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On Un-Doing Law

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On Un-Doing Law

Why should we un-do law? Sociological and anthropological approaches to law and legal processes have long suggested that state-made law has to be understood as a culturally embedded process and as but one form of prescriptive ordering among many others. If law is understood to be one normative system that, like others, serves to order human life, then why should we desire to take it apart? This is not to deny law's efficacy in bringing resolve to human conflicts or to doubt the ethicacy and idealism with which many legal actors perform their work. Rather, it is to also acknowledge that law can be used to abet suffering and to legitimate irresponsibility.[1]

Law is granted a force[2] to enact violence[3] that other normative systems do not possess. The legitimacy of law tends not only to be taken for granted but also to be viewed as foundational to other forms of human activity such as formalizing social relations (adoption, marriage), clarifying geo-national status (citizenship, refugee status), and upholding (individual) property rights while potentially also withholding more communal cultural rights concerning joint and cooperative use of land, etc. Law is the central means by which states and other institutions structure the conditions of human life. This process extends to what is socially thinkable and is predicated by forms of legal consciousness and legal subjectivity.

If we propose to undo the law in this special issue it is not with an eye to deconstructing it but rather to cause an unraveling of state-centered law's unproblematized legitimacy. This is done by illustrating how law has to be understood as a cultural process and by showing how law, in the sense most people understand it, that is as state-made law, is intrinsically linked to forms of social control. These state-mandated types of control legitimate hierarchical orderings between humans and non-humans (animals, those deemed to be less than fully human), citizens and non-citizens, men and women, cis men and women and queer* and trans* persons, the abled and dis-abled, those whose race and/or ethnicity goes unmarked due to their majoritarian positions, and those for whom these categories are marked and therefore made subject to increased legal controls. Thus posthumanist and queer critiques of law suggest that Humanism's conceptualization of rational subjects needs to be rethought as the basis of legal orders, as the vision of justice that the law ultimately realizes. Distinctions between legal persons and non-persons, humans and non-humans rest on a post-Enlightenment project

that has privileged the White, cis, Western, Able-Bodied, and Propertied Man as the origin and subject of law.[4] These critiques follow on insights by feminist and queer scholars into law's masculinist and paternalistic premises and the contributions of legal practices to misogynist and heteronormative forms of policing. Further, practitioners of critical disability theory have shown how legal systems privilege the able-bodied and marginalize the non-able-bodied. This includes practices such as immigration screening and prenatal testing.

What needs un-doing?

All of this issue's contributions share a critical stance towards a concept of contemporary law that proves to be problematic in pluralistic legal contexts. This is the normative claim law makes to being completely applicable within the purview of its system and those it amends to that system. This claim to universality is historically grounded in the framework of colonialist expansionism and state centralization. In the context of colonialism, European imperial powers used the law to systematize and standardize the state's relationship to extremely diverse spaces and populations.[5] "The law" became a way to facilitate state control of such populations through the creation and maintenance of rigid inter-human distinctions. These were distinctions associated with categories such as race,[6] class [Schniedermann in this issue], gender [de Mel and Samararatne in this issue], sanity [Patchett in this issue], and (dis)ability [Beckmann in this issue]. These categories overlap with sociolegal distinctions that are made between persons and non-persons on the basis of their normative humanity[7] [Suntrup in this issue], or their perceived threat to security [Gschrey in this issue].

Legislating rigid distinctions between categories of human populations is a necessary condition of contemporary Western law and statehood and remains much more than a relic of a colonialist past. The normative distinctions that are reproduced by law systematize our experience of the world. Thus the critical study of the law is valuable not least because the genesis and structure of rigid inter-human categorization can be traced there. Yet the particular value of studying the law from the perspectives of literary and cultural studies lies in explicating these legal categories' specific cultural valences. These relations underlie the thinkable range of inter-human relations in Western and postcolonial traditions.

The undoing of law that proceeds in this special issue also involves a bracketing and reevaluation of "culture," the self-explanatory nature of which this journal has set out to question and trouble. The "culture" invoked here is that of Raymond Williams. This is a non-monolithic culture, one that is always in flux due to the tensions between currently dominant and emerging elements. It involves an awareness of both the cultivation and preservation aspects of culture – the fostering and passing on – as well as the critique of preferment inherent in the evaluation of so-called high cultural forms.[8] The discernment of supposedly rarified aesthetic forms has then been shown to be part and parcel of practices of demonstrating social and class distinction.[9] The emergence and articulation of cultural elements accompanies, influences, and may also be used to critique those processes by which legal divisions are made between persons, persons and animals, and persons and things.

The culturalist approaches to law espoused in this special issue work on the basis of interdisciplinary work in Law and Literature, Law and Narrative, Law and Semiotics, Law and Cultural Studies, Law and Visual Culture, and Law and Media. All of these subfields of critical legal studies argue that law neither belongs to an autonomous realm of activity, nor does it transpire with exclusively rational means. Such approaches therefore contribute to subtler understandings of "culture" as neither organic, homogenous, nor static. As the contributors to these pages argue, every investigation into the cultural imbrications of law with its contexts needs to be historically, materially, and geographically specific.[10]

If law is understood to not simply proceed according to rational means or through teleological and linearly constructed narratives, how may we then explore its visuality, metaphoricity and unconscious? As Peter Goodrich has written:

> The other scenes of law — its images, its figures, its architecture, its rites, myths, and other emotions — are potentially the economies of resistance to law. They evidence, I will argue, the possibilities of a jurisprudence of difference, and specifically a genealogy of other forms of law, of plural jurisdictions and distinctive subjectivities, of other genders, ethnicities, and classes of legality and of writing.[11]

One of the ways this issue proceeds in delineating these "plural jurisdictions and distinctive subjectivities" is through demonstrating the imbrication of visuality and performance in legally condoned surveillance practices. Thus Raul Gschrey's *Perspective* "Visualizing 'Law's Pluralities': Artistic Practice and Legal Culture" reports in this issue on a collective exhibition in the context of the conference *Law's Pluralities:*

Cultures/Narratives/Images/Genders that was held in Giessen, Germany in 2015.[12] His contribution analyzes the works of the artists Il-Jin Choi, Raul Gschrey, Mi You, and Manu Luksch, and describes how their works perform critiques of legalized surveillance practices. This occurs through making otherwise invisible or unnoticed techniques of surveillance visible and naming the conditions of their legality. Other works challenge the dominance of the printed word in law and propose alternative forms of visualizing legal practices.

In line with Goodrich's call to trace the architectonics, liminal practices, and affective resonances of and points of resistance to law, Greta Olson has documented efforts to denaturalize the narrative basis of law in the aesthetic and the affective.[13] This includes also an attention to the metaphoricity of law as well as its unconscious. These are subjects that Katrin Becker addresses in her *Article* "The Juridical Voice of Literature – A Perspective on Literature's Entanglement with Normativity." There, Becker employs Pierre Legendre to describe how normative systems are imagined and legitimated through aesthetic means. Music, poems, dance, and rituals allow legal subjects to feel that they are represented in and by their culture. In particular, the author highlights the relation between literature and the law, the former of which legitimates the legal, yet may also be employed to highlight law's contingency. As Becker writes: "Where law […] guarantees the specular separation, and needs, for the purpose of its effectivity, to veil the fictionality of its fundament, literature embodies both the normative necessity *and* the aesthetic fictionality lying underneath." This leads her to a reading of E.T.A. Hoffmann's "The Sandman" (1816) as a tale that accentuates the fundamental dilemma posed by the unknowability of relations that proceed what law determines to be a legally relevant case.

De-humanizing, Queering, and Dis-abling the Law

This issue departs from a program that is set out in its subtitle: to dehumanize, queer, and to dis-able the law. **To de-humanize** law is to unseat the ubiquity of the human animal who has claimed primacy as rule creator and rule speaker. It is to trace the historical demarcation of animal and human animal in Western history as the basis of the assumption of rationality from which to pronounce law. It is to recognize that the legal category of personhood is not identical with the subject of human rights, nor with the moral subject of deontological philosophy. Rather, the granting of legal personhood is

always systemic-dependent and historically contingent. The recognition of this categorical status is used to protect the privileges of those who fall under its scope.[14] This occurs in a continual process of boundary drawing between non-human animal and human, for whenever the identified animal has threatened to appear or be too human-like, this creature has been met with particular violence and censure.[15]

Two essays in *Undoing Law*, in particular, work to effect this de-humanization, and another one, dealing with itineracy, interfaces with them. The first of these is Emma Patchett's "Law Undone: Corporeal Subversion in Mariella Mehr's *Stoneage*." This *_Article* addresses the history of vagrant laws in Switzerland and draws attention to the twentieth-century practice of removing Yenish children from their families and incarcerating them as wards of the state. Patchett's work demonstrates how ethnic delineations based on notions of disease and degeneration are instrumentalized to solidify the notion of a national body politic that must be 'pure.' (Her emphasis on national boundary making in conjunction with exclusionary practices directed at individuals and groups whose bodies do not fulfill normative notions of citizenship also interfaces with Lisa Beckmann's contribution to this issue.) Patchett's essay serves to "expose law's role in the deliberate production of degenerate bodies." Drawing on Deleuze and Guattari's concept of a *body without organs*, Patchett argues that the juridical positioning of the corporeal is designed to obscure threatening ruptures in the body of the law, which might highlight its own 'disabilities.' Her argument is developed through an analysis of Mariella Mehr's auto-fictional *Stoneage* (1990) [1981]), which reflects on Mehr's childhood as one of the affected children. Mehr's formal techniques function to disrupt the logic of containment and purification enacted by law. Quoting from the novel in translation: "scars cover leather-red skin, create roads, furrows, gorges, which my awareness does not dare to explore."[16] The novel then highlights the law's efforts to contain and subordinate and exclude monstrous bodies, while presenting an embodied resistance to these efforts.

The second essay to uncover how law can be employed to dehumanize individuals systematically and to work to move beyond that paradigm is Jan Christoph Suntrup's "The Legal Person and its Other: A Comparative View on Drawing and Effacing Boundaries in Various Cultural Contexts." In this *_Article*, Suntrup tests the posthumanist construction of the law in historical perspective. His contribution rehearses the *longue durée* of precarious relationships between legal personhood and the status of

the life that is assigned or denied personhood, including for instance 'its' species membership. On the basis of this history, he develops observations that pertain to contemporary discussions of (non-human) animal studies, copyright issues and cultural rights, as well as the precarious legal distinction between persons and things.

Wibke Schniedermann's *Article* speaks to Suntrup's insight that making differentiations between persons and non-persons involves treating the latter as things, whereas things are violently defended in other legal contexts. Law is used to protect private, individualized Lockean property and property usage as well as the use of public spaces, an area of social control that has always been determined by class interests.[17] Thus, in her "Bypassing the Law in a Homeless Vehicle," Schniedermann compares several iterations and adaptions of Alan Bennett's *The Lady in the Van* (1989). This was Bennett's account of his personal experiences with a homeless woman who parked her home, a van, in Bennett's private parking space for more than a decade. The woman's inhabitation of public and semi-public space rattled expected class-based claims to privacy and property that are protected by law. Schniedermann compares the book, stage, and film versions of this account to determine the different formal and semantic strategies with which they illustrate and in great part also resist the role of the law in carrying out neoliberal urban policymaking.

To queer the law is to follow in the footsteps of feminist and subsequent queer interrogations of the masculinist, patriarchal, and heteronormative ordering practices that are enacted and protected by laws. It is further to acknowledge with Gayle Rubin and Michel Foucault that expressions and representations of sexuality never take place in a vacuum but are always culturally inscribed with particular meanings and judgments.[18]

> One should not think that desire is repressed, for the simple reason that the law is what constitutes both desire and the lack on which it is predicated. Where there is desire, the power relation is already present: an illusion, then, to denounce this relation for a repression exerted after the event.[19]

Thus, as Foucault writes in *The History of Sexuality* (1990 [1976]), a work which was to debunk the myth that Western societies have proceeded along a teleological historical line in which more and more liberation has been gained over time, non-normative sexual practices such as sodomy were present before 1800. Yet in the eighteenth and

nineteenth centuries, pathological identity categories related to these practices were invented and later institutionalized to become part of the fabric of an episteme of knowledge that was subsequently defended by the law.

It is also to acknowledge that feminist and queer critics are not always harmonious with one another. Whereas feminist work challenges masculinist notions of assault that carry over and tend to be prescriptive in judgments concerning acts of sexual violence towards women, queer legal advocacy may work towards other.[20] In this special issue Neloufer de Mel and Dinesha Samararatne offer a critical feminist analysis of a current geo-political legal setting. In their _*Article* "The Law's Gender: Entanglements and Recursions – Three Stories from Sri Lanka," the authors present three case studies of Sri Lankan women who encounter the police and judiciary in contexts of gendered violence. Their contribution tests the conditions of the law as the guarantor of justice and asks why it is thinkable and, indeed, crucial for women to (re)turn to the law despite its demonstrably discriminatory practices. They argue that only through such insistence can law be rendered less masculinist. The individual women's faith in law demonstrates a trust in the law's legitimacy that may belie various minoritarian groups' historically reiterated experiences of discrimination. Yet it also speaks to legal reform as an ongoing project.

To dis-able law is to demonstrate, once again, the historical specificity with which law has determined who and what counts as a legal persona in a given locality. This task is carried out powerfully by Lisa Beckmann in this issue. Beckmann's *Essay* "Undoing Ableism – Disability as a Category of Historical and Legal Analysis" traces the emergence of disability as a category in US history and law at the turn from the nineteenth to the twentieth century. She offers a sustained analysis of how industrialization conjoined with legal practices and categories to create disability. Thus dis-ability can never be considered in isolation, she argues, as its creation in law and forms of legal enforcement always overlaps with discriminatory practices of gendering, racially inscribing, and marginalizing the poor.

Further Arguments for Law's Pluralities

With reference to the third part of its title, how does this special issue on Undoing Law present further arguments for law's pluralities? In the first case, the subtitle refers to

the origin of some of the essays included here, which was a conference on *Law's Pluralities* that was supported by the International Centre for the Study of Culture (GCSC) at the Justus Liebig University of Giessen in cooperation with the Rudolf von Jhering Institute. In the second case, this part of the title refers to what "law's pluralities" entails.

In a recent publication that also resulted out of that conference, the contributors argue that a plurality of multidisciplinary means is needed to unpack the culturally embedded instances and performances of law in its various settings. Other meanings of "law's pluralities" explored there include non-Western and non-state oriented forms of normativity, as well as the current increase in overlaps between legal systems caused by legal transplants and, for instance, the Europeanization of law. Legal plurality is further understood to encompass a pre-nationalist understanding of normativity that was wider than subsequent state-centered ones, as well as re-current arguments for a legal pluralism that heeds the claims of normative orders outside of itself when existing legal norms and methods do not suffice to address a given conflict.[21] Further, the contributors claim, as do the ones here, that law is transmitted through topoi, narrative, performance, popular media and affective means.[22]

We understand the essays presented here to make further and interrelated claims to law's pluralities. The essays demonstrate how law genders and creates legal persons in processes of exclusion and differentiation from gendered, dis-abled, and de-humanized persons. Thereby, the potential violence and systemic defense of law is uncovered and un-done. It is our intention that this publication shall add further to a heteroglossic discourse about law's pluralistic nature. We invite readers to carry this conversation into the future.

_Endnotes

1 Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Abingdon/New York: Routledge-Cavendish, 2007).

2 Jacques Derrida, "Force of Law: The Mythical Foundation of Authority," in *Acts of Religion: Jacques Derrida*, ed. Gil Anidjar (New York/London: Routledge, 2002), 230–298.

3 Robert M. Cover, "Violence and the Word," in *The Yale Law Journal* 95.8 (1986), 1601–1629.

4 Greta Olson, "The Turn to Passion: Has Law and Literature become Law and Affect?," in Special Issue on "Legal Bodies: Corpus/Persona/Communitas," *Law & Literature* 28.3 (2016), 335–353.

5 Jörg Fisch, *Die europäische Expansion und das Völkerrecht: Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* (Stuttgart: Steiner, 1984).

[6] Sonja Schillings, *Enemies of all Humankind: Fictions of Legitimate Violence* (Hanover: Dartmouth College Press, 2017).

[7] Greta Olson, *Criminals as Animals from Shakespeare to Lombroso*. (Berlin/New York: de Gruyter, 2013).

[8] Raymond Williams, "Culture," *Keywords: A Vocabulary of Culture and Society* (New York: Oxford University Press, 1985 [1976]), 87–93.

[9] Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (New York/London: Routledge, 1984 [1979]).

[10] See Greta Olson, "Towards a Comparative and Localized Study of Brazilian Law and Literature," in *Direito e Literatura na Virada do Milênio/Law and Literature at the Turn of the Millennium*, ed. Sonja Arnold and Michael Korfmann (Porto Alegre: Editora Dublinense, 2014), 15–38, and Sonja Schillings, "The Privateering Critic: Re-Reading the Problem of the Ban in Marie de France and Giorgio Agamben," in *Krisis: Journal for Contemporary Philosophy* 1 (2015), 30–38.

[11] Peter Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (Berkeley: University of California Press, 1995), 15.

[12] "Law's Pluralities. Cultures, Narratives, Images, Genders," Conference Homepage, accessed July 4, 2017, <https://lawspluralities.wordpress.com/>.

[13] Greta Olson, "Narration and Narrative in Legal Discourse," in *Living Handbook of Narratology*, ed. Peter Kühn et al. (Hamburg: Hamburg University Press, 2014), n. pag.; Greta Olson, "Futures of Law and Literature: A Preliminary Overview from a Culturalist Perspective," in *Recht und Literatur im Zwischenraum/Law and Literature In-Between: Aktuelle inter- und transdisziplinäre Zugänge/Contemporary Inter- and Transdisciplinary Approaches*, ed. Christian Hiebaum, Susanne Knaller, and Doris Pichler (Bielefeld: transcript, 2015), 37–69; Olson, "The Turn to Passion" (cf. note 4); Greta Olson, "Figuring Human Rights and Troping Law-and-Literature: Li-Young Lee's Poetic Investigations of Refugeeism and Migration," in Special Issue of *Amerikastudien* on "American Poetry Imagines the Law," ed. Birte Christ and Stefanie Mueller (forthcoming); and Greta Olson "On Narrating and Troping the Law: The Conjoined Use of Narrative and Metaphor in Legal Discourse," in *Narrative and Metaphor in the Law*, ed. Robert Weisberg and Michael Hanne (Cambridge UP, forthcoming).

[14] See Jeanne Gaakeer, " 'Sua cuique persona': A Note on the Fiction of Legal Personhood and a Reflection on Interdisciplinary Consequences," in *Law & Literature* 28.3 (Fall 2016), 287–317.

[15] Mary Midgley, *Beast and Man: The Roots of Human Nature* (London: Routledge, 1995).

[16] Mariella Mehr, *Stoneage*, Trans. Roger Russi, 1990 [Steinzeit (Basel: Zytglogge Verlag, 1981)], 48.

[17] Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, eds. Douglas Hay, Peter Linebaugh, John G. Rule, E. P. Thompson and Cal Winslow (London: Allen Lane, 1975), 17–63; Ian Gilmour, *Riot, Risings and Rvolution: Governance and Violence in 18th-Century England* (London: Pimlico, 1993).

[18] Gayle Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality," in *Culture, Society and Sexuality: A Reader*, 2nd ed., eds. Richard Parker and Peter Aggleton (New York: Routledge, 2007 [1984]), 150–187.

[19] Michel Foucault, *The History of Sexuality: An Introduction* (New York: Vintage Books, 1990 [1976]), 81–82.

[20] See discussions in Ulrike Lembke, *Regulierungen des Intimen: Sexualität und Recht im modernen Staat* (Wiesbaden: VS Springer, 2017), and Lynne Huffer, *Are the Lips a Grave? A Queer Feminist on the Ethics of Sex* (New York: Columbia University Press, 2013).

[21] Greta Olson, "Introduction: Mapping the Pluralist Character of Cultural Approaches to Law," in Special issue on "Law's Pluralities: Arguments for Cultural Approaches to Law," eds. Greta Olson with Franz Reimer, *German Law Journal* 18.2 (March 2017), 233–254, here: 234–241.

[22] Olson with Reimer, "Law's Pluralities," (cf. note 21).