding. This element, this reservoir of potential, means that all things can never be fully ordered, manipulated, or regulated by human beings. Objects have a life of their own, independent of our particular projects. Unlike the first New Materialist approach however, this second approach – often self-described as Object-Oriented Ontology or Speculative Realism – does not focus on relationality and interconnectedness. It focuses instead on how all objects, including the most mundane, withdraw from one another. Thus, instead of privileging relationality and the univocity or connectedness of being, this approach explicitly denies the possibility of relationality.

Using a Heideggerian-inspired phenomenology that others have equated with medieval mystical thinking, this second approach presumes that in moments of breakdown, when a hammer shifts from being the ready-at-hand tool of the carpenter to the broken present-at-hand object, the hammer offers us an elusive glimpse of its radical independence, the reservoir of potentiality it harbors outside our use of it. It is in the moment of breakdown that we recognize a hammer is never only a tool for a human

project – a "correlate" of human existence to use the Quentin Meillassoux's word. A hammer also exists in a netherworld of its own possibilities.

Both New Materialist approaches find ways to access what Kant's critical philosophy said was off-limits to us—the outside. But when we read the New Materialisms alongside the stories about natural law I have told in this dissertation a helpful distinction comes to light in terms of what Aquinas called the "analogical structure of being" (*analogia entis*) (and more recently what Jacob von Uexküll has called "the musical laws of nature"). Reading the New Materialisms jurisprudentially alongside Thomistic natural law theory opens up avenues to reconsider the debate between how to access the "great outdoors" internal to the New Materialisms as another iteration of the Scholastic debate between the univocity and equivocity of being.

B. Agency as Enactment

Another possible strand uniting the New Materialisms might be the claim that agency is enacted rather than possessed by subjects. This is related to the claim that knowledge is embodied. Knowledge is not possessed by subjects; knowledge is something in the world that subjects partake of, enact, or live through. Michel Villey suggests the same may be said of jurisprudence as jurisprudence emerges from particular "cases" mixed up in the world rather than neatly pre-given in subject-object schema (Villey).[130] Similarly, the New Materialist David Abrams asks, although more poetically,

[130] According to Costas Douzinas, for Michel Villey "The judge [first] acts like a botanist or an anthropologist: he observes the connections and relations amongst his fellow citizens, the way in which they arrange their affairs, in particular the way in which they distribute benefits and burdens" (2000, 40). These "connections and relations" have real value according to Villey explicating Aristotle, drawing their sustenance not just from human convention but *dikaion*. *Dikaion*, Villey argues, was an important concept in jurisprudence that was not concerned with morality, utility, or truth, but with the sharing of external

"What if mind is not ours, but is Earth's?...What if like the hunkered owl, and the spruce bending above it, and beetle staggering from needle to needle on that branch, we all partake of the wide intelligence of this world" (123).

Andrew Pickering and Karen Barad are more systematic in their critique of the traditional representationalist epistemology which positions the subject (scientist) as possessor of knowledge rather than actor in the world. Pickering argues for what he calls a "mangle of practice" evoking the old-fashioned laundry "mangle" that dried clothes by smooshing and wringing them between two rollers. Practice and knowledge emerge for Pickering as wrung out together (1995). The human scientist does not stand apart from the world as an external observer, but acts within the world and as an integral piece of the world. Barad goes even further arguing that all knowledge is always only "part of the universe making itself intelligible to another part" or what she calls the "intractivity" of the universe instead of its "interactivity" (2006, 143).[131] Focusing on matters of practices, doings, and actions, Barad argues for the priority of "phenomena" (121). "Phenomena," Barad writes, "are ontologically primitive relations—relations without preexisting relata" (133). In making this move, Barad, similar to Pickering, rejects a Kantian tradition that subordinates phenomena to a more real realm of noumena. "Relata," or the discrete things that together compose a relation, "do not preexist relations; rather, relata-within-phenomena emerge through specific intra-actions" (134). "Intra-action," or action within,

goods and the ordering of the world (Villey 1969). Consequently, "the just decision is always provisional and experimental, transient and dynamic in the same way that human nature is always on the move, between the actual and the potential and continuously adjusts to changes, new circumstances and contingencies. Finding the dikaion is the aim of the classical jurist but that is never fully and finally achieved" (2000, 40).

[131] The title of her most influential book *Meeting the Universe Halfway* also makes the same point.

rather than inter-action, or action between, better gets at the characteristics of agency and knowledge production, Barad suggests. “Agency is not,” Barad concludes, “an attribute,” or something that might belong to something, “but the ongoing reconfigurings of the world” (135).

Bennett makes a similar observation is her account of the 2003 North American electrical blackout I detailed above. Quoting Latour, Bennett describes the blackout as a “slight surprise of action” (27). Bennett’s point is that there is always something slightly surprising, unpredictable, and cumulative about action. Over half a century ago, the political theorist Hannah Arendt made similar claims about action and its surprising, unpredictable character, although for Arendt action is an exclusively human affair. The action itself, in addition to the actors, adds something that is not predicated to the effect. We always find ourselves in the middle of action. Action happens, it is something done, an enactment rather than something possessed or done by a subject upon or to an object. Hence, the ever-present possibility of surprise. Of course, this is why Arendt thought promising, forgiving, and the law-like “islands of stability” they produced were so crucial to the human experience of action. It is also why she says only the “backwards glance” of the storyteller can give meaning to the “sheer occurrences” humans encounter and participate in as action. The stories this dissertation has told about natural law suggests the continued importance of the “backward glance” of the storyteller and its law-like quality especially in a cosmos we are realizing is more and more open and indeterminate.

C. And Earthly Ethics

A third and final strand uniting the New Materialisms has been described as the New Materialisms' call to "listen to the call of things" (Cole 2013, 107). Both practitioners and critics alike have taken to describing this as the New Materialisms' "ethical" moment. In *Reassembling the Social*, Latour describes his method at length as one of giving objects voice, of "making them talk."

> To be accounted for, objects have to enter into accounts. If no trace if produced, they offer no information to the observer and will have no visible effect on other agents. They remain silent and are no longer actors: they remain, literally, unaccountable. Although the situation is the same for groups and agencies—no trial, no account, no information—it is clearly more difficult for objects, since carrying their effects while becoming silent is what they are so good at as Samuel Butler noted. Once built, the wall of bricks does not utter a word—even though the group of workmen goes on talking and graffiti may proliferate on its surface…This is why specific tricks have to be invented to make them talk, that is, to offer descriptions of themselves, to produce scripts of what they are making others—humans and nonhumans—do. (2005, 79)

More recently, Latour has described his method as establishing "a parliament of things" (2009). Just as humans need representatives to have a voice in parliamentary systems of governance, nonhuman objects need to be provided representatives to give them a voice. Similarly, Jane Bennett "tr[ies] to give voice to a vitality intrinsic to materiality" in *Vibrant Matter* (2010, 3).

Here the cross-overs between the New Materialisms and the use of legal language become apparent. Yet when the New Materialists seem to draw on legal theory, they never recognize it as a resource. Rather, they emphasize the ethical claim that we must listen to the call of things by assuming that there is call and we are either just talking too loudly to hear it or do not yet have the techniques to hear it (Kang 2017). In other words,

the problem is on our end. It is an ethical problem, one we need to fix with ourselves rather than a problem with the links and ties that connect us to the world which the stories I have told in this dissertation suggest are better addressed as a jurisprudential problem. Such a problem may be more richly addressed when it is recognized as a jurisprudential one.

This brings me full circle in this chapter to the animal trials I began with and the institutional work they did of connecting and bonding a human community to a place within the wider more-than-human world. I understand the New Materialisms to be pursuing a similar task for us late moderns today although from an individual ethical standpoint. The salvo the animal trials raise for us today then is with what institutional work and care will we greet and face the bonds of vulnerability and embodiment that hold us in unfinished makings with a still-becoming material world (Latour 2016)? This dissertation has attempted, among other things, to recover some stories from the past to illuminate and begin to answer this question.

CODA: A Parting Tale

Figure 1, Johns Hopkins University, 22 September 2014. Copyright owned by author.

The queer but not uncommon incident which I am about to relate in truncated form occurred in the early fall of 2014 on Johns Hopkins University's Homewood campus in northern Baltimore City. I was fortunate enough to be privy and present (only a few documentary photographs exist, see figure 1*). It is my feeling that this account of "the natural law's holding court" may now be published without impunity due to the time that has elapsed, the increasing frequency and ubiquity of such occurrences in our warming world, and the negligence I might otherwise suffer and sustain.*

*Years earlier, the aforementioned university had decreed and promulgated a network of crisscrossing redbrick paths throughout the campus. These paths, cut at sharp angles, were felt by many members of the community to be an artificial and arbitrary imposition of university's legislative power. One section of pathway, near Levering Hall and just off the Wyman Quad, elicited especial protest from the faculty, staff, squirrels, students, dogs, trees, visitors, and flowing water, all collectively pursuing gentle government. So arbitrary and unnatural (*contra naturam*) was the bent of the path felt to be, that none but the most acquiescent to posited authority followed it; the majority ambling instead across the grass and under the shade of a small pin oak, walking the lay of the land. In repeated shows of might and order, the university erected barriers and other obstacles attempting to discipline the anarchic bodies—at least this was the university's presumed view—wreaking havoc on a manicured lawn.*

The cold draconian measures had little effect however, and in overdue course the university relented to warm sighted Themis, daughter of Gaia, justice below. Now working with rather than against the natural law, heeding the 'tie that sympathetically binds the parts of the world,' the university repealed the old (and rarely trodden) pathway, seeding it with grass, and promulgated with redbrick the pathway the natural law had so long ago set forth.

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Curriculum Vitae

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