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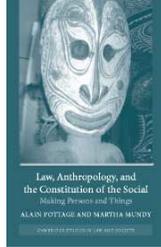
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Law, Anthropology, and the Constitution of the Social

Making Persons and Things

Edited by Alain Pottage, Martha Mundy

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Chapter

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CHAPTER ONE

INTRODUCTION: THE FABRICATION OF PERSONS AND THINGS

Alain Pottage

Each of the contributions to this book addresses the question of how legal techniques fabricate persons and things. In exploring that question, and in asking just what ‘fabrication’ means, each chapter focuses on a specific historical, social, or ethnographic context. Given that these contexts, and the modes of institutional or ritual action which they disclose, are quite varied, this book does not aim to provide a general theoretical account of the fabrication of persons and things in law. Indeed, the term ‘fabrication’ is chosen precisely because it suggests modes of action which are lodged in rich, culturally-specific, layers of texts, practices, instruments, technical devices, aesthetic forms, stylised gestures, semantic artefacts, and bodily dispositions. Each contribution shows how, in a given social, historical, or ethnographic context, elements of this repertoire are mobilised by legal techniques of personification and reification. The specific character of these modes of action would be lost in a general theory of law as an agent of ‘social construction’. Yet, diverse as they may be, our approaches to the question of legal fabrication are brought together as resources for reflection upon a specific institutional predicament. In Western legal systems, persons and things are now problems rather than presuppositions. One could point to technology, and biotechnology in particular, as the main factor here, but there are other reasons for the implosion of the old legal division between persons and things. For example, those institutions which effectively ‘naturalised’ legal artefacts (notably, the institution of inheritance) have lost their central role in law and society. For the purposes of an introduction, the important point is that the complex

techniques which legal institutions traditionally used to fabricate persons and things no longer function silently and reliably. The legal boundary between persons and things, rather like that between nature and culture, is no longer self-evident. In many areas, legal forms have been colonised by 'ethical' (or similarly regulatory) modes of decision-making, which implicitly acknowledge the impossibility of beginning within a natural order of things. Collectively, the contributions to this volume give historical and comparative depth to reflection on this predicament.

The question of how legal institutions construct the category of the person has been asked often before. For example, a great deal of attention has been given to the statuses which Western legal systems attributed (or denied) to married women. Many of these studies imagine legal personality as the institutional clothing of a 'real' (natural, biological, or social) person; and, however critical they might be in other respects, the distinction between persons and things continues to function as an untheorised premise, much as it does in orthodox legal doctrine and theory. In some cases, what is in question is only the proper attribution of phenomena to either side of an ostensibly natural division between persons and things. Elsewhere, an immanent critique of legal constructs is underpinned by the untheorised assumption that legal rules *correspond* to natural or social facts.¹ Of course, there are studies of the legal status of women which develop sophisticated analyses of legal categories as ideological constructs.² But even where the legal person is analysed in these terms, the division between persons and things remains a silent premise; it resurfaces as a methodological commitment to a distinction between construction and reality; or, in Marxist terms, between science and ideology.³ The contributions to this book approach the question of fabrication without assuming a division between persons and things, either as a basic truth about the nature of phenomena they observe, or as a methodological postulate

¹ As in M. Davies and N. Naffine, *Are Persons Property?* (Dartmouth, Ashgate, 2001). See, e.g., at p. 99: 'possessive individualism in law, though still robust in contemporary legal thinking, fails to supply a sensible, credible understanding of our embodied selves'; and, on the same page, possessive individualism is said to 'deal poorly with the facts of female embodiment'.

² See notably Mary Poovey, *Uneven Developments: The Ideological Work of Gender in Mid-Victorian England* (Virago, London, 1989).

³ See, e.g., the observations on social constructivism that are made in Bruno Latour, Chapter 3.

which structures observation itself. The distinction between persons and things may be a keystone of the semantic architecture of Western law, but our accounts of fabrication distinguish between the semantic and pragmatic dimensions of law. From that perspective, the distinction becomes a contingent form, which is sustained by modes of social action which are productively misunderstood⁴ by legal semantics.

The distinction between persons is interesting not because there is some critical discrepancy between the legal construction of the person and the natural reality of human individuality, but because it is becoming clear that the *act of distinguishing* between these two orders is itself radically contingent. In other words, the question now is not how to fit entities into the 'right' category, but to explore the emergence and deployment of the category itself. It is becoming increasingly clear that in Western legal systems, as elsewhere, 'the order of things is determined by decision, a distinction, that itself is not ordered'.⁵ So, whereas critiques of law have so far treated the category of person/thing as an embedded feature of the world (either in the sense that it mirrors the ontological structure of the world, or in the sense that it defines the terms in which we apprehend the world), the approach taken in this volume treats it as a purely semantic, aesthetic, or ritual form, which is produced by particular perspectives or techniques. The distinction 'is not itself ordered' because it is referable to these emergent ways of seeing and doing rather than to the ontological architecture of the world. Not all of the contributors to this volume share the vocabulary of divisions and distinctions (which is drawn from systems theory) or the theoretical approach which it expresses, but all are concerned to apprehend legal and social action without presupposing a categorical division between persons and things. More importantly, perhaps, all of the contributions drop the theoretical prejudice built into the old category, which, at least in the case of law, took the person as the privileged term. Whereas traditional accounts of law were concerned only with the question of how persons were constructed ('things' being the implicit antithesis of 'persons') our inquiry is symmetrical, being as much concerned with the fabrication of things as of persons.

⁴ For this idea of 'productive misunderstanding', see, e.g., Gunther Teubner, 'Contracting Worlds: The Many Autonomies of Private Law' (2000) 9(3) *Social and Legal Studies* 399.

⁵ William Rasch, 'Introduction' to Niklas Luhmann, *Theories of Distinction: Redescribing the Descriptions of Modernity* (Stanford University Press, Stanford, 2002), p. 24.

RES AND PERSONA

The distinction between persons and things has always been central to legal institutions and procedures. The institutions of Roman law, to the extent that Rome can be taken as the origin of the Western legal tradition, attached persons (*personae*) to things (*res*) by means of a set of legal forms and transactions (*actiones*) which prescribed all of their permissible combinations.⁶ In the common law tradition, this sort of division is not as precisely drawn as it is in European codified systems, but the continuing importance of Hohfeld in Anglo-American legal theory testifies to the fact that the common law also assumes this fundamental division.⁷ It may even be that, having been constructed and refined in Roman legal institutions, the basic division was taken up in other branches of social theory. There is a very powerful argument that the institutional architecture of Roman law still structures our apprehension of society, and that sociology and political theory are more profoundly 'juridical' than they imagine themselves to be, precisely because they presuppose a basic division between persons and things.⁸ Whether or not one subscribes to that argument, it reminds us that the distinction between persons and things is a foundational theme in Western society, and that legal institutions have played an essential role in constituting and maintaining that distinction. Confidence in what Bruno Latour calls the 'old settlement' is no longer as straightforward as it might seem. With the advent of biotechnology patents, biomedical interventions, transgenic crops, and new environmental sensitivities, the distinction between persons and things has become a focus of general social anxiety. In each of these technological areas, persons become indistinguishable from things: gene sequences are at once part of the genetic programme of the person and chemical templates from which drugs are manufactured; embryos are related to their parents by means of the commodifying forms of contract and property, and yet they are *also* persons; depending on the uses to which they are put, the cells of embryos produced by *in vitro* fertilisation might be seen as having either

⁶ See W. T. Murphy, *The Oldest Social Science* (Oxford University Press, Oxford, 1997), ch. 1.

⁷ The classic texts are W.N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 26 *Yale Law Journal* 16; 'Some Fundamental Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710.

⁸ The most sophisticated argument is found in Gillian Rose, *Dialectic of Nihilism* (Basil Blackwell, Oxford, 1984).

the 'natural' developmental potential of the human person or the technical 'pluripotentiality' that makes them such a valuable resource for research into gene therapies. In each of these cases, the categorisation of an entity as a person or a thing is dependent upon a contingent distinction rather than an embedded division.

Accordingly to popular perception, legal institutions are supposed to be based on a natural division between persons and things, and yet now they seem systematically to transgress that natural ordering. For example, intellectual property laws reinforce the grip of pharmaceuticals corporations on human tissues, family law tolerates or endorses the commodification of gametes and embryos, and bio-ethical legislation allows various kinds of therapeutic research on (human) embryos. Attention is (again) directed to the question of how to distinguish persons from things, and it is often argued that new developments imply a fundamental departure from the 'original' legal constitution of the two categories. In these circumstances it seems especially appropriate to (re-)consider the making of persons and things in legal settings. Whatever one makes of the idea that we still have to reckon with the legacy of Roman law,⁹ contemporary critiques of technology implicitly appeal to some notion of a tradition conserved by law. It is therefore quite timely to explore the fabrication of persons and things from a historical-anthropological perspective, by paying attention to the different contexts in which these legal categories have been deployed, and by extending the inquiry beyond Western institutions. The contributions to this book suggest that persons and things have multiple genealogies, and that their uses are too varied to be reduced to one single institutional architecture. Each form or transaction constitutes persons/things in its own way. This has some important implications. Although the theme of slavery still informs critiques of contemporary technology (it is often asked, for example, how the 'ownership' of genes or embryos is different from the ownership of slaves) the real problem is that we can no longer divide the world into the two registers that are presupposed by any argument against slavery. Now, the problem is that humans are *neither* person *nor* thing, or simultaneously person *and* thing, so that law quite literally *makes* the difference.¹⁰ This book develops a

⁹ This is the perspective adopted by the legal anthropology of Pierre Legendre, which is presented in his *De la société comme texte* (Fayard, Paris, 2002).

¹⁰ There is a resonance between emergent social anxieties and the recent questioning of the distinction between persons and things in science studies (e.g., Bruno Latour, *Politiques de la nature* (La Découverte, Paris, 1999), esp. chs. 1 and 2).

number of perspectives on the kind of ‘in-between’ action which produces legal form, and especially persons and things: network action and circulating reference, institutional fictions, indexes of attachment, the manipulation of semantic potential, and so on. And this is precisely where ethnographic observation complements legal-theoretical analysis. Although not all of the essays are about Western law, and although one or two have little to say about legal institutions as such, each offers a resource for re-thinking the composition of persons and things, the modes in which they are distinguished and (re-)combined by legal institutions.

One particular sub-institution – ownership – is central to the treatment of personification and reification. To some extent this may be inevitable, because ownership is so often taken to be the keystone of legal and social institutions. Certainly, ownership is the context in which legal doctrine and legal theory have worked out the capacities or competences of persons *in relation* to things, and ownership is the thematic ‘channel’ through which these doctrinal glosses have made their way into general circulation in society. Ownership is the setting in which the legal constitution of persons and things has become most vulnerable to social and technological developments. Through the use of biomedical technologies, human beings have acquired potentialities which are actualised in a new set of claims and attachments. Law, and property law in particular, is asked to construe ‘claims for which no prior transactional idiom [exists]’.¹¹ This is not just a variation on the old argument that law lags behind society (in any case, we should now conceive of law *in* society rather than law *and* society).¹² Western law (or, more precisely, adjudication) has always taken shape ‘between’ convention and invention; the paradox arises from the manner in which legal procedures invent the tradition which they purport only to continue.¹³ The trouble with biomedicine and biotechnology is that they expose the paradox for what it is, and a number of our contributors identify reasons why Western law is finding it increasingly difficult to manage contingency in the ‘traditional’ ways. The tension between tradition

¹¹ Marilyn Strathern, ‘Potential Property: Intellectual Rights and Property in Persons’ (1996) 4 *Social Anthropology* 1, 17–32, at p. 18.

¹² See generally Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt, 1995).

¹³ There is a wonderful illustration of this in F.W. Maitland, ‘Why the History of English law is Not Written’ in H.A.L. Fisher (ed.), *The Collected Papers of Frederic William Maitland* (Cambridge University Press, Cambridge, 1911).

and modernity, as it affects the central contexts of legal personification and reification (kinship, ownership, production), is an important theme in contemporary anthropology. And, even though it is not explicitly addressed by all of our contributors, it is an essential theme in the collection as a whole; for example, Yan Thomas' analysis of the Roman law relating to dead bodies is written against the backdrop of developments in contemporary law relating to the legal status of the body and its tissues.

This is just one sense in which our reflection on personification and reification in law brings together law *and* anthropology.¹⁴ The questions raised by biotechnology and biomedicine are compounded by the effects of 'globalisation'. To begin with, the extension of corporate and institutional networks re-contextualises cultural forms; the point is not that the world is becoming progressively more uniform,¹⁵ but that globalisation brings with it new sensitivities to the distinction between local and global. This is an anthropological question: 'whether one lives in Papua New Guinea or in Britain, cultural categories are being dissolved and re-formed at a tempo that calls for reflection, and that, I would add, calls for the kind of lateral reflection afforded by ethnographic insight'.¹⁶ But these sensitivities have important implications for the (self-)conceptualisation of law. The expansion of legal discourses beyond their national limits elicits new conceptions of the agency or fabrication of law.¹⁷ How should law be identified if the old emblems of state power are no longer available? One response is given in Gunther Teubner's interpretation of global law in terms of autopoietic theory, which develops the old anthropological theme of legal pluralism into the model of a legal discourse that sustains itself without reference to a local, national, authority.¹⁸ Legal action is re-defined. In place of hierarchy, sovereignty, and domination, law is construed as a discourse that consists only in actualisation (its use in communication) rather than

¹⁴ The complexities of this mediating 'and' cannot be discussed extensively here. See, Annelise Riles, 'Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity' (1994) 3 *University of Illinois Law Review* 597.

¹⁵ A recent issue of the French legal journal *Archives de la Philosophie du Droit* was entitled 'L'américanisation du droit'.

¹⁶ See Marilyn Strathern, *Property, Substance and Effect* (Athlone, London, 1999), p. 24.

¹⁷ On this theme see generally A. Riles, *The Network Inside Out* (Michigan University Press, Ann Arbor, 1999).

¹⁸ G. Teubner (ed.), *Global Law Without a State* (Dartmouth, Aldershot, 1997).

in substance (a corpus of texts or an institution of domination). Again, the implications of globalisation are more explicitly addressed in certain contributions, notably those by Murphy, Strathern, and K uchler, but the new contexts of legal-cultural idioms define another of the major thematic horizons of the collection as a whole. Globalisation joins biotechnology in eliciting new conceptions of the functioning of legal institutions.

More abstractly, these essays on personification and reification are situated at a particular juncture in social theory. To borrow Niklas Luhmann's characterisation, one might say that contemporary theories of society are faced with the difficulty of changing their theoretical 'instrumentation' from a schema of 'division' to a schema of 'distinction'.¹⁹ Classically – from Aristotle to Hegel, that is – theories divided the world into foundational oppositions, which were inscribed in the very texture of the world or in the categories through which the world was (necessarily) experienced; as in, for example, the basic categories of space (near/far), time (past/future), or action (intention/effect).²⁰ Taking the example of time, the classical scheme takes the division between past and future to be embedded in the categories of experience in such a way that the present moment from which the world is observed is lodged in a succession of modal 'presents': past present, actual present, and future present.²¹ The predicament involved in transforming division-based schemes into distinction-based forms arises from the recognition that this linear scheme has become 'dis-embedded', so that the present becomes referable to a particular observer rather than a position embedded in a linear succession. In other words, the form of the distinction is contingent on the observer who draws it: 'in the case of distinction, everything depends on how the boundary that divides two sides (that is, the distinction) is drawn'.²² In the case of time, this is exemplified by the emergence of the predicament of risk, which arises

¹⁹ Niklas Luhmann, *Observations on Modernity* (Stanford University Press, Stanford, 1998), esp. ch. 4. Luhmann may be more familiar in legal theory than in anthropological theory, but see (e.g.) Sari Wastell, 'Presuming Scale, Making Diversity' (2001) 21(2) *Critique of Anthropology* 185.

²⁰ For a fuller discussion, see Luhmann, *Observations on Modernity*.

²¹ See also Jacques Derrida, *Specters of Marx* (Routledge, London, 1994).

²² Luhmann, *Observations on Modernity*, at p. 87. This is not just another form of 'relativism', if only because the distinction between relativism and objectivity loses its pertinence when theory begins from the premise of self-reference rather than correspondence.

when actors become aware that decisions made in *this* present will have consequences which will become apparent only in the *future* present that will be generated by the decision itself. In Luhmann's terms, 'time and space are only media for possible distinctions, media for possible observations, but are as unobservable as is the world as a world'.²³ The character of time as a 'dis-embedded medium' is illustrated more expressively in Marilyn Strathern's re-interpretation of the familiar legal-historical division between status (tradition) and contract (modernity). Whereas the tradition (*sic*) presents this division in terms of linear historical evolution, Strathern suggests that we are at 'both ends of the continuum at the same time', so that we might be said to have '*more* tradition and *more* modernity at the same time'.²⁴ A form which was constituted as the historicity of the world becomes the medium for generating a multiplicity of temporal schemata. And these modes of temporalisation bring with them modes of personification and reification. Whereas persons and things were the principal exemplars or anchors of 'divisionism' or 'asymmetry', the increasing recognition that each human body or individual is potentially either person *or* thing brings with it an awareness that techniques of personification and reification are constitutive rather than declaratory of the ontology upon which they are based.

This points to another thematic horizon of the collection: the question of potentiality/actuality. The proposition that legal and social conventions constitute the ontological forms which they claim only to recognise is clearly inconsistent with doctrinal and legal-philosophical understandings of social action. This has particular implications for the construal of ownership claims. The economic understanding of property is based on the notion of material scarcity; transactions in property are either concerned with extracting, processing, dividing, or transferring the finite substance of the world. In the case of intellectual property, this understanding implies that the spontaneity of mental creativity has to be materialised before it can constitute property;²⁵

²³ Luhmann, *Observations on Modernity*, at p. 87. 'Unobservable' because, as schemes which inform observation, they cannot be present to the observer in the moment of observation.

²⁴ Marilyn Strathern, 'Enabling Identity? Biology, Choice and the New Reproductive Technologies' in Stuart Hall and Paul du Gay (eds.), *Questions of Cultural Identity* (Sage, London, 1996).

²⁵ 'The law takes an intangible thing and builds around it a property structure modelled on the structure which social and legal systems have always applied to some tangible

subjectivity is only legible in material embodiments or supports. In terms of the question of potentiality/actuality, this implies that ownership conventions are coupled to a particular conception of *production* as the means by which potentialities are made actual. This conception of production attributes all creative or originating action to one or other pole of the division between persons and things. However, claims to biotechnology patents (to take one example) confront legal conventions with a kind of originating activity which does not belong to that causal scheme. As I observe in my contribution, experiments in molecular biology suggest that living organisms emerge from processes of self-production (autopoiesis or epigenesis). Far from conforming to the juridical paradigm of production, which would require the potentiality of organisms to be lodged in a genetic or evolutionary programme, these modes of self-production suggest that organisms are formed in and by the metabolic processes which sustain their processes of ontogenesis. Organic production resonates with those models of social action which have attempted to explain the paradox of emergence (namely, the paradox of self-production).²⁶ My contribution and that of Susanne Küchler sketch out some of the ways in which new conceptualisations of biological process suggest new ways of conceiving attachment, production, creation, and actualisation. Many of the essays describe legal techniques of personification and reification which, precisely because they do *not* express a more fundamental division of the world into the two registers of persons and things, suggest that law makes persons and things by actualising undifferentiated potentialities. And if nothing in this medium has an essential, ontological, vocation to be person or thing, this in turn suggests that the actualisation of potentialities is a radically creative operation.

The essays in the book describe this kind of creativity from different perspectives and with reference to different contexts or questions. The first section of the book explores the theme of institutional production. The question of institutional creativity is tracked through the

things. By instituting trespassory rules whose content restricts uses of [an] ideational entity, intellectual property law preserves to an individual or group of individuals an open-ended set of use-privileges and powers of control and transmission characteristic of ownership interests over tangible items': J.W. Harris, *Property and Justice* (Oxford University Press, Oxford, 1996), p. 44.

²⁶ In social theory the obvious example (again) is the work of Niklas Luhmann, but the question increasingly arises in the fields of accounting, management, operational systems, biology, and so on.

historical anthropology of Roman law (Thomas), through an ethnography of France's Conseil d'Etat (Latour), to an examination of the role of mass-production in law (Murphy). The second section considers how legal techniques of personification and reification actualise the potentialities contained in, respectively, semantic forms and the human body. Mundy and Akarlı analyse the construction of persons and things in Ottoman-Islamic legal settings, while Strathern, Küchler, and I develop the theme of bodily potential as a resource for the fabrication of persons and things.

PERSONS AND THINGS AS INSTITUTIONAL ARTEFACTS

If the 'making' of persons and things is approached by way of a reflection on institutional creativity, two general issues present themselves. First, the techniques by means of which the law manufactures and deploys the categories of person and thing can be seen as defining the peculiar nature of (legal-)institutional action. Following the example of Roman law, one might say that the identity of legal institutions consists in the way they build conventions and transactions round the cardinal points of person and thing. But this mode of institutional action also identifies law in the sense of distinguishing it from other social discourses or institutions. In that sense, and at least in the first instance, there is no warrant for extending the action of the persons and things invented by law beyond the horizon of the institution. Minimally, and most importantly, this means that the legal person has no necessary correspondence to social, psychological, or biological individuality. In an age which still identifies personal fulfilment or emancipation with the acquisition and defence of legal rights, this might seem almost perverse. The construction of the legal persona of the author illustrates how legal personality is taken as an attribute of 'real' individuals, and how in turn legal doctrine reinforces those expectations. For example, by constituting the author as an owner of ideas, intellectual property law stabilised and 'naturalised' the romantic conception of the spontaneously creative individual,²⁷ and this relation between legal personality and

²⁷ 'The principal institutional embodiment of the author-work relation is copyright, which not only makes possible the profitable publishing of books, but also, by endowing it with legal reality, produces and affirms the very identity of the author as author . . . What we here observe is a twin birth, the simultaneous emergence in

natural individuality still seems self-evident.²⁸ One of the advantages of anthropological distantiating is that it problematises assumptions of this sort. For example, the anthropology of Roman law reveals a mode of institutional action – or, more precisely, a technique of personification and reification – which suggests that what are taken as overarching *social* categories (the sex, gender, kinship, capacity, or creativity of persons, and the quiddity of things) are specialised artefacts which are not predicated on some general social ontology.

Institutional fictions

Yan Thomas' essay on the category of the 'pure' in Roman law proposes the most restrictive specification of legal institutions. This contribution should be set in the context of Thomas' historical anthropology of Roman law, which has been developed through a number of now celebrated studies in institutional technique. Reductively, one might say the central or fundamental question is that of institutional reference: how do legal categories relate to the world 'outside' the institution? For Thomas, the character of legal institutions is expressed by the Roman law technique of fictions.²⁹ According to the modern doctrinal understanding of proof and procedure, fictions and presumptions are devices which assist in making decisions in conditions of uncertainty. Typically, presumptions are presented as crude, pragmatic, instruments of probabilistic reasoning: as encrypted experience. For example, the old

the discourse of the law of the proprietary author and the literary work. The two concepts are bound to each other. To assert one is to imply the other, and together, like the twin suns of a binary star locked into orbit about each other, they define the centre of the modern literary system': Mark Rose, 'The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship' in Brad Sherman and Alain Strowel (eds.), *Of Authors and Origins* (Clarendon Press, Oxford, 1994), p. 23, at pp. 28 and 39.

²⁸ David Saunders summarises this point of view as follows: 'A certain habit of mind remains attached to the notion of an essential person, one which in terms of the history of authorship would typically be moral or aesthetic, the locus of a subjectivity deeper and more general than mere institutional constructs such as the juridical persons of copyright holder or obscene libeller. Unlike them, so it might seem, this subjectivity would not depend on attributes formed in a technical apparatus resting on executed statutes and judicial determinations . . . Surely there has to be a fundamental personality, the person itself, that constitutes the necessary ground of legal personalities, the anchorage on which they ultimately depend': *Authorship and Copyright* (Routledge, London, 1992), p. 12.

²⁹ Yan Thomas, '*Fictio legis*: L'empire de la fiction romaine et ses limites médiévales' (1995) 21 *Droits* 17.

repertoire of presumptions used in family law to determine paternity – an example which is especially apposite because changes in the use of the old presumptions have renewed anthropological interests in legal determinations of kinship³⁰ – can be seen as attempts to second-guess biology. The probabilistic quality of presumptions becomes somewhat more tenuous in the case of something like the *commorientes* principle,³¹ and it disappears altogether where (irrebuttable) presumptions are used to impose normative objectives.³² Moreover, one might say that, precisely because fictions and presumptions are used in the absence of any determinate facts from which to draw evidential inferences, they are not really ‘evidence’ or ‘argument’.³³ But the important point is that whether they are seen as probabilistic devices or as normative trumps, their role is understood in terms of the ideal of a proper relation of correspondence between norm and nature. Fictions and presumptions work *within* the division between law and fact, or between legal propositions and the ‘things’ to which they refer.

Against this background, Thomas focuses on the technique of legal fictions in Roman law, and proposes two correctives to the modern understanding. First, there is a categorical distinction between fiction and presumptions: presumptions (even irrebuttable presumptions) are used where there is uncertainty as to the true facts; fictions are used where there is certainty as to the *falsity* of the proposition asserted by the fiction. The eclipse of this classical distinction between fictions and presumptions has obscured our view of law’s original institutional technique. Precisely because they took shape against a background negation of ‘reality’, fictions in Roman law implied something very different from the modern idea of a correspondence between norm and nature. Rather, the construction of Roman law was based on ‘a radical non-relation between the institution and the world of natural

³⁰ See, e.g., Janet L. Dolgin, *Defining the Family: Law, Technology, and Reproduction in an Uneasy Age* (New York University Press, New York, 1997).

³¹ Where two heirs die together in circumstances in which it is impossible to establish which of the two predeceased the other, the descent of property follows the ‘natural’ principle that the elder of the two died first.

³² One example is the traditional presumption of criminal law that boys under the age of 14 are incapable of rape.

³³ The upshot is that presumptions are not a mode of evidential reasoning: ‘Presumptions are not in themselves either argument or evidence, although for the time being they accomplish the result of both’: James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston, 1898), p. 336.

facts [*la radicale déliaison de l'institutionnalité d'avec le monde des choses de la nature*].³⁴ The institution had effects in the world, but these were achieved by an ongoing negation of reality. The operation of fictions in Roman law can be illustrated by reference to the technique of 'negative fictions'; these were fictions which declared that real, actual, events had not occurred (as distinct from 'positive' fictions, which declared something to exist which had no existence in 'fact'). For example, the *lex Cornelia* of 81 BC held that, despite the general rule that Roman citizens lost their testamentary capacity when they were taken captive by an enemy, citizens who died as captives were nevertheless deemed, by operation of fiction, not have been captured at all, to have died as free men, and therefore to have retained their capacity to make a valid will.³⁵ What is essential is that the law did not just fictionalise the facts so as to deny the truth of capture, but that the fiction also effected a kind of institutional 'double negation'. The role of the fiction was to countermand the prior rule as to testamentary capacity, so that the fiction negated a pre-existing law *by way of* a declaration as to the facts. In a sense one might say that the fiction articulated a relation of the institution to itself: the fiction equiparates³⁶ the institution itself to an external reality which, ostensibly, it negates. Fictions therefore performed a kind of institutional involution in which differences or distinctions were internal to the institution itself:

The difference between law and fact is not a difference of fact but one of law, and this is what defines the essence of the institution, and what makes fictions so revelatory of the artificiality of the institution.³⁷

The axis relates the institution to itself rather than to the 'real' world. So, although it might have been easier simply to validate the wills of citizens who died in captivity, without employing any kind of fiction, Roman law *preferred* fictions. With each successive involution, 'the law became increasingly isolated by these ever more complex constructions, always widening the gap between itself and reality [*le réel*]'.³⁸ By means of these concatenated negations, fictions preserved the notion of external reference, but only as a resource for an ever more involuted process of institutional self-reference.

³⁴ Thomas, 'Fictio legis', at p. 20. ³⁵ *Ibid.* at pp. 22–4.

³⁶ Equiparation being itself a legal technique of fictionalisation.

³⁷ Thomas, 'Fictio legis', at p. 35. ³⁸ *Ibid.* at p. 34.

Thomas's approach to legal institutions has some affinity with the style of legal anthropology developed by Louis Gernet.³⁹ For example, Gernet's celebrated essay on time and temporality in ancient (Greek and Roman) law demonstrates how these institutional regimes were indifferent to what would now be regarded as 'real' facts in the world. One of the examples given concerns the Roman law action of *vindicatio*, which was the formula used to claim ownership of some object. It was therefore one of the key techniques of personification and reification in Roman law, an institutional device which delimited the respective capacities and competences of person and thing. The modern interpreter might find the formula for the action of *vindicatio* entirely absurd. When he is challenged by his adversary to show cause or title ('I ask you to justify your claim [*postulo anne dicas qua ex causa vindicaveris*']'), the claimant merely refers to the ritual words with which he initiated his action ('I established my right by imposing my claim [*ius feci sicut vindictam imposui*]'). So, whereas we would expect the claimant to invoke some prior act or event as the warrant of his claim, the claimant grounds the 'substance' of the claim within the convention itself, rather than in the world of facts lying outside the institutional drama of the action. Law 'consisted in action [*le droit est essentiellement action*]'⁴⁰ because rights – and, importantly, their relation to the facts which were their warrant – had no 'ontology' other than that which was granted to them by the drama of the trial process.

Thomas emphasises the historical or anthropological specificity of the institution the better to demystify modern expectations of what law can achieve. Although there is a stronger claim – implied in the proposition that legal technique was 'the most durable and the most historically adaptable form of intelligence produced by the Roman world' – the polemical charge of his account is essentially directed against any assumption that the legal forms of person and thing can somehow

³⁹ There is one very important qualification to be made here. Gernet's doctoral thesis of 1917 (recently republished as *Recherches sur le développement de la pensée juridique et morale en Grèce* (Albin Michel, Paris, 2001) cites Durkheim as its principal influence. His later essays are collected in *Droit et institutions en Grèce antique* (Flammarion, Paris, 1982) and *Anthropologie de la Grèce antique* (Flammarion, Paris, 1982). Tim Murphy observes (Chapter 4) that Durkheim is a major proponent of the view that 'law is one of the most important, or the most institutionalised, way in which the features of society are apprehended in thought'. Thomas's view of law's social functions is clearly not Durkheimian.

⁴⁰ Gernet, *Droit et institutions en Grèce antique*, at p. 122.

embody or implement general social objectives. Contrary to the general political expectation that the legal definition of persons or things might secure the integrity of environments, genes, or embryos, and contrary to the theoretical understanding of legal institutions as discursive palimpsests in which succeeding social ideas inscribe themselves, Thomas insists on the 'cold, technical' character of legal rationality. In his essay on *res religiosae*, this critical approach is focused on the interpretation of the category of (im)purity in certain versions of the anthropology of religion. The essay is a case study of a particular form of *res religiosa* – the tomb. Whereas one would expect the laws relating to tombs and dead bodies to be saturated with social and religious meanings surrounding death and the afterlife, Thomas shows how the relevant prescriptions, while not being entirely indifferent to generalised beliefs, were developed autonomously. The tomb and its contents were defined by an institutional technique that was concerned with two interlinked questions: first, the problem of fabricating a permanent institutional entity from the various contingencies which surrounded the practice of burial; and, secondly, that of defining this institutional *res* in such a way as to secure and delimit the perpetual memorial foundations which were attached to tombs, and which benefited from significant fiscal concessions. Crudely, one might say that the legal constitution of tombs had more to do with tax avoidance than religious belief. As Thomas puts it: 'In Rome, law and legal rules were not the expression of [religious] taboos. Rather, they were instruments by which taboos were transformed into a set of techniques for the management of inheritance funds' (Yan Thomas, Chapter 2).

The first, ostensibly unremarkable, observation is that a tomb was constituted as a *res religiosa* by the inscription or incorporation of a body within it. In Roman law, a tomb was not apprehended as a purely incorporeal symbol or sign of the deceased person; rather, the *res* in question being an eminently corporeal *res* it had to be predicated on a material *corpus*. In Roman law doctrine, this was what made the difference between the constitution of a *res religiosa* as distinct from a *res sancta*. How then was the materiality of body defined? Many of the difficulties of reifying body have been accentuated or multiplied by the advent of modern technologies, and are exemplified in debates concerning the removal of tissues or gametes *post mortem*. In the case of Roman law, the difficulties arose from the circumstances of death or the peculiarity of cultural practices relating to dead bodies. For example, in the (not unusual) case of a body which had been dismembered on the battle

field, which part, or what proportion of the parts, sufficed to constitute a body? Again, this was in part a question of social belief or interpretation (in the Roman imagination the head was the chief element of the body) and in part a question of fiscal policy – if a single body were allowed to generate a number of (protected) tombs there would clearly be a number of consequences. At what point did the legal protections associated with the status of a body as a *res religiosa* begin? In the Roman world, a body might be detained by creditors of the deceased, and held as a form of illegitimate lien or security for repayment of the alleged debt. Could a regime of protection based upon the rites of burial be extended (anticipatedly, as it were) to protect a body that had not yet been sanctified or ‘memorialised’? More generally, how was the law to deal with the organic process of decay? A tomb had to contain the material *corpus* that was the body, but the actual substance was variable: ashes, bones, decaying flesh. Clearly the problem of defining what counted as ‘body’ had practical implications. Lawyers might have to determine whether bodies could be exhumed and re-interred, and graves (and the bodies they contained) might have been violated in some way. But the more fundamental question was how, doctrinally, the *res* to which legal prescriptions referred should be defined. Granted that a material *corpus* was essential to the constitution of a *res religiosa*, how should this ‘matter’ be defined? What is important here is that legal technique bypassed any reflection on the actual condition of the remains found in tombs, and reduced the properly buried body, whatever its actual condition, to a state of permanence. The body was ‘instituted’ in the sense that institutional technique abstracted it from the flux of real (that is, social, biological, or historical) time so as to immobilise it: ‘the impression of permanence that was produced by the Roman law relating to tombs, by means of its norms of inviolability, inalienability, and imprescriptibility, clothed a corporeal entity, thereby rendering it immune to the deprivations of time’ (Thomas, Chapter 2). The body was, one might say, a form of institutional fiction. This was an essential technique of reification, by which bodily remains were turned into institutional ‘things’.

So, far from confirming the supposed responsiveness of Roman legal institutions to social beliefs, this example of tombs and dead bodies suggests that law was operationally autonomous. Although the categorisation of tombs as *res religiosae* implied their categorisation as ‘impure’ in Roman law, this had little to do with religious beliefs or taboos centred on the impurity of dead bodies. In law, the distinction between pure and

impure was deployed to differentiate those objects which were open to commercial exchange from those which were not. In other words, they were institutional categories which did no more than facilitate particular transactions: ‘The “profane” or the “pure” were not immediate and intuitive observations of religious consciousness, no more than were the “sacred”, the “religious” or the “holy”, which were strictly defined institutional categories’ (Thomas, Chapter 2). The question of the (im)purity of the body was elided by means of a technique which, having fictionalised the *corpus*, then focused on the *res* constituted by its inscription: the tomb. This institutional arrangement was characteristically Roman; the law protected the tomb rather than the body, the container rather than its contents: ‘The jurisprudence relating to the violation of tombs elaborated the basic principle that it was the tomb, rather than the body it contained, that benefited from religious status’. These illustrations give a close-textured picture of the fabrication of things in classical Roman law, and exemplify the kind of ‘innate autonomy’⁴¹ that characterised its institutions.

Reference and production

Bruno Latour’s approach to legal reference is a development of his ethnography of the scientific laboratory, in which the old configuration of persons and things, or subjects and objects, is displaced by the concepts of hybrids, translation, humans/non-humans, and associative action.⁴² These concepts have now become quite influential, so it may be sufficient to point to one particular illustration; namely, the concept of ‘circulating reference’ that is developed in Latour’s case study of soil collection in the Amazon basin.⁴³ This account of the collection and analysis of soil samples describes a process of displacement, in which each successive inscription becomes a referent for the next

⁴¹ See generally Thomas, *Fictio legis*.

⁴² The classic text is Bruno Latour, *We Have Never Been Modern* (Harvester, London, 1997).

⁴³ Bruno Latour, ‘Circulating Reference: Sampling Soil in the Amazon Forest’ in *Pandora’s Hope: Essays on the Reality of Science Studies* (Harvard University Press, Cambridge, MA, 1999), p. 24: ‘The old settlement started from a gap between words and the world, and then tried to construct a tiny footbridge over this chasm through a risky correspondence between what were understood as totally different ontological domains – language and nature. I want to show that there is neither correspondence, nor gaps, nor even two distinct ontological domains, but an entirely different phenomenon: circulating reference’.

signifying inscription: the set of superimposed maps, photographs, and coloured diagrams which domesticate the forest terrain, turning it into a rudimentary laboratory with controllable parameters; the extraction of samples by reference to this rudimentary grid, by means of a device which always takes samples of the same size; the immediate localisation of each sample by means of a record of provenance based on detailed co-ordinates; the collection of the final array of samples into a sort of multi-sectioned cabinet or specimen box in which soil distribution can be appreciated synoptically, and from which hypothetical patterns can be elicited; and, finally, the classification of soils according to a colour chart, which again accommodates the ‘facts’ precipitated so far to a new medium of signification – the colour code used to determine how rich in a clay a given sample might be. This is a story of continual displacement or ‘transportation’, of the production of reference by means of the gradual precipitation of an ever more determinate ‘fact’ from the transportation of reference through a chain of inscriptions:

Our philosophical tradition has been mistaken in wanting to make phenomena the meeting point between things-in-themselves and categories of human understanding . . . Phenomena are not found at the *meeting point* between things and the forms of the human mind; phenomena are what *circulates* all along the reversible chain of transformations, at each step losing some properties to gain others that render them compatible with already-established centers of calculation. Instead of growing from two fixed extremities toward a stable meeting point in the middle, the unstable reference *grows from the middle toward the ends*, which are continually pushed further away.⁴⁴

Latour’s notion of ‘transportation’ expresses a mode of emergence in which the reference potential of words and things is not innate, but is constituted by the process which actualises that potential: ‘Knowledge does not reflect a real external world that it resembles via mimesis, but rather a real interior world, the coherence and continuity of which it helps to ensure’.⁴⁵ This is the science studies version of Thomas’ analysis of the involuted fictions which defined the autonomy of Roman law.

Interestingly, Thomas’ anthropology of Roman legal institutions figures in Latour’s approach to science studies because legal technique – or, more precisely, procedural or legal rhetoric – supplies a prototype of the kind of hybrid(ising) action that is at work in ‘circulating reference’.

⁴⁴ Latour, ‘Circulating Reference’, at pp. 71–2. ⁴⁵ Ibid. at p. 58.

Things, and, for that matter, persons, are essential to this connection. Thomas' genealogy of the term 'thing' (*chose* in French, but one can do similar things with the English word 'thing')⁴⁶ traces its emergence back through the Roman law conception of a *res* to the term *causa*, which signified an issue, debate, or matter at hand. The point is that a term which now signifies an ontological form was once the name for a provisional nexus which held social or legal actors together in a kind of fluid or emergent bond.⁴⁷ In that sense, *chose/causa* was the name for a principle of emergent association between actors; or, to use Latour's favoured terminology, between humans and non-humans. Thus, Thomas' legal-anthropological etymology reveals the role of the thing as an 'index to the particular collective that one is seeking to bring together' [*l'indice du collectif que l'on cherche à rassembler*].⁴⁸ To return to the starting point of the introduction, one might say that juridical form, far from being the confirmation of long-standing models of action and creation, illustrates the modes of 'networked' associative action which animates laboratories, and social networks in general. But at the same time, Latour's ethnographic attention to law suggests limitations to this analogy between legal and scientific production. Both may be animated by 'hybridising' action, but conventions of personification and reification are deployed very differently in each domain, so that humans and non-humans take on different roles or functions in each. Latour's essay in this volume suggests that the distinction between subjectivity (persons) and objectivity (things) marks the difference between law and science. In fact, given Latour's notion of 'hybridising' associations of human and non-human agents, neither subjectivity nor objectivity is quite right. The essay talks about 'subjectification' and 'objectivity'; the terms evoke two contrasting techniques for apprehending and transporting 'facts'.

In one sense, the production of persons and things in legal settings is an example of 'circulating reference'. The legal 'laboratory' to which Latour turns his ethnographic attention – the Conseil d'Etat – is a very peculiar kind of legal institution. As France's supreme constitutional court, it is a unique fusion of legal, political, and administrative cultures. A court can be a laboratory in the same way as an area of the forest

⁴⁶ See, e.g., Martin Heidegger, 'The Thing' in *Poetry, Language, Thought* (Harper, Row, New York, 1971).

⁴⁷ See Bruno Latour, *Politiques de la nature*, pp. 88–9 and note at p. 316, citing Yan Thomas 'Res, chose et patrimoine: note sur le rapport sujet-objet en droit romain' (1980) *Archives de la philosophie du droit* 413.

⁴⁸ Latour, *Politiques de la nature*, at p. 351.

floor can be a laboratory: as soon as one has the ingredients of circulating reference as an accumulation of layers of signification one has the elements of a laboratory. But in the case of law, the process of accumulation largely happens between the covers of a file: the effective modes of transportation are ‘files, more files, nothing but files’. The scope of law’s referential chains is confined to what can be encompassed and appreciated by perusing the file. And this is the essential point of difference between science and law. Science is also a textual activity – its modes of transportation depend upon the accumulation and transformation of inscriptions. But in science researchers are always concerned with multiplying transformations, of gaining additional perspectives on the ‘original’ facts constituted by circulating reference, whereas in law the chains of reference are sharply cut down by the procedural definitions of relevance (what Latour calls ‘the limits imposed by the adversarial logic of the case’) and by the availability of techniques of standardisation which, thanks to its history of professionalisation and routinisation, allow the law to resolve the facts by reference to devices such as the signature. To take one of Latour’s examples, there is a world of difference between establishing whether a drugs dealer threatened with deportation ‘really’ has dependent children, and asking whether his lawyers had made a claim to the existence of children in due procedural form. In law, ‘facts are things that one tries to get rid of as quickly as possible, in order to move on to something else, namely the relevant point of law’ (Bruno Latour, Chapter 3); that is why lawyers and judges work only with the world represented in the case file. Like the more complicated layering of scientific inscriptions, the case file could be described as a map of the world. But in science all of the action takes place in the ‘middle’, *between* map and territory, so that there is a dynamic tension between the two registers of reference. Any ‘topographic’ sign is liable to be re-contextualised or re-drawn in the light of new information about the territory. In short, science is a process of reflexive *learning*. In the case of law, by contrast, the map entirely supplants the territory, and information about the territory is admitted only in such a way as to prompt an involutory re-composition of the fabric of the law. Latour describes involution in terms of a model of *qualification* rather than fictionalisation. The formula for qualification (‘A is an instance of B as it is defined by article C’ (Latour, Chapter 3)) describes a discursive operation in which, rather like the Roman law technique of *fictio legis*, apprehension of the ‘facts’ is always conditioned by a normative premise. Inquiry into the facts is confined to the

question whether the facts are such as to trigger the application of the rule; and, as Latour observes, this is a mode of involution rather than just a mode of classification because qualification is less about cognition than it is about steering institutional action: 'this kind of ordering is of assistance in logistics rather than in judgment' (Latour, Chapter 3).

This is what makes the difference between scientific 'objectivity' and legal 'objectivity'. The engagement of the scientist is based on a peculiarly circular form of object relation; a different and much more expansive mode of involution, one might say. If there is a juridical character to laboratory science, it is not that science fulfils the common legalistic notion of what 'objective' knowledge is. Rather, it is that the object – or non-human – plays a quasi-judicial role; it ultimately 'passes judgment on what is said of it'. That is, the object is in two places at once. In one role it is the thing studied – the object that is framed and animated by the textual and technical apparatus of the laboratory. In another, it determines the truth of the claims made in respect of it by laboratory researchers in their scientific articles. Here, the particular character of circulating reference in science is important. In science, the movement of 'referential' transportation is reversible. The accumulation of inscriptions is relayed in such a way that any subsequent critic of the experiment in question could recreate the array of instruments, reagents, computers, and expertise that enabled the behaviour of the relevant fact to be observed, scrutinising the process for assumptions or tolerances that might have induced the object to perform in one way rather than another. Indeed, until this process of reconstruction has taken place, the 'truth value' of experimental conclusions or hypotheses remains indeterminate. Truth is settled after the event, once the experiment has been written up and published, by means of a process in which its conclusions are tested by returning to the 'original' object. To sharpen the analogy between the tribunal and the laboratory, Latour describes the dual role of the scientific object by reference to the ancient or mediæval judicial ordeal, in which the behaviour of an object revealed the innermost truth about an accused. Similarly, the 'subjective' expectations and attachments of the scientist hang on the response given by the experimental object. Latour characterises this mode of engagement as 'objectivity'.

By contrast, 'the strange thing about legal objectivity is that it is quite literally object-less, and is sustained entirely by the production of a mental state, a bodily *hexis*' (Latour, Chapter 3). This adds another

dimension to the theme of the fabrication of persons and things. The contrast between law and science is also ethological in the sense that it draws out two ways of being in the world, two kinds of behavioural stance or attitude on the part of the humans engaged in the two respective practices. Latour nicely captures the differences between the two environments, beginning with laboratory scientists:

They resemble a group of gamblers huddled around a cockfight on which each has staked his fortune; they may not be shouting or screaming like madmen, but there can be no question but that they are *passionately* interested in the fate of their neuron, and in what it might have to say for itself . . . On the other hand, passion is the least appropriate term to describe the attitude of judges [*conseillers*] in the course of a hearing. There is no *libido sciendi*. No word is pronounced more loudly than another. Leaning back in their chairs, attentive or asleep, interested or indifferent, the judges always keep themselves *at a distance*.

Laboratory scientists are entirely in the thrall of the experimental object, so much so that their own 'subjective' affects and expectations are invested in the texture of the object itself. That is 'objectivity': a mode of engagement that is strangely 'subject-less'. Law, on the other hand, produces objectivity by knowing as little as possible about the object. Objectivity is an ethological effect because it consists in the production of a particular kind of bodily and environmental tone. For example, the idea of 'due hesitation': the choice of phrases, tones of voice, or procedural formulae in the Conseil d'Etat is informed by the silent strategy of always appearing to give the fullest consideration to a case (according to the formula of qualification) before the final judgment falls. But 'consideration' is an effect of institutional aesthetics and bodily *hexis* rather than a genuinely cognitive enterprise because it is generated by the 'accumulation of micro-procedures which manage to produce detachment and keep doubt at bay' (Latour, Chapter 3). In that sense, objectivity depends upon a mode of subjectification: the fabrication of things (objective facts) in law correlates to the production of persons (institutional *personae*). Both science and law are constituted by hybridising action and circulating reference, but they are differentiated by their respective ways of sculpting the roles of humans and non-humans. In that sense, the contrast between legal and scientific 'laboratories' sharpens Latour's theory of associative action.

In Tim Murphy's essay, the difference between scientific and legal reference is just as essential. Citing Niklas Luhmann, Murphy observes

that ‘the law cannot be used as a machine for the investigation of truths, or for the discovery of intelligent solutions to problems’ (Tim Murphy, Chapter 4). In terms of the question of making persons and things, this prompts a somewhat polemical engagement with the question of what actually constitutes ‘making’ in legal settings. Rather than emphasising the peculiarity of legal technique, Murphy suggests that law has to be seen as an instance of a more general form of production or technology; because production in contemporary society implies mass-production, much of modern law is itself mass-produced and/or positivised. What is important, if one develops the sub-theme of involution, recursion, or ‘re-potentialisation’, is that mass-production implies a collapse of the division that underwrites the classical understanding of production. Ordinarily, industrial production is understood as a process in which an inventive design or an authorial intention is given shape in a mechanical form. This implies a relation in which the output or effect is commanded by the design, according to a linear process of causation. Machines, or mechanically-produced artefacts, are defined by their makers. However, Murphy’s approach to mass-production implies a relation in which the essence of each product or artefact is lodged in feedback loops or processes of ‘re-entry’. The ‘nature’ of the product or output is defined by a design which is always in the process of being re-designed in the light of information gathered from the performance of the product. The best example is that of biotechnological mass-production.⁴⁹ Similarly, the autonomy of legal institutions or discourses has to be seen as a process in which legal artefacts (persons and things, one might say) are just nexes in an ongoing process of ‘re-potentialisation’, in which the formative design of the artefact is always hostage to the evaluation of the performance of the artefact. This is what Murphy suggests in his reference to the ‘mobility’ of legal schemata:

Mobile grids are set in motion or, more exactly, are in motion all the time – there is no beginning and no reason to suppose an end to this kind of process – and these grids and their shifting contents are what the law and its essential technologies of reports, indexes, computer-based data storage and retrieval makes. These grid formations and classificatory schemes feed back into the processes of adjudication and legislating and law teaching via textbooks, reading lists, journal articles and the world

⁴⁹ Here, Murphy cites Knorr-Cetina (Chapter 4 at p.).

wide web. So we can say that one answer to the question what does the law make is that it makes grids – ways of organising what through its epistemic filters it considers to be facts, including facts about the state of the law.⁵⁰

In one sense, this idea of ‘mobility’ implies learning, and therefore a greater degree of openness of the institution to the social than is suggested by Thomas’ analysis of Roman law (though here, ‘openness’ should be understood in terms of the systems theory formula that openness is possible only on the basis of ‘closure’).⁵¹

THE PERSONIFICATION AND REIFICATION OF POTENTIALITIES

The remaining contributions to the volume explore the construction of legal conventions or transactions by developing two related themes. The first concerns the way in which social themes or events are folded into legal discourses to develop what might be called the ‘semantic potentiality’ of law. Secondly, with reference to the role played by biotechnology and biomedicine in the problematisation of ‘traditional’ legal conventions, our contributors develop analogies which explore the medium or substance which has become most problematic: namely, ‘body’ as a peculiar stock of potentiality.⁵²

Semantic potential

Thomas’ theory of the innate autonomy of Roman legal institutions develops the notion that legal concepts or categories are the resources from which *res* and *personae* are fabricated. The competences and capacities of persons and things are contained in the semantic potential of these categories, and are drawn out by rhetorical techniques which actualise the potential of a given convention or formula by means of argumentation. In that sense, the entities that surface in legal procedure are really artefacts of the procedure itself rather than descriptions of external social or psychological events. One might say that the institutional force of Roman law consisted in its capacity to capture ‘real’

⁵⁰ See Murphy, Chapter 4.

⁵¹ See generally Niklas Luhmann, *Social Systems* (Stanford University Press, Stanford, 1997), ch. 5.

⁵² Dropping the article, in the manner of Caroline Walker Bynum, *The Resurrection of the Body* (University of California Press, Berkeley, 1988) is one way of highlighting this potentiality.

persons and things in these conventional artefacts. So, for example, the imposition of legal liability depended not upon some exploration of the psychological motivations or processes of the individual, but upon the ability of the advocate to ensnare an individual in a formula which was 'prefabricated' in the sense that it was prepared by rhetorical invention entirely within the time of the trial:

The very idea that one might be bound by one's actions was foreign to Roman thought, which treated subjects as the accessories of actions. The relationship implied by the formula *noxae se obligare* (meaning 'to bind oneself to one's action' and not 'by one's action') is quite the opposite of that which defines personal obligations in the contemporary sense. The misdeed (*nox*) tightened retroactively around the guilty person. The latter was not so much an agent, as the captive subject of the wrong, tied or bound to his action; the point is not that he was not required to answer for it, but that in a very specific sense that he was held in the grip of the law: *actione teneri*, meaning: to be held by a legal action.⁵³

Thus, the Roman legal imaginary was one in which persons and things were the (semantic) incidents of legal formulae or conventions. The 'action' of personification and reification happened entirely within the institution, and they expressed what might be called encrypted institutional potential.

Engin Akarlı's and Martha Mundy's illustrations from Ottoman-Islamic law suggest variations on this notion of semantic potential. In contrast to Thomas' picture of a strictly autonomous institution, Akarlı emphasises that the place of adjudication in the 'Ottoman-Islamic legal ethos' was such that 'courts made and remade the laws, in the practical sense of the word as binding provisions, with the participation of those actors to whom the provisions would apply' (Engin Akarlı, Chapter 6). The legal records suggest that even in the imperial court, doctrinal forms and conventions were the media through which law accommodated, and through which it accommodated itself to, the increasing social complexity of claims. The study focuses on the category of *gedik* in Ottoman jurisprudence and practice, describing the process of evolution through which the concept was loaded with a semantic potential which allowed it to hold a number of quite heterogeneous elements. *Gedik* described the tools of an artisan's trade, the market position

⁵³ Yan Thomas, 'Acte, agent, société: Sur l'homme coupable dans la pensée juridique romaine' (1977) 24 *Archives de la philosophie du droit* 63, at p. 71.

enjoyed through the use of those tools, the participation of the artisan in a guild, the certificate which constituted security for debts contracted by the artisan, or an item of inheritance. The complexity of the claims within this arrangement, the shifting matrix of persons and things, is illustrated by the example of the problems faced by merchants dealing with artisans who defaulted on their obligations. In these circumstances the *gedik* certificate might turn out to be a worthless security because nothing in the structure of guilds prevented an artisan from alienating the assets indexed by the certificate or from leaving the guild to set up as an artisan elsewhere. The doctrinal construction of the rights and obligations articulated by the category of *gedik* therefore implied the precipitation of persons and things out of a form which could *potentially* be either, depending on the nature of the claim. For example, as with any corporate entity, this involved a complex bundle of personifications: the agency of the corporate persona acting as such vis-à-vis the outside world, the agency of that person with respect to its members, the *personae* taken on by members *inter se*, the capacities and competences of artisans vis-à-vis merchants or secular and religious institutions. This was not just a question of resolving the corporation into its component elements, because that is a more complex business than a mere enumeration of roles might suggest.⁵⁴ Rather it is about the creation of persons/things out of what might be termed a ‘multiplicity’. For example, in determining the right to inherit a *gedik*, legal doctrine had to reckon with the fact that an artisan as the holder of a *gedik* was *simultaneously* a member of the guild, an economic actor in his own right, a member of a family, and a representative of a lineage. The personal relations and attachments compressed into this multiplicity could be actualised by techniques of personification and reification which would be deployed differently, and to different effect, where the nature of the claim was different. That is the sense in which the *gedik* was (like the human body in the contributions discussed below) a semantic form from which either persons or things could be actualised.

Martha Mundy’s essay is a companion study in the construction of semantic potential. It concerns a question of doctrine: did the holder of an administrative grant of land in Mamluk/Ottoman Egypt have a property right which was capable of alienation? The grants in question were

⁵⁴ For an example of how a single *persona* can be split into a number of different existences, see the discussion of Marx and Rousseau in Gillian Rose, *The Broken Middle* (Blackwell, Oxford, 1992).

usually made to military officers or religious functionaries, who were allowed to take a proportion of the tax revenues due to the sovereign. In that sense, the grant could be seen as remuneration for service, and as a right revocable by the sovereign at any time. In these circumstances, could a military holder alienate his right by renting it out, effectively treating it as a usufructuary property right? Two closely-related doctrinal issues arose at that point. First, was the right to be conceived in terms of property or office? that is, was it a right attached to (or reified in) the land, or was it an incident of the grantee's office? This question was complicated by the fact that the grant might be revoked by the sovereign at any point, so that the *res* in question was of precarious status and undefined duration. Secondly, if it was to be seen as a right in the land, how could the *res* be defined where its essence was constituted by the tripartite personal relations between sovereign, grantee, and the actual cultivator of the land? The fact that the essence of thing was so thoroughly 'personified' raised 'the tension between the basic idioms of ownership by an individual of a thing and the office-like hierarchy of the three *personae* (ruler, grantee and cultivator) who all hold rights in the same land' (Martha Mundy, Chapter 5). The point is that the specification of the rights and responsibilities attached to land implies the (re)construction of doctrinal models of persons and things. These models are not just found in society; they have to be constructed conceptually or semantically by law, from its own resources of meaning. In one phase, this implies reaching beyond the institution to formulate representations of evolving social realities. So, for example, the legal treatise that is central to Mundy's account looks beyond the bare legal conventions to the real, social, character of the role of the right-holder (the military grantee), and the nature of agricultural production (the social status of agricultural labour) to argue for the proposition that an abstract usufructuary right should be recognised by this branch of Islamic jurisprudence (Mundy, Chapter 5). But in another phase, these infused meanings have to be expressed in 'traditional' idioms and conventions. The ability to formulate new models presupposes an ability to find semantic prototypes within the doctrinal tradition. In this case, the prototype for an abstract usufructuary right is found in existing conceptions of slave labour: 'the potentiality arising from the labour of a slave allows the development of more complex formulations of rights over real property' (Mundy, Chapter 5). At this juncture, the semantic potential of doctrinal categories merges with the potentiality of 'body', and the reference to slave labour can be seen as

drawing on what the remaining contributions describe as the peculiarly equivocal character of the human body.

Actualising bodily potential

Conventional techniques of personification and reification are opened up to ethnographic comparison by exploring the potentialities contained in ‘body’. Marilyn Strathern takes the question of bodily form as the basis for an analogy between Western and Melanesian conventions of personification and reification. What is in question is the production of bodily ‘wholeness’, that is, the way in which the body is – or is not – reified as a determinate thing. ‘Wholeness’ in this sense is one particular aspect or effect of those conventions which shape the ‘manner in which people make claims on others’, though at least in the case of Melanesia these connections might be ‘of a politico-ritual rather than legal nature’ (Marilyn Strathern, Chapter 7). The question is how the potentialities associated with body are actualised in such a way as to give effective form and force to ownership claims. In the case of Western law, this might imply an oscillation between person and thing. For example, Strathern has described elsewhere how a frozen embryo changes its potentiality depending on whether or not it has been defrosted, referring to the ‘ontological choreography by which embryos can go from being “a potential person” when they are part of the treatment process to “not being a potential person” as when it has been decided that they can be frozen or discarded, or even back again as when they are defrosted’.⁵⁵ Thus, depending on the nature of the relation actualised by the claim, body itself can be actualised as different kinds of ‘form’. And this is not just a matter of recording biological facts: ‘one effect of unanswered questions about whether or not body parts constitute property is the realisation that detachment must be fabricated conceptually as well as physically’ (Strathern, Chapter 7).

Bodily potential poses particular problems for Western legal conventions. As Strathern observes, ‘the body seems to be taken as entire in the double sense of being a complete functioning (or once functioning) organism, and of being of a piece with the individual person as subject and agent’.⁵⁶ This sense of biology as being ‘of a piece’ with psychic or social individuality is an unexamined presupposition of modern legal doctrine. Yan Thomas’ anthropology of Roman legal institutions

⁵⁵ Strathern, *Property, Substance, and Effect*, at p. 175, citing Cussins.

⁵⁶ Marilyn Strathern, Chapter 7.

suggests that law once recognised that personality was multiple and contingent. First, there was no such thing as a unitary legal *persona*; instead Roman law dealt in a large number of differentiated transactional *personae*. Secondly, the legal quality of personality was not taken to be descriptive of biological or social individuality. So a human being might be classed as a thing (*res*) for some purposes; for example (leaving aside the obvious but problematic example of slaves) grandparents counted as part of the inheritance (*familia*) to which the incoming heir succeeded. Only much later in the tradition of Roman law were the various transactional *personae* constituted by legal technique amalgamated into the form of a single legal *persona*, and only with the infusion of Christian doctrine (specifically, the doctrinal conjoining of mortal, perishable, body and immortal soul) did this artificial person merge with its biological substratum to compose a 'whole' form. Initially, one might say that this gave a particular importance to the body, which encompassed both person and thing. In that sense, the body 'unified' the distinction between person and thing in the sense that it was the third term which, logically, guaranteed the distinction. At the same time, the body was the medium or currency in which the distinction between person and thing was negotiated; depending on the condition of the body, a human being might be said to be either a person or a thing. Hence the prominence of the question of slavery in legal doctrine and philosophy. If some compulsion could be exercised over the body so as to reduce it to subjection or turn it into a commodity, the human being *became* a thing. This was a one-way route: persons lapsed into things, not the other way around. In other words, 'person' was the weighted side of the distinction, and the body was just the medium through which the person was exposed to the danger of becoming a mere thing. So, for example, in French law the body is treated as a very special sort of entity not because the law respects the body as such, but rather because the body is a form which engages respect for the person. In this traditional arrangement, the body was neither person nor thing – it was just the gage through which the person staked its personhood. This was sustainable precisely because the body was always whole, so that the distinction between person and thing always passed between two whole forms (bodies) rather than through the 'whole' form of the body. For present purposes, what is significant about this fabrication of wholeness is that the body was the form in which the potentiality or equivocation of the distinction between person and thing was actualised or made determinate.

The problem for contemporary Western legal conventions is that the distinction now passes *within* each individual body (at least potentially). Body parts, genes, and gametes are now ‘detachable’, and might circulate independently of any whole body. In these circumstances, body continues to function as a unification of the distinction between person and thing, and as the form in which the potentialities of that distinction are actualised. But the geometric point of unity or actualisation has changed. ‘Wholeness’ has to be fabricated by making body abstract, by exploiting its equivocal status as both person and thing to fictionalise its continuing integrity. This is what Strathern calls ‘fabrication by default’. In her discussion of the Nuffield Council on Bioethics Report of 1995 on the status of body tissues (a text which she takes as ‘a treatise on the making of things’) Chapter 7) Strathern illustrates what this mode of fabrication involves:

In a wonderfully illogical but perfectly sensible way, at the very juncture when through detachment it could be regarded as having ceased to be a part of the body, the tissue or organ is reconstituted neither as a whole entity in itself nor as an intrinsic part of a previous whole. Colloquially, it is, somehow, a free-standing ‘part’. So what is kept alive in this nomenclature is the process of detachment itself: it would seem that for so long as its detachability from the person remains evident it can be thought of as a ‘thing’ – but not to the lengths of a ‘whole thing’.

Each detached part – precisely because it is still characterised as a part – remains characterised by the whole of which it was once an integral part. By keeping the process of detachment alive, bio-ethics holds in suspense the question of how to differentiate person and thing with respect to the body. More importantly, this fabrication of ‘wholeness’ allows the body to continue being the gage upon which personhood is staked, and as a result the distinction between person and thing remains cast as an asymmetrical *division*. The sense in which fabrication by default keeps the old configuration of person/thing/body alive is perhaps clearer in another legal strategy, based on an extrapolation of an intellectual property right (or, in this case, a *droit d’auteur*). The suggestion is that body ‘parts’ should remain attached to their qualifying ‘wholes’ by means of a *droit de destination*, which is the right attributed to authors in French intellectual property law to determine the conditions under which a work can be published or exploited.⁵⁷ Body tissues would

⁵⁷ See Jean-Christophe Galloux, ‘L’utilisation des matériels biologiques humains: vers un droit de destination?’ (1999) *Receuil Dalloz (Chronique)* 13.

remain attached to the original whole by the continuing attachment implied in the consent which authorises and delimits each particular use. To make a body part a separate, distinct, entity would mean having to make a decision as to precisely where the line between person and thing should be drawn, which would, in turn, unravel the productive equivocation comprised in body.

Fabrication by default is motivated by anxieties about the ownership of persons: slavery. But in reality the old problem of slavery, and the conjunctions of person and thing which were implied in political-philosophical discussions of slavery, have been superseded. The ethnographic analogy which Strathern constructs on the basis of examples from Melanesia shows a context in which persons are 'owned'. The analogy is necessarily a construct; it appears as a result of rendering anthropological material as 'like – rather than unlike – Euro-American assumptions'. The Melanesian examples shows how persons can appear as distinct, whole, things and therefore as objects of ownership. 'Wholeness' in this context is a bodily quality. If the Melanesian person is composed of multiple relations, then the moment in which they become a thing and hence an object of ownership is the moment in which their relational potentiality is entirely eclipsed by the identity and relation which is being actualised in the present moment. This proposition condenses Strathern's rendering of the virtual multiplicity of the Melanesian person. Although the theory is too complex to be addressed here,⁵⁸ it is important to say something about how the theme of ownership sets up an analogy between Melanesian fabrications of bodily form and Western anxieties about the reification of the body.

In the Melanesian context, bodily form can be described (by analogy) as the subject matter of ownership because each reification is elicited by the person(s) to whom it is addressed (Strathern, Chapter 7):

When a male initiate steps forward all decked out in his transformed body, a new member of the clan, his clansmen own so to speak the concept of this person as 'a male clansman'. He has to look, act and behave like one. His clan mates acknowledge him by claiming him; they see in him, at that moment, the embodiment of a concept.

The concept in question is a conventional form or role – that of the 'male clansman' – which has to be actualised in a bodily performance.

⁵⁸ The definitive account of the 'fractal' nature of Melanesian persons is given in Marilyn Strathern, *The Gender of the Gift* (University of California Press, Berkeley, 1988).

Effects have to be contrived; or, to use Strathern's terminology, conventions are constituted through invention. A convention is 'a recipe for social action',⁵⁹ but a 'recipe' in this sense is a virtual scheme whose effective form is constituted by the actions that it elicits. The Melanesian convention of compensation⁶⁰ supplies an excellent illustration because 'the compensation process itself defines what is transactable'.⁶¹ The point is that the substantial elements to which a compensation claim refers are actualised – that is to say given effective form and force – in the *making* of the claim. In the course of making their claim, social groups (and persons) actualise themselves, resolving themselves into the form appropriate to the claim they seek to sustain: 'collectivities differentiate, identify, and, in short, describe themselves by their role in compensation'.⁶² Each actualisation of a convention is a singular event because it consists entirely in the aesthetic and corporeal effect achieved by actors in the very moment of exchange. Unlike the fabrication of wholeness exemplified in the Nuffield Council's report, this mode of detachment is decisive: 'the person appears whole and entire from the perspective of a specific other'. Wholeness is effected in *bodily* form, so that reification or actualisation is, so to speak, an effect of corpo-reality.

On the other side of the analogy, the Western understanding of ownership (and hence slavery) is predicated on an antithetical relation between persons and things, an antithesis which strategies of fabrication by default try to salvage. The model of an antithetical or

⁵⁹ Ibid. at p. 271.

⁶⁰ 'Compensation' as it is generally understood in Papua New Guinea does everything which an English-speaker might imagine, and much more. It refers both to the payment owed to persons and to the procedures by which they come to negotiate settlement. It can thus cover recompense due to kin for nurture they have bestowed, as in bridewealth, as well as damages, as in reparations to equalise thefts or injuries. It can substitute for a life, in homicide compensation, or for loss of resources. Car fatalities, war reparations, mining royalties: all potentially fall under its rubric, although since it is generally agreed that people frequently make exorbitant demands, compensation is seen as the enemy as well as the friend of peace-making ceremonies and of commercial exploitation alike. Its outcome is, from a Euro-American point of view, hybrid, insofar as it consists in an equally easy translation of persons into things and things into persons. And its procedural capability is of utmost simplicity. Liabilities and claims are defined by the positions parties take in relation to one another over the issues of compensation itself (Marilyn Strathern, *Property, Substance and Effect* (Athlone, London, 1999), p. 188).

⁶¹ Ibid. at p. 190. ⁶² Ibid. at p. 191.

asymmetrical relation between persons and things imposes a particular understanding of originating action (production). At the level of content, the Western idiom of ownership construes (proprietary) agency in terms of what persons do to or with things by means of their labour or knowledge. The body presents a special problem for these conventions precisely because it represents the point at which the terms of this division become indistinguishable. But until the question of body presented this new issue of potentiality, Euro-American conceptions of property imposed an understanding of cause/effect, or potentiality/actuality, in which social action could be referred to the capacities of things or the subjective competences of persons. This is one implication of what Bruno Latour calls the 'old settlement'; the division of the world into two ontological registers. The effect of superimposing Western modes of personification and reification on the Melanesian examples is to reveal a mode of originating action based on symmetrical relations between *persons*. The basic units of social action are just persons: persons can be reified (in whole body form) and things can be personified, in which case they embody one of the virtual relations which compose the Melanesian person. In this sense the social world is not divided into two registers, but is composed of relations and attachments (distinctions, one might say) which are elicited from the symmetrical plane of 'personality'. Social action is not predicated upon the potentialities lodged in some original division. Instead, it consists in modes of *actualisation* which constitute their correlative potentialities. At this point, Strathern's ethnographic analogy suggests a resonance – if not a proximity – between Melanesian and Euro-American contexts. The strategy of fabrication by default is one way of coping with a world which, through the agency of biomedicine, is increasingly recognised as a single plane of potentiality. Where body can be *either* person *or* thing the old asymmetry becomes dis-embedded, motivated only by emergent regulatory objectives (witness the shift to risk analysis and proceduralisation in bio-ethics).

Susanne Küchler's essay sketches another approach to the actualisation of attachments. Her approach can be seen as an inflection of a theory of art which 'merges seamlessly with the social anthropology of persons and their bodies, allowing for the possibility that anything could conceivably be an art object, including living persons'.⁶³ 'Re-thinking

⁶³ Susanne Küchler, Chapter 8.

attachment' is the rubric under which the question of personification and reification is addressed. 'Attachment' evokes the array of relations (between persons/things) indexed by art objects, and the agency of these objects in eliciting and exchanging potentialities *between* persons/things. The theme of potentiality is central to the inquiry because the question of attachment – posed in this way – opens up ethnographic analogies between the understandings of origination, generation, reproduction, and replication which sustain Western idioms of intellectual property and (in this case) Melanesian modes of connectivity. In that sense, the essay can be read as a contribution to contemporary anthropological engagements with Western discourses or technologies of intellectual property rights (copyright and patent).⁶⁴ More specifically, it develops some of the themes introduced in Küchler's earlier work on Malanggan carvings.⁶⁵ The Malanggan in question are produced as embodiments of (or for) the life force of an ancestor. Everything turns on what 'embodiment' might mean in this instance. The peculiarity of Malanggan carvings is that their role as vessels or embodiments is short-lived; they are destroyed or discarded immediately after their use in memorial ceremonies, at which point the life force condensed in them is released. What kind of agency is implied in this articulation (embodiment and release)? In the process of being produced as an embodiment, the Malanggan takes on the form(s) of the Melanesian person. The carving is an assemblage of design motifs, some transmitted from the past, others drawn from neighbours, and yet others which are addressed to future 'owners' (and which in so doing anticipate their future apprehension as communications from the past). This nexus of recollection and anticipation instantiates the potentiality of body: 'a Malanggan converts existing relationships into virtual ones, matter into energy, and living into ancestral agency – heralding the reversal of these transformations at a future stage in the reproductive cycle'.⁶⁶ What is

⁶⁴ See the now classic article by Simon Harrison, 'Intellectual Property and Ritual Culture' (1991) 21 *Man* (n.s.) 435.

⁶⁵ See especially Susanne Küchler, 'Malangan: Art and Memory in a Melanesian Society' (1987) 22 *Man* 238; 'Making Skins: Malangan and the Idiom of Kinship in New Ireland' in J. Coote and A. Shelton (eds.), *Anthropology, Art, and Aesthetics* (Clarendon Press, Oxford, 1992); 'The Place of Memory' in A. Forty and S. Küchler (eds.), *The Art of Forgetting* (Berg, Oxford, 1999).

⁶⁶ Marilyn Strathern, 'The Patent and the Malanggan' (2001) 18(4) *Theory, Culture and Society* 1, at p. 7.

essential here (at least as regards the issue of intellectual property) is the mode of potentiality or 'potentialisation' which this implies. In giving a formulation to past attachments, the Malanggan is an articulation which carries those attachments forward, into a future which it has in some sense configured through its own agency, so that it functions as an agent of restless transformation or emergence. This is, one might say, a 're-potentialisation' of the past in anticipation of its effects in a future present. If one needed an example of the inapplicability of divisions between tradition and modernity, it would be difficult to find a better one than this.

The analogy with Western idioms of intellectual property takes shape at this point. In patent law, the reification (embodiment) of an industrial concept turns it into an object or *res* which can then be licensed for use, or used 'negatively' by competitors trying to 'invent around' the patent. In that sense the intangible *res* – the patent – is also a transformative articulation between two skeins of attachment(s). The configuration or (re)collection of one set of attachments (the network gathered into the patent, one might say) occasions the opening of another network, which transforms the 'old' network by holding it up to the 'new' context into which it has opened.⁶⁷ As with the agency of the Malanggan, the point is that the potential that is (provisionally) actualised in the patent is always being re-made, or re-actualised. Contrary to the image of origination which sustains the idioms of intellectual property law, and property law in general, the work of actualisation constitutes the potential that it actualises.⁶⁸ That, at least, is one sense of the 'virtuality' of the Malanggan as an embodiment. But at the same time, proximity opens up analogical distance. The agency of the Malanggan becomes one side of an analogy which 'relativises' Western idioms. The Malanggan is what Kuchler describes as 'an inherently recallable image'; the destruction of the carving after its ceremonial means that it continues to exist only as the 'concept' of the design. In this sense again one might say that Malanggan designs circulate within a regime of intellectual property. The person to whom the design is 'entrusted' has the right to reproduce it. However, this opens up an analogical distance because the 'concept' is not understood as an intellectual creation of an originating author (even if the author is not the

⁶⁷ Again, the essential reference is to the work of Marilyn Strathern, notably 'Cutting the Network' (1996) 2 *Journal of the Royal Anthropological Society* 517.

⁶⁸ For philosophical accounts of this, see Gilles Deleuze, *Le pli* (Minuit, Paris, 1988); Giorgio Agamben, *Potentialities* (Stanford University Press, Stanford, 1999).

current holder of the right). The design is simply 'held in the head'⁶⁹ of the person authorised to reproduce it. Again, this is a mode of embodiment that is sustained without reference to a division between personal, subjective, agency, and material capacity.

In her contribution to this collection, K uchler elaborates this notion of a transformative articulation by elaborating the theme of 'surface' as an aspect of the 'allure' of art objects. Surface was already an important part of K uchler's interpretation of Malanggan as exemplars of a planar (as opposed to linear) conception of surface.⁷⁰ Here, the surfaces in question are textiles: techno-textiles, Yupno knotted cords, and *tivaevae* quilts from the Cook Islands. In these examples, the theme of 'surface' locates a point in which potentiality and actuality become co-extensive, existing in the same plane or dimension, and articulating emergent relations which cannot be fixed as ownership or possession. The *performance* of techno-textiles draws the poles of the Western division into a dynamic 'middle': at each point, fixed antitheses become emergent forms. For example, these are textiles which 'behave like organisms, displaying a second nature comprised of rule-ordered human constructions while mirroring the given, pristine nature of physical and biotic processes, laws and forms' (Susanne K uchler, Chapter 8); in that sense, they play on the division between real and artificial by dissolving it into a process in which the registers become indistinguishable. As K uchler observes, these textiles are like the 'synthetic vitality' of artificial life programmes. As I suggest in my contribution, this mode of symmetry is expressed in Gilles Deleuze's concept of a simulacrum: 'a simulacrum is not an imperfect copy [*une copie d egrad ee*], it contains a positive power that negates both original and copy, both model and reproduction'.⁷¹ A similar argument is expressed in K uchler's observation that techno-textiles turn tailoring into 'a problem of fibre, not figure' (Susanne K uchler, Chapter 8). Fibre lies 'between' the two registers which traditionally define the place of 'tailoring': figure and function, substance and ornamentation, body and apparel. Intelligent fibres, which can respond to environmental (that is, physical *and* social) conditions by (for example) changing their heat-retaining capacities or their sensitivity to light, or by changing patterns or colours, effectively

⁶⁹ The phrase is from Marilyn Strathern, 'Divided Origins' (ms.).

⁷⁰ Susanne K uchler, 'Binding in the Pacific: The Case of the Malanggan' (1999) 69(3) *Oceania* 145.

⁷¹ Gilles Deleuze, *Logique du sens* (Minuit, Paris, 1969), p. 302.

modulate the distinction between figure and clothing, actualising their respective potentialities.⁷²

This kind of ongoing modulation of relations and attachments is also evidenced by the Melanesian examples. Yupno knottings hold potentiality in their texture; they are strings of knots representing ancestral place names, each knot being a determinate representation and yet it being unclear which place name it represents, so that the topology represented by the names has to be actualised by each 'reader'. And yet a 'reading' can make or break a life. The *tivaevae* quilts are layered with flower motifs, all 'held together by the stitched lines of thread visible as a continuous line on the underside of a quilt' (Susanne Küchler, Chapter 8). Like the Malanggan, they also articulate co-existing property rights, because the design of each layer 'belongs' to a different woman, household, or clan. In the case of *tivaevae*, which transpose the old layerings of barkcloth with layerings of cotton, it is no exaggeration to say that the availability of a new cloth with new tensile qualities 'facilitated a development of surface and *thus* of new forms of property' (emphasis added) by enabling many layers or attachments to be (re)collected together. But in some respects, the surface of the *tivaevae* quilts is different from the surface of the Malanggan. But the fact that ordered relations are (re)collected in a single surface transforms their potentialities. Far from being the fixed co-ordinates of a terrain, they become like the knots in Yupno cord; that is, they acquire the relational value that is attributed by each reading of the surface, or each time a fresh attachment is made 'through' the surface of the quilt. So although in one sense the *tivaevae* quilt tells an ordered story of proprietary or possessory attachments, in another sense it is a resource or medium through which these conventionalised attachments are dissolved into a flux that is fixed only by the making of new attachments. The complex agency of body, as transposed to the agency of the Malanggan, is located in the medium of 'surface'.

In my contribution, the exploration of bodily potential and images of 'organic' action shifts from surface planes to interiorised processes. Various legislative and bio-ethical interventions have sought to institute gene sequences as 'the heritage of humanity'. This notion of genetic patrimony attempts to domesticate the potentialities elicited by biotechnology by characterising genes in terms of the old division

⁷² For a critique of the attribution of intelligence to materials, see Bernadette Bensaude-Vincent, *Eloge du mixte* (Harmattan, Paris, 1998).

between persons and things. Ironically, the old (Western) legal institutions of inheritance freely deployed some quite sophisticated techniques of personification and reification which enabled the division between persons and things to be affirmed as a primordial condition while at the same time, in practice, that division was superseded by ciphers (intention, money, writing, blood, and land) which were equivocal or 'hybrid' in the sense that ciphers from either register could be actualised either as persons or as things. But the argument for genetic patrimony passes over this 'alternative' history of inheritance. Indeed, I suggest that genes are apprehended as the ultimate objects of inheritance. Whereas the old institutions of inheritance were thoroughly improbable constructions, whose apparent stability was secured by their capacity to metabolise the contingencies of kinship and society, our genetic inheritance is based on a natural force rather than an institutional effect (Küchler, Chapter 8). This representation depends on what could be called the 'juridification' of gene action; that is, the representation of genes as normative forces. The all too familiar characterisation of the human genome as the 'alphabet of human life' collapses bodies into genes by the familiar route of a linear process of translation and transcription: the person comes to incarnate a supra-individual value. This gives rise to a complex choreography of personification and reification, and my contribution focuses on the model of institutional time which organises that choreography. The temporal scheme of inheritance pre-exists (and perhaps informs) the science of genetics, so that a juridical model of time is located both in norm and nature, law and biology. Cast in the conceptual language used at the beginning of this introduction, one might say that the temporal order of the institution is structured by divisions rather than distinctions. But, although the institution presupposes an external, 'objective', temporal horizon, in effect the institution *produces* the horizon upon which it finds its operations. The prototype for this operation is found in the primordial legal myth of institutional origin – autochthony – in which the essential origin of the institution is constituted by its current operations. And, far from reinforcing the old fantasy of inheritance, law's encounter with genes, and hence with molecular biology, confronts it with a model of self-production which has always been the motor force of legal institutions. Law might be described as the original biotechnology, but only because it produced human life by techniques of personification and reification which were just as radically creative as the techniques of commercial biotechnology.