

## LAW'S CULTURAL MEDIATIONS

### An Introduction by Way of Introduction

*William MacNeil and Peter Hutchings\**

One of the more remarkable developments throughout the *fin de siècle* of the 1990s and up to and including the millennial 2000s was — and *is* — the shift in the jurisprudence of the anglophonic common law world away from its 1980s *point de capiton*, 'critique', towards the more current — even hegemonic — sign of the times, 'culture'. This shift in master trope, however, registers more than just a change in semantic fashion; rather, it entails a jurisprudential reorientation on a variety of different levels — formal, substantive: of textual source as much as interpretive method; of theoretical posture; and even of juristic vision. So, for example, instead of focusing upon (indeed, obsessing over, as American critical legal studies of yesteryear did) the formal legal judgment (think of Jack Balkin's celebrated analysis of the footnote in the *Carolene Products* case which, however radical the reading — in this instance, deconstructive — stays firmly wedded to the text), cultural legal studies strays from the hermetically sealed space of the what Langdell called the law school's 'laboratory' — that is, the library, with its dull, dusty and drear tomes — and turns to an array of *fictions*.

Now fictions have a long and (dis)honourable history in the common law, but the kind of legal fictions which cultural legal studies engages are not to be confused with Bentham's *bete noire*: those latter fictions were forensically developed devices intended to obscure, by giving the appearance of procedural propriety, the jurisdictional hijacking of cases carried out by the king's courts throughout medieval and early modern English legal history; while the former are textual representations — literary, cinematic, philosophical, televisual, artistic — designed to *mediate* the relationship between law and culture through their staging of, for example, judges and juries, lawyers and clients, procedure and policy. It is this latter sense of legal fiction — as mediation — which this issue mobilises, organising itself first around the forms which dramatise the law ('Words' and 'Images'), then by *topoi* which thematise it ('Subjects' and 'Objects'). This move towards what might be called, with a nod to Derrida, *hors-loi* is not without its problems, however, because it threatens an 'aestheticisation' of jurisprudence that could leave the jurispude transfixed, silenced and, ultimately, incapacitated by the objective correlatives of law's media. But, paradoxically, this redirection away from law's formal letter (substituting, say, artwork for an appellate judgment) in fact takes the jurispude *closer* to, not farther from, law's spirit. That is to say, what law's cultural mediations offer is a 'royal road' to what one might call, by way of Jameson and Freud, the 'legal unconscious' — or, better yet, by hybridising Lacan and Boyd White, the 'legal imaginary': namely, those reflections and

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refractions which occlude, but also open up, in this juridical hall of mirrors, the jurisprudential Real, and its abiding antagonisms like 'What is the connection to, or conflict between law and morality?', 'Law and power?' 'Law and rights?' and especially 'Law and justice?' In short — and this is the fundamental lack undergirding and rupturing the jurisprudential Real — what does one mean by the word 'law'?

All the contributors to this special issue of the *Griffith Law Review* — entitled, appropriately enough, 'Law's Cultural Mediations' — address this jurisprudential Real, and the many manifestations of its overarching problematic (i.e. the meaning of 'law'), through a variety of law's cultural media: in films as diverse as the postmodern Western *Unforgiven* (Sarat), the futuristic camp of *Starship Troopers* (Rosenthal), the instant cult classic *The Matrix* (Duncanson) and the mordant comedy of *Zelig* (Fleming); literary texts as different in form and period as Shakespeare's tragedy, *Hamlet* (Pantazakos), Shelley's verse drama, *Prometheus Unbound* (Gearey), and the Harlem Renaissance poetry of Langston Hughes (Goodwin); artwork, like Schiele's paintings, and law's anxieties about their authenticity (Leiboff); even music, often neglected by legal scholars (with all due respect to Desmond Manderson's path-breaking work in *Songs Without Music*), gets a look in here with a searing critique of the neo-Orthodoxy (in both the secular and sacred sense of that word) of John Tavener's liturgical *oeuvre* (Seymour).

However, variety is not confined here to the essayistic content of these contributions: the very essay *form* is itself the subject of experimentation in, for example, Michele Goodwin's richly evocative 'poessay' (the author's neologism: see her 'Poetic Reflections on Law, Race and Society'), with its deft interweaving of personal narrative (through the mediation of her own poetry), literary allusion (in citations of Walker, Hughes, etc.) and topical reference (in the tragic case of Girl X, the racialised counterpoint to the doll-like JonBenet Ramsay). Dirk Meure continues this mode of *bricolage*, constructing in his piece 'Homo Panic in the High Court' a veritable Byzantine mosaic of judicial excerpts (drawn largely from Australia's curial disgrace, *R. v Green*, notorious for its 'homosexual panic defence'), poetic echoes (eg Shakespeare) and theoretical cross-references (literary critic Eve Sedgwick, criminologist Alison Young and, notably, one of the other contributors to this issue, queer theorist Les Moran), which pushes essayistic form to its very limit so that it loses its linearity and begins to resemble the kind of digital simultaneity of Angus McDonald's 'Rebel at the End of History'. If Meure combusts the article format, then McDonald sardonically reconstructs it — or rather reconfigures it as a video game which takes as its objective, *das Spiel* of dialectical materialism, and the historical unfolding of the class struggle (nature to culture, feudalism to capitalism, industrialism to aestheticism). Finally, as befits an issue devoted to culture (and heedful of McDonald's warnings about the depoliticisation which over-'culturising' threatens), the academic accedes fully to the aesthetic in the contributions which open and close this issue. In Adam Gearey's haunting elegy for Chris Okigbo — poet, activist, martyr — this issue reaches its terminus. It is a suitably sober and dignified moment of closure which, in its admixture of the

political and the poetic, contrasts boldly with the poetry of parody of Mark Thomas's exuberant opening — his *tour de farce*, as it were, and Eliotic send-up, as much as *homage* — 'The Umfralisation of Alfred Prufrock J'.

This issue's wide diversity of forms (articles, poessays, anti-essays, games, poetry) and content (film, literature, art, music) is exceeded only by the sheer difference of the theoretical positions and political postures adopted throughout, and modelled by each of the contributors. Driving these differences is, of course, the notion of difference itself which, as Anja Louis' paper, 'Equality, Difference and All That Jazz: the Infamous Debate and a Spanish Take on It', makes clear is the controlling principle of contemporary theory writ large with all its ever-proliferating 'posts-' and '-isms', now insinuating itself into, and revitalising, the stale field of jurisprudential critique, and its highly predictable and overdetermined 1980s *marxisant*, 'identity politics', or deconstructive gestures. More current movements in 1990s and millennial theory are represented here — like the new psychoanalysis (especially as typified by France's reigning post-Lacanian jurispude, Pierre Legendre in Adam Gearey's 'Myth, Law and Shelley's *Prometheus Unbound*: Pierre Legendre and the Possibility of Critique), Queer theory (see particularly Les Moran's detailed and provocative analysis of the way in which the trope of 'the gothic' controls and regulates the legal imaginary underpinning Britain's sodomy laws, and their judicial construction in 'Gothic jurisprudence'), and postcolonialism (notably in Isobel Findlay's rigorous unpacking of the Canadian Criminal Code's simultaneous acknowledgement and disavowal of aboriginal difference with respect to sentencing in 'Discourse, Difference and Confining Circumstances: The Case of *R v Gladue* and the 'Proper Interpretation and Application' of s 718.2(e) of the *Criminal Code*).

As well, a variety of individual theorists, rarely seen in law journals, pop up here — like Deleuze (in Mark Rosenthal's lively reading of *Starship Troopers* as a text of 'fascinating fascism', *a la* Sontag which invites us to enter into and traverse the fantasy of Theweleit-like militarism in 'The Violent Excess of the Image and the Negation of Law in *Starship Troopers*'), Lacan (in Chris Fleming's finely tuned 'Mad or Just Acting? Insanity and Theatricalisation', which focuses on the question of madness's 'performance' and the psychoanalytic response it solicits — ego psychology diagnosis or Lacanian ethics?) and Bourdieu (in Penny Pether's blackly comic account, 'Discipline and Punish: Despatches from the Citation Manual Wars and Other (Literally) Unspeakable Stories', dealing with the travails of teaching writing skills within the Bourdieuvian *habitus* of the American legal academy; or in Marett Leiboff's discussion in 'Clashing Things' of the social capital of the auction house's 'expertise' in regulating the international art market, and its principal juridical prop — the intellectual property regime). Indeed, one might say that, when read together, these contributions constitute something of a rogues' gallery (in the fashion of Marett Leiboff's Sotheby's scallywags) of critical theory in the present day, across the fields of not only law, but sociology, semiotics, cinema studies, literary criticism and philosophy.

This is not to say, however, that each of these contributions is some slavish application of someone *else's* or some *other* field's theory (usually Continental, and preferably from Paris or Frankfurt) to an issue in legal practice or policy. For far too long, jurisprudence has exhibited at best a timid deference (often leading to an hilarious 'map of misreading'), or at worst a gormless defiance (provoking pig ignorance like 'What's this got to do with torts?') about continental theory which spelled either its wholesale (and unthinking) acceptance (by, for example, 1980s CLS) or (even more a-cephalic) its rejection (by, for example, 1990s 'law and economics' and/or the various sociological critiques of the law organised around race, gender and class). Luckily, neither attitude — either defiance or deference — is present in any of the contributions in this volume, largely because one senses here the emergence of indigenous schools and movements, doubtless indebted to foreign fields and sources, but nevertheless localised, *sui generis* and peculiar to jurisprudence. Just to take one of the most obvious examples of the return not just of 'grand theory' to jurisprudence, but of jurisprudence to 'grand theory', the imprimatur of the British 'Birkbeck School', centred around the Department of Law, Birkbeck College London, is etched sharply on the work of Les Moran (not surprisingly, since he is the department's current head), Adam Gearey (a Birkbeck colleague) and even David Seymour (as a member of the faculty of Birkbeck's northern progenitor, the law school at Lancaster), especially in their engagement with, and development of the thought of, those two 'magi of Bloomsbury' — Peter Goodrich's legal semiotics (turning, as it does, on Legendre's Lacanic and laconically obscure 'Reference') and Costas Douzinas's legal ethics of the Other (filtered through Bloch as much as Levinas, and a marxified psychoanalysis of rights, the clarion call of which is 'Englander erwache!').

The Birkbeck School's influence, however, is not confined to the 'tight little island' of Blighty, but extends — like the Empire of old — overseas, reaching even the transatlantic shores of the New World, especially in light of Peter Goodrich's recent departure for America, and his current professorial residency as Cardozo Law School's favourite (as Sting would put it) 'Englishman in New York'. There Goodrich joins and contributes to a faculty already rich in juristic thought, as the paper of his Cardozo colleague, Michael Pantazakos — 'Examples as Gross as Earth: Hamlet's Inaction and the Problem of *Stare Decisis*' — clearly shows in its heady brew of local thought (Llewellyn on precedent), a canonical classic (*Hamlet*) and the mediation of the two via continental thought (mainly Nietzschean) — a hallmark of the Cardozo style and institution which, with Amherst College's Department of Law, Jurisprudence and Social Thought (headed by, and represented in this issue by Austin Sarat and his trenchant piece 'When Memory Speaks: Remembrance and Revenge in *Unforgiven*'), has been the principal point of entry into America for European (and/or Anglo-Commonwealth) high theory, be it deconstruction (Michel Rosenfeld), the 'new Hegel' (David Carlson) or Lacan (Jeanne Schroeder). New York and London, while providing the anchoring points for this issue, are by no means, however, the sole axis around which the volume rotates. Amherst College has been mentioned already, but

that institution might be seen really — with no affront intended to its significant coterie of jurists (not only Sarat but Nasser Hussain, Martha Umphrey, Tom Dumm and Lawrence Douglas) — as a way station between London and New York.

The third term which must be added here is the space from which we, the editors, speak: that space is, of course, Australia — itself a lively scene of jurisprudential writing, reading and dissemination. Mark Rosenthal in Melbourne, Marett Leiboff in Brisbane, Chris Fleming in Sydney: all speak to, and are the products of, a confident, post-colonial and fiercely independent Australia, free enough of the jurisprudential 'cringe' (axing Oxon) to be not only a prime producer of legal theory but an exporter of juristic ideas (think of Penelope Pether, formerly of the Sydney Law School, now teaching in America). Perhaps, though, given the dispersal of theory-friendly jurists across the expanse of the Australian continent, it might be premature to talk of any particular school or movement, institutionally localised at, say, Griffith or LaTrobe. However, certainly with Alison Young, Andrew Kenyon and Peter Rush at Melbourne (with an able assist from Ian Duncanson and Judith Grbich at LaTrobe), and Shaun McVeigh, Rosemary Hunter, Roshan da Silva, John Dewar and Sandra Berns at Griffith (as well as issue editor Bill MacNeil), then surely a distinctively Australian school of legal theory is not far from emerging. This *wunsch* for a local legal theory, however, is not to be construed as issuing from some nativist imperative — an Australian Republic! an Australian legal theory! — but rather from its reverse: the cosmopolitical — and its issues of displacement, migration and diaspora. In fact, this issue is premised on the understanding that Oz should — and, indeed, *must* — join the cosmopolis that is the new jurisprudence, forging a triangulation that might be mapped as Birbeck-Cardozo/Amherst-Griffith, all the while participating in its institutional flows (of keynotes, collaborations, editorial boards, visiting fellowships, etc) as much as symbolic exchanges (of close readings, of the higher criticism, of grand theory, etc).

Certainly, the contributors to this volume represent precisely this kind of transnationality of legal theory, crossing not just metaphorical disciplinary boundaries, but literal national ones with, for example, a Scot teaching in Saskatchewan (Isobel Findlay), an Aussie battler teaching at an American University in Washington, DC (Penny Pether), a German citizen enrolled at London University but resident in Spain (Anja Louis), as well as editors (Bill MacNeil and Peter Hutchings) who have turned expatriation into a minor art form (the former Canadian born, British and American educated, Hong Kong apprenticed, now resident in Brisbane; the latter, Australian born, French domiciled, Hong Kong apprenticed, now resident in Sydney). On top of that, this volume crosses generational as much as national boundaries, numbering not only eminent scholars amongst its 'whinging poms' (Moran, Findlay) and 'bloody Yanks' (Sarat, Pantazakos), but a host of rising stars in both jurisdictions (Goodwin, Gearey, Seymour), as well as Oz (Fleming, Thomas, Leiboff) and a phalanx of the next generation of jurisprudence's Young Turks (Rosenthal, Duncanson, Louis). So what this issue of the *Griffith Law Review* is intended to give the reader is nothing less than a millennial 'snapshot' of

cultural legal studies around the common law world, its past, its present and what promises to be — with scholars like Rosenthal and Duncanson — a bright future. Of course, such an ambitious project as this issue could not have succeeded without the help of many individuals, whom the editors would like to thank in turn: first, to our contributors, from all parts of the world, for their excellent pieces, which provide this issue with its dazzling range, depth and scope; second, to the editorial board of the *Griffith Law Review* (Sandra Berns, Shaun McVeigh, Bronwyn Statham and Graeme Orr), as well as the Socio-Legal Research Centre (and its head, Rosemary Hunter, and Business Manager, April Chrzanowski) for all their financial and technical (many thanks April!) support; third, last and certainly not least, to Susan Jarvis, our Production Editor, who took on, single-handedly, the almost insurmountable task of formatting, proofing, precisising, checking, as well as tracking down biographical details for all the contributions/contributors in this issue. To her, the editors are profoundly grateful for her dedication, efficiency and (most significant of all) patience during a somewhat protracted period of production. To our readers, enjoy 'Law's Cultural Mediations' — jouis!