GOTHIC LAW

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This paper begins an exploration of the complex interface between law and the Gothic imagination. The Gothic imagination is a system for making sense of experience, as a semantic field of force. By way of two extended examples, the paper explores the ways in which legal discourse generates and is generated by the Gothic imaginary. It open with a preliminary exploration of law themes within Gothic literature. Gothic interest has ranged from the domestic legal tradition in general, the English common law, to a more specific focus on a wide range of locations within law's institutional topography. It then offers an overview of the attributes ascribed to law and its various institutions and practices associated with the Gothic in legal scholarship. The Gothic offers representations of law's corruption as well as law's wisdom. Having set out a preliminary preliminary catalogue of associations between law and the Gothic imagination, the paper then offers two extended reflections of the place of Gothic imaginery within law. By way of an analysis of the jurisprudence of buggery, the paper examines law's role in the production of the Gothic imaginary. Turning then to contemporary jurisprudence, the paper plots the resort to familiar gothic tropes within postmodern jurisprudence.

Introduction

Law appears to be a regular theme within Gothic literature[1]. Gothic interest has ranged from the domestic legal tradition in general, the English common law, to a more specific focus on a wide range of locations within law's institutional topography. In these various contexts, the law appears as the archaic and the dark, a vestigial shadow that haunts the legal and social order of the enlightenment and of modernity characterised by rationalism and neo-classicism. More specifically, it appears as the *ad hoc*, unreason, the outmoded, the judicial in contrast to the parliamentary, the law as unwritten in contrast to the written law. *Bleak House*[2] is one of the best known and most extensive examples of resort to these themes. The particular context is Equity, a distinct institution, jurisdiction and jurisprudence that emerged within English law in the sixteenth century. Equity and its court, the Court of

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1 Punter (1998) traces the significance of law in proto Gothic literature. He suggests that, within true Gothic, the themes of law gain in intensity and shift somewhat in focus.

2 Dickens (1853)

Chancery, are made the quintessence of law as an archaic past that haunts and corrupts the straight path of rule and reason, rendering it labyrinthine. In William Beckford's *Vatheck*, the particular focus of attention is the constitutional institutions of monarchy and sovereignty. In *Vathek*, they appear as corruption and evil, institutionalised and anthropomorphised in the character 'Vatheck ninth Caliph'.[3] In contrast to the monarch and the sovereign as divine reason and ruled order, in Beckford's novel the institution of sovereign power is corruption. This takes the form of passion, sensuality, pleasure: 'Notwithstanding the sensuality ... his people ... thought that a sovereign giving himself up to pleasure, was able to govern, as one who declared himself an enemy to it.'[4] The court room, the trial, the dungeon, the prison and guilt (Godwin's *Caleb Williams*) are other important legal sites within the Gothic. Each stands metonymically as a sign of law's ruin, law's impenetrable darkness, law as labyrinth. Crime has a particular place in the Gothic.[5] In Maturin's *Melmoth the Wanderer*, crime is unreason (madness) to law's reason[6]. The wrongful act is the mark through which man's corruption is given form — understood as evil made manifest in particular acts. By way of the criminal act, the body is made monstrous — a living sign of corruption. *Great Expectations* is a rich example of this theme.[7] Murder is the gothic act *par excellence*. Mary Shelley's *Frankenstein: The Modern Prometheus*,[8] Maturin's *Melmoth the Wanderer*[9] and Stevenson's *The Strange Case of Dr Jekyll and Mr Hyde*,[10] to name a few, draw attention to the particular frequency with which murder takes serial form in the Gothic tradition.[11] Lawyers, as solicitors, barristers and judges, appear as characters in Gothic texts as the embodiment of a certain ambivalence of good and evil: between law as order and right reason and law as corruption. Dodson, Fogg, Sampson Brass, Uriah Heep and

3 Beckford (1786). Beckford's choice of Caliph as a manifestation of the attributes of sovereignty is particularly interesting. The explanatory footnotes that accompany this edition of the text explain that 'caliph' implies 'three characters of Prophet, Priest, and King': Beckford (1786), pp 1ff. The conflation of the secular and sacred is a characteristic of English monarchy and sovereignty and more generally of those concepts within a wider European tradition: see Kantorowicz (1957).

4 Beckford (1786), p 3. MacNeil offers another instance of the theme of sovereignty and state institutions in the Gothic in his reading of Mary Shelley's *Frankenstein*. He suggests that Shelley's text offers an exploration romantic origins of the bourgeois rights tradition that emerged out the French Revolution: MacNeil (1999a).

5 Private (civil) law is less commonly found. *Bleak House* is an exception to this, though Hutchings notes that murder and the criminal law are intimately connected with the civil law in Dickens' novel: see Hutchings (1999), p 46.

6 Maturin (1820), p 64.

7 Collins (1994); Hutchings (1999); MacNeil (1999b).

8 Shelley,(1831).

9 Maturin (1820).

10 Stevenson (1886).

11 MacNeil (1999a).

Mr Vohles are examples of lawyers in Dickens.[12] Lawyers appear as narrators in Gothic texts — for example, Mr Utterson in Stevenson's *The Strange Case of Dr Jekyll and Mr Hyde*. In this instance, the personification of law as order guarantees the possibility of the truth of the narrative and is in contrast to the corrupting force of science. Lawyers appear as heroes, taking the role of guides who might charter a route through 'the labyrinth of the Law'.[13] The particular tropes of law as madness, unreason, corruption, and a tangle of tortuous and perplexing enigmas and idiosyncrasies also need to be understood in terms of being a precursor to another manifestation of law: law as a form of violence through which the social order is made possible. Here law appears according to the logic of the sublime — law as divine, (super)natural, terror.

Another aspect of the relation between law and the Gothic is to be found in the resort to a juridical approach to narrative and truth in various Gothic novels. Like the truth of the courtroom, Gothic novels such as *The Castle of Otranto*[14] and *Dracula*[15] construct their truth through the presentation of an accumulation and an incomplete consolidation, of fragments. In *The Woman in White*, Wilkie Collins explains the text's format — a series of 'witness' statements — in the following terms: 'As the Judge might have once heard it, so the Reader shall hear it now.'[16] Each chapter is offered as 'evidence' produced according to the legal demands that prohibit the taint of 'hearsay'. The resort to these juridical forms of narrative produces particular effects. They deploy and reproduce characteristics of deferral and delay of the trial process produced through the succession of witnesses.[17] The potential for the deferral of the truth provides the reader with an experience of both the legal process and the Gothic text as a labyrinth. Its particular use is to (re)produce the narrative as an experience of suspense and mystery.[18] The use of these juridical practices of narrative in Gothic literature also produces the practice of reading as an experience of authorship as an absent presence.[19]

In turn, the attributes ascribed to law and its various institutions and practices associated with the Gothic are also to be found within legal scholarship. For example, they inform Bentham's writings. Over against a utilitarian reformist vision of law made by way of Bentham's scientific rationalism, the extant practice of English common law takes the form of a ghostly presence — a set of fictions that haunts law's reason and the will to

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12 Collins (1994), p 174.

13 Collins (1860).

14 Walpole (1764).

15 Stoker (1897).

16 Collins (1860), p 9.

17 Formal devices have been developed within legal practice to bring this potential for deferral and thereby the impossibility of truth in law to an end. They include the burden of proof, beyond a reasonable doubt (in criminal law) and on a balance of probabilities (in civil disputes) and in the institution of the jury.

18 Haggerty (1989), p 21; Haltunnen (1998), p 4.

19 Botting (1996), p 49.

reform.[20] Contemporary law is characterised as unreason, madness, an archaic and a haunting presence that threatens to destroy or delay the new bureaucratic order of modernity that demands rational institutional hierarchy, deductive reason and exhaustive expression according to the logic of codification. Here the English common law is the labyrinth and the ruin of the will to juridical modernity.

A different Gothic of law appears in the context of reflections on the particular temporality and geography of the English common law. Here the common law, as unwritten law, is represented as a nascent wisdom revealed in precedent. It is a repetition and a return that locates the wisdom and truth of the legal order in an archaic past, a time immemorial, a mediaeval time made present. It makes law a celebration of Gothic.

This celebratory Gothic appears in various contexts. It is apparent in the various examples of redaction, where the disparate, the *ad hoc* and the unwritten of law's past and present are collected, systematised and organised into a single text. Taking the form of a commentary on law, Coke's seventeenth century four-volume *Institutes of the Laws of England*[21] and Blackstone's four-volume *Commentaries on the Laws of England*[22] are the most celebrated examples. Victorian scholars such as Maitland[23] engaged in similar projects. Each writes the present as a realisation and perfection of a Mediaeval past. Here the archaic is not so much an impenetrable shadow and a convoluted journey, with many wrong turns and dead ends, as a slow, ordered progression, in which the long and winding path is a geography of wisdom rather than folly. Its end point is not so much monstrosity but a particular beauty where nature and nurture, the divine and the secular achieve a unity. In different ways and at different times, these jurisprudential reflections celebrate the idiosyncrasies of an island tradition in contrast to a mainland European tradition, of civil law. They are a celebration of the northern — and as such a Gothic — in contrast to a Roman, Mediterranean, (neo)classical/rationalist juridical tradition.[24] This Gothic celebrates law as a certain wisdom, truth and justice.[25] At the same time, in the redaction of the unwritten law according to the logic of the code to produce the *ad hoc* and the idiosyncratic as an underlying logic and an supra-rationality, they demand a repression of the scholasticism and the rigour of the civilian logic of the code in the production

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20 Hutchings (1999) and (2000). Its perhaps ironic that the aesthetics of the new courts of justice in the Strand, London was the Gothic, albeit a 'muscular Gothic': Brownlee (1984).

21 Coke (1628).

22 Blackstone (1769).

23 Maitland (1911).

24 Berman (1983); Goodrich (1981).

25 David Brownlee's study, *The Law Courts: The Architecture of George Edmund Street*, illustrates the ways in which these factors informed the decisions relating to the design of the new High Court buildings on the Strand. Gothic appears as the 'natural' architectural aesthetic of law in High Victorian monumentalism: Brownlee (1984).

of the common law as Gothic.[26] In the juxtaposition of these legal writings, scholars have produced law's Gothic as a certain ambivalence, both foundational good and fundamental evil, the quintessence of civilisation and a threatening barbarity.

Finally, crime is an important legal context for the production of Gothic themes in law and related disciplines. Criminal law, criminal justice and criminology are locations *par excellence* of production of ideas of evil, particularly in the context of violence and sexual acts. There is a long juridical tradition of associations between criminality, particular bodies, the monstrous and the grotesque.[27] Criminology has translated these juridical concerns and produced them according the epistemological requirements of a social science. In turn, this criminological truth of crime has informed criminal law and the processes of criminal justice.[28]

This preliminary catalogue of associations between law and the Gothic imagination draws attention to an important issue: the nature of the relation between the law and the Gothic. In part, other scholars offer an answer to this question in their explanations of the nature of the Gothic. While many point to the relation between the Gothic and particular literary modes of production, most scholars who engage with the Gothic would not want to reduce it to a literary genre. This parallels Brooks' approach to melodrama, which he describes as 'less a genre, more an imaginative mode'.[29] He goes on to explain that the melodramatic imagination is a 'fictional system for making sense of experience, as a semantic field of force'.[30] Here Brooks brings together ideas about origins (literature) and effects that point to the wider cultural significance of melodrama — or, for the purposes of this essay, the Gothic. Others add flesh to these bones. For example, Bayer-Berenbaum describes the Gothic as a particular 'philosophy'.[31] Halttunen explains the Gothic in terms of a 'mental and emotional strateg[y] employed within a given historical culture'.[32]

Gothic scholars have suggested that, as an imaginative mode and philosophical schema, the Gothic is an effect of and response to modernity that is experienced as the loss of tradition, the loss of the divine and the sacred, as organising principles of moral truth and order. In the Gothic, the sacred/the

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26 Goodrich (1995).

27 Hart (1994); Hutchings (2000).

28 Young (1996).

29 Brooks (1995), p vii.

30 Brooks (1995), p xii. Judith Walkowitz's *City of Dreadful Delight* provides an example of an attempt to realise Brooks' idea of the melodramatic imagination as a more general cultural intelligibility through an analysis of English Victorian campaigns relating to female sexuality: Walkowitz (1992). A few asides are made referring to the significance of the Gothic fairytale that informed the politics relating to the enactment of the *Criminal Law Amendment Act* 1885, but these are undeveloped here.

31 Bayer-Barenbaum (1982), p 12.

32 Halttunen (1998), p 2.

divine returns in a secular form — nature. Gothic scholars have also drawn attention to the importance of taking account of the ways in which the Gothic offers a reaction and response to the totalising aspects of the Renaissance's recuperation of a Greco-Roman classicism and the Enlightenment's focus on the scientific and the rational. The unreason and the irrational that are banished return to haunt and disturb. While their return threatens to destroy, the terror of that which returns offers the possibility of new sensations, new insights, new social orders.

The particular historical context of its emergence (consolidation?) is eighteenth century English modernity. Its persistence through the nineteenth century and revival in the late twentieth century are explained in part by reference to the persistence of the concerns that it seeks to address: 'it speaks to the 20th century'.[33] Others have noted the ways in which new technologies of communication have given new life to the Gothic — first film, then television and more recently digital technologies.[34]

In these terms, it is no surprise that a Gothic intelligibility and law are intimately connected institutions and sets of practices through which the sense and non-sense of past and present, stability and change, tradition and modernity are made and unmade on a day-to-day basis. The Gothic offers a 'philosophy' through which these terrains might be rendered intelligible and unintelligible. The remainder of this paper explores two aspects of the relation between law and the Gothic. In the first instance, I want to consider law as a site of production of a Gothic intelligibility. Second, I want to explore the potential of the Gothic as a critical and analytical tool to offer insights into some recent jurisprudential scholarly reflections.

Enter Law's Ghost

In this section I want to analyse one context in which the law might be said to be a 'source of' a Gothic intelligibility. The particular focus is a study of the offence of buggery.[35] This wrongful act provides an opportunity to examine

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33 Bayer-Barenbaum (1982), p 12.

34 Botting (1996), p 165.

35 While buggery — and in the United States sodomy — are not reducible to anal penetration between men, my analysis will focus on this aspect of the offence. See Robson (1992) and Robson (1998). It is the act that has long dominated the jurisprudence and legal practice of buggery/sodomy. While the spectral body has long been imagined in this particular term for homogenital relations, it would be wrong to conclude that the juxtaposition of the body's corruption and the spectral body is unique to this act. Lord Sumner, *R v Thompson* [1918] AC 221 at 235 provides an excellent example of this juxtaposition in the context of a dispute relating to a question of evidence of identity:

> 'The evidence [photographs of naked boys and powder and powder puffs] tends to attach to the accused a peculiarity which, though not purely physical, I think may be recognised as properly bearing that name. Experience tends to show that these offences against nature connote an inversion of normal characteristics which while demanding punishment as offending against social morality, always partake of the nature of an abnormal physical property ... Persons ... who commit the offences

the way the male homogenital body in law is made a ghostly body that has long be made to haunt the body of law and in turn haunt the natural (male) body.[36] I want to examine the legal knowledge and legal practices though which a conjunction between the body as corruption and spectrality has been produced. Buggery will also provide an opportunity to examine a set of techniques of writing the terror of law.

Buggery is a wrongful act through which the sacred is made secular. Prior to its temporary enactment in 1533–34 (and enactment in perpetuity in 1562), buggery was a wrong under the jurisdiction of the spiritual courts, not the secular courts. In its secularisation in 1533, the natural body as a spiritual body of law became formally incorporated into the secular body of law.[37] This incorporation is explained in the Henrician statute not as a displacement or a termination of the spiritual, but as its reaffirmation and perfection: 'There is not yet sufficient and condign punishment.' The secularisation of the offence sought to perfect the prohibition and to better realise the sentence: death.

Buggery is produced in law as a particular form of violence. Bray notes the importance of the sacred here. At the time of the Henrician reform, a particular theological logic produced buggery as a very special evil. It was understood as an evil that 'had no place in the Kingdom of Hell because it had none in the Kingdom of Heaven'.[38] He adds: 'It was not conceived of as part of the created order at all; it was part of its dissolution.'[39] An examination of the detail of the law provides an opportunity to consider the production of the relationship between the forbidden act and terror in the secular context of law. This can be explored by way of the writings of Sir Edward Coke, in the third

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now under consideration [gross indecency is an offence that may only be performed by men] seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialised and extraordinary class as much as if they carried on their bodies some physical peculiarity.'

It is also to be found in the offence of gross indecency, introduced in the *Criminal Law Amendment Act* 1885. The details of the offence are undefined in the Act. The terror and writing techniques that I will examine in the context of buggery were applied to the offence of gross indecency. In part, this might be explained by the fact that gross indecency involves genital relations between men, which has traditionally dominated the definition of buggery. In part it might be explained by the fact that the 'new' offence of gross indecency merely renamed what was already effectively criminal under the offence of buggery. On the lesbian body as the monstrous in law, see Hart (1994). In the context of lesbian and the Gothic see Palmer (1999).

36 Queer scholars have noted that such a configuration is associated with homogenital relations.See Fuss (1991); De Laurentis (1991); Castle (1993) They have noted the way the homogenital body (a body whose sense, and non sense, is made by way of that body's genital relations with other bodies of the same sex) is lived and represented as a haunting and ghostly phenomenon.

37 Goodrich (1999) and Goodrich (1995).

38 Bray (1982) p.23.

39 Bray (1982) p.25.

part of the *Institutes of the Laws of England*,[40] one of the first detailed secular expositions on buggery. For Coke, buggery is a sign of the alien, understood as a sort of invasion — a practice brought to these shores by Lombardians[41]. Here buggery and Englishness are closely aligned. Buggery is the outside that is always already (via invasion) inside (England's corruption) and that which has to be expelled.[42]

Coke writes the particular form of violence of buggery through his taxonomy of 'Offences against the Crown'. In its close proximity to treason, buggery is an act that threatens sovereignty and state institutions. It is also an act akin to murder, being proximate to the offence of deodands which is defined in the following terms:

> when any moveable thing inanimate or beast animate, doe move to, or cause the untimely death of any reasonable creature by mischance ... without will offence or fault of himself, or of any person.

In this particular proximity, it is made sense of as a violence that has a capacity to blur otherwise clear distinctions: between animate and inanimate, reason and unreason.[43] It is here associated with a form of murder performed by a thing already dead (an inanimate thing). In Coke's text, buggery is also affiliated with rape. In this conjunction, buggery is to be understood in terms of a violence against the carnal order and the patriarchal order of the circulation of women. The tradition of buggery as a 'sign of corruption' and extreme violence is written in subsequent taxonomies as a threat to the social order in various ways — be it as a threat to the sacral order, or the secular order of the state (public order), the order of the person (an offence against the person) or, more recently (in the *Sexual Offences Act* 1956), the sexual order.[44]

In writing the detail of the wrongful act, the eye of the law slides across the surface of the body, from the penis to the anus, from active to passive, from penetration to emission and so on. Through writing the meaning of the wrongful act through successive taxonomies of 'Offences against the Crown', the hand of law writes this tradition of buggery as an extreme violence that shifts from the natural body to the artificial body; the human body to the social body, to the body of the King (the juridical body of law).

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40 Coke (1628).

41 The Lombards were a Germanic people that settled in northern Italy. They are also associated with banking, money-lending and pawn-broking.

42 Goodrich (1992)

43 The theme of buggery's capacity to blur distinctions is further developed in Coke's commentary. Buggery as genital relations between humans and animals renders that distinction problematic. Coke cites a case in which, as a result of such encounters, a woman gave birth to a baboon. In Lord Audley's case, one of the manifestations of buggery is in its capacity to blur distinctions between Anglicism and Catholicism. See Lord Audley, Earl of Castlehaven (1631) 3 State Trials 401.

44 Moran (1996).

The persistence of the associations between the act of buggery, corruption and terror was subject to detailed governmental scrutiny in a review undertaken by the Wolfenden Committee, spanning the years 1954–57.[45] During the course of a debate to abolish the offence of buggery, having concluded that there was no substance in the reality of the apparition, the committee decided to retain the legal term 'buggery' and proposed its re-enactment in the law. They offered the following explanation:

> Although we (or a majority of us) see no reason to distinguish, from the point of view of the law, between buggery *per se* and other homosexual acts, there is no doubt that the very thought of buggery causes many people to get hot under the collar. We cannot overlook the fact that there are a great many people who believe (however much we may disagree with them) that buggery, as distinct from other forms of homosexual behaviour, has demoralising effects not only on individuals but on nations and empires.[46]

The sensation under the collar is a corporeal mark of a lingering disturbance, a terror institutionalised by way of buggery. The phrase 'demoralising effects' points to the persistence of the relations between buggery and corruption. That corruption still knows no bounds. It haunts the individual, the nation and the Empire. The particular dangers attributed to the act should be preserved by way of the name 'buggery'.

In the final report of the Wolfenden Committee, the retention of buggery as a device through which an experience of corruption and terror might be reinstitutionalised is explained on the basis that it represents tradition and the wisdom of our forefathers. What is interesting in the demand that the name of buggery be retained is the need/desire for the terror that lingers in the name. In the extract from the Wolfenden review, the proposal to retain the name of the prohibition suggests that it takes the form of a desire for the particular violence of law.

In 1967, the terror of buggery was formally transposed into a new juridical context when buggery was renamed as an act of homosexuality. The retention of the archaic term, buggery, and its connection to 'homosexual' represents the formal translation of the mark of the apparitional body from buggery as an act of evil to the act as a mark of flawed identity (homosexual).

More recently still,[47] this particular Gothic tradition was given new life in the litigation that is known in law as *R v Brown*,[48] but which most people know

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45 Wolfenden (1957).

46 Public Records Office. HO 345/10, CHP/MISC/2.

47 Other examples should be noted. Parliamentary debates which led to the enactment of section 28 of the *Local Government Act* 1988 provided a vehicle for the production of the male homogenital body as terror in the 1980s. This legislative intervention also coincided with the homogenital body as terror produced through the emergence of the AIDS pandemic: see Smith (1994) and Watney (1987). In the late 1990s, the Labour government's attempts to reform the 'age of consent' for sexual relations between men and attempts to repeal s 28 were

as 'Operation Spanner'. One of the interesting features of this case is the appearance, disappearance and reappearance of the 'homo'. It appears in the naming of the men as homosexual throughout the investigations and the litigation; it disappears when the men themselves attempt to claim that acts of homosexual sado masochism are homosexual acts and thereby lawful. It reappears in the final determination to name the sado-masochism of men 'wrongful acts'.

In the final instance, homosexuality and sado-masochism have a metonymic/metaphoric relation. They are thereby one and the same body and a very particular body at that.[49] Here the signs of pleasure are read as the marks of corruption. The bodies of the defendants appear as ruined bodies — scarred, bleeding, weeping, broken, open. In the various judgments, these bodies stand as a sign of escalating violence; they are unruly, bodies without the possibility of a referee (without order/without a father). These bodies are understood in law as delirium, as bodies that destroy order and as bodies that call for order.

That this is a body of sadomasochism as homogenital and not just the sadomasochistic body is confirmed in a subsequent decision of the Court of Appeal in February 1996, *R v Wilson*,[50] which concerned an act (similar to that found in the *Brown* case) of branding. The accused, a man, had branded his initials on the buttocks of his female partner. The judgment of the Court of Appeal emphasises the matrimonial nature of the act. In the context of cross-sex relations, branding is not so much a sign of loss of social order and loss of control — the potential for scarred and broken bodies — but an adornment, a token of affection, a bond of love. Here the violence to the woman's body is a sentimental romantic inscription. The violence against the women in this case is displaced and denied, and reappears as a terror and fear that slips from the homo body to the 'sado-masochist' to the juridical body and back again.

Buggery appears to provide a rich site for the production of the Gothic imagination. Law as a practice of repetition and citation is a practice that might ensure their durability. Law is a living archive through which the present might be haunted by a specific past that is a logic of evil acts, corruption, monstrosity, dread and terror.

Writing the Ghost

I now want to shift the focus of analysis to the textual practices of law that produce the body of buggery as a spectral body. What are its terms and conditions? Where do we look for these terms and conditions? It is not to be

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recent examples of the continuation of the tradition of the homogenital body as terror.

48 *R v Brown* (1992) Cr App R 302; *R v Brown* [1992] 1 QB 491 and *R v Brown* [1994] AC 212. This case proceeded to the European Court of Human Rights in Strasbourg as *Laskey, Jaggard and Brown v The United Kingdom, Lasky* (1997) 2 European Court of Human Rights Reports 39. The court upheld the decision of the English court: see Moran (1998).

49 Moran (1995).

50 *R v Wilson* (1996) 3 WLR 125.

found in the public declaration of the law; statute law. The act of Henry VIII invokes the name of buggery but invokes it as a name that is always already in existence and presupposes the terms and conditions of its operation. As such, its terms and conditions are not to be found in public law (the law articulated in public discourse) but in what we might call 'the obscene "nightly" law' that necessarily redoubles and accompanies, as its shadow, the 'public' law of the statute.[51] This 'obscene "nightly" law' is the 'law' between lawyers — scholarly commentary and procedural law, the practices that write the voice of law rather than the (disembodied) letter of the law.

Various legal scholars and commentators have documented the practices and rituals through which writing the ghost in law must be performed. Sir Edward Coke's 'Of Buggery or Sodomy'[52] documents the contemporary procedural requirements. If buggery is to appear in the law then, he explains, it must be produced not by way of the term 'buggery' but according to the following formula: 'not to be named amongst Christians' (*inter christianos non nominandum).* It must be produced according the requirements of an injunction to silence.

The impact of this injunction to silence can be seen in the writings of Sir William Blackstone, one of the most noted, respected and influential commentators on the common law.[53] He makes reference to the offence of buggery in Chapter 15 (Offences Against the Person), section IV, Volume 4, 'Of Public Wrongs', in his *Commentaries on the Law of England.*[54] He refers to the wrong of buggery not by resort to the word 'buggery', but by means of the title 'the infamous crime against nature'. Having explained the need for the offence to be strictly and impartially proved, he continues:

> I will not act so disagreeable a part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature.[55]

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51 Zizek (1994), p 54.

52 Coke (1628). It first appeared in *Coke's A Booke of Entries: Containing Perfect and Approved Presidents*: Coke (1614). The text includes a precedent for an indictment, a formal written accusation required in order to initiate a trial for sodomy. As a precedent, the indictment suggests that the 'abominable sin of Sodom, called in English Buggarie ... ought not to be named among Christians ...' While the edition referred to here was published in 1628 the materials upon which it is based may have been circulated previously, reflecting an earlier practice of silence. The conjunction of buggery and sodomy in the title of Coke's meditation is of particular significance. It draws attention to a point of connection between the sodomitical legal tradition of the United States and the English legal tradition of buggery. The remainder of his meditation privileges the term used within the English legal system, 'buggery'. In Scotland, the term used is 'sodomy': see Hume (1986).

53 Alshuler (1994).

54 Blackstone (1769), p 215.

55 Blackstone (1769), p 215.

Coke and Blackstone both draw attention to the practices of writing in law that phantomise the male homogenital body. It is produced through the absence of the word 'buggery' from the text of law. Blackstone's obedience to the command to be silent inscribes this marked body in law as an absence (as a hole in the real), as the impossibility of representation which might be understood as a form of death. At the same time, he demonstrates the way this injunction to silence sets the signifier in motion.[56] The injunction to silence appears to operate more as a prerequisite for its representation in the law; a demand that we write this body as the shadow of this absence. Thereby the text of law (the body of law) is haunted by an absent presence that is the name 'buggery'.

The marked body is also phantomised in the mode of annunciation as performed in Blackstone's modesty and restraint: 'I will not act so disagreeable a part ...' The body as shadow is performed in the rituals of sanitised public speech. Through these rituals, this genital body is produced as reticence and hesitation. It is performed as that which is barely utterable. It is barely decipherable. It is barely audible — an oral/aural paleness. It is performed as an outline of a body that is elsewhere, a terrible force on the threshold of appearance that must be kept at bay.

That these rituals produce this body as dread and terror is evidenced in Blackstone's observation that 'the very mention of which [buggery] is a disgrace to human nature'.[57] Here silence is the icon of terror rehearsed again in the description of the potential effects of that terror unleashed, 'a disgrace to human nature'. The ritual of hesitation memorialises the danger of the corrupting power of buggery explained in terms of a fall from grace — a fall into silence. Thereby the juridical protocols produce this body as the diabolical body, a body beyond representation, an exorbitant power.[58]

The textual incorporation of the incorporeal is one locus of danger that produces its own problems. Some of the problems of dealing with the dangers associated with use of the word buggery are found *in R v Rowed and Another*.[59] The indictment against Rowed contained several counts which purported to describe a series of similar illegal acts performed by the accused in Kensington Gardens. The first count of the indictment read as follows:

> ... being persons of nasty, wicked, filthy, lewd, beastly and unnatural dispositions, and wholly lost to all sense of decency and good manners, heretofore, to wit on, ... with force and arms....in a certain open and public place there, called Kensington Gardens, frequented by divers of the liege subjects of our lady the Queen, unlawfully and wickedly did meet together for the purpose and with the intent of committing and perpetrating with each other, openly lewdly and indecently, in the said public place, divers nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices; and then and there unlawfully, wickedly, openly,

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56 Lacan (1977), p 38.

57 Blackstone (1769), p 215.

58 Kristeva (1982). See also Fuss (1991); Butler (1990) and (1991).

59 *R v Rowed and Another* (1842) 3 QB 180.

> lewdly and indecently did commit and perpetrate with each other, in the sight and view of divers of the liege subjects of our said lady the Queen, in the said public place there passing and being, divers such practices as aforesaid to the great scandal and disgrace of mankind in contempt ... to the evil example ... and against the peace.

In the context of the legal injunction to silence (which the judges noted was still a requirement of the law), the absence of any particular criticism of the immense verbosity of the representation of the body of the unrepresentable *per se* is of particular interest. In the appeal court, the judicial criticism of the indictments was not that too much was said, but that too little was said. It is interesting that this verbosity makes the forbidden act (and thereby the forbidden body) vivid — one might say comic — but at the same time insubstantial, too pale, too shadowy. As such, it threatens to undermine the legal process. The problem is the inadequacy of the signifying elements. Their adequacy is to be recuperated by the inscription of the sign of the founding injunction: buggery. But it should not be thought that the juridical writing of this shadowy body would demand the removal of the manifold epithets. The appeal court merely concluded that they must be conjoined with the juridical term 'buggery' which, it was said, had the capacity of 'shewing the intention implied by the epithets'.[60] Only by way of the archaic term of law might this shadowy body appear in the law. The manifold epithets can only make judicial sense if sutured to the hole in the real. The ghost that is to haunt the legal body must appear by way of particular rituals. Thereby the excess of representation that threatens to make the spectral too substantial renders the most vivid a sufficiently pale shadow.

The danger associated with representation is also the site of a demand for vigilance. The legal rituals and lexicon have a compulsory quality. To be in the law as a speaking subject, a legal subject must fulfil particular requirements. The legal subject does not have the right to say everything and comes into being according to a particular (restricted) economy of speech.[61] It is according to these rituals and requirements of a legal practice that the apparition might be produced as the truth in law.[62] This is the point at which fantasy is installed in subjectivity — legal subjectivity.[63] In the juxtaposition of the injunction to silence and a command to speak, the ritual invocation of the injunction to silence in the law appears not only to call forth the horrors that are associated with buggery but it also appears to protect those who speak of such things in the law.

While the injunction to silence is no longer a formal requirement of legal practice, silence continues to be intimately connected to the acts of the male homogenital body. It is enacted in the 1967 *Sexual Offences Act* in the requirement that decriminalisation would only relate to homosexual acts in

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60 *R v Rowed* (1842) 3 QB 187.

61 Foucault (1981), p 61.

62 Foucault (1981), p 60.

63 Cf Hachamovitzh (1994).

private — that is, where no more than two persons were present. In turn, the private has been central to subsequent key developments in the field of human rights litigation that have further advanced decriminalisation, in *Dudgeon v United Kingdom*,[64] in the United Kingdom's recent *Human Rights Act*, and more generally in scholarship on gay rights as human rights.[65]. However, as Roland Barthes comments:

> The 'private life' is nothing but a zone of space, of time, where I am not an image, an object.[66]

In being consigned to the private, the male homogenital body is to be lived as an image that is not an image, an object that is not a subject, a subject that is not a legal subject.

Law's Double: The Doppleganger Effect

One trope of the Gothic is the double or doppleganger. An examination of the doppleganger effect in law provides an opportunity for further insights into the nature of the violence associated with the forbidden acts and in turn the nature of law's violence. A series of eighteenth century cases dealing with the common law offence of robbery are one instance where these matters have arisen in law. Robbery is:

> the stealing or taking from a person, or in the presence of another, property of any amount, with such a degree of force or terror, as to induce the party unwillingly to part with the property.

In these cases, 'the force and terror' that led to property being given up was a present and future violence generated by language, through the invocation of the term 'sodomy'.[67]

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64 *Dudgeon v United Kingdom* (1982) 4 EHRR 149 and Moran (1996a).

65 Wintermute (1995).

66 Barthes (1977), p 15.

67 The recognition of the buggery/violence conjunction and the monopoly over its deployment is not peculiar to the opinion of certain judges. It has also been recognised and formalised in legislation. This legislation is of particular importance, as it brings buggery within the ambit of the law that we now refer to as blackmail. In 1825, an Act was introduced to amend the law relating to the offence of sending threatening letters and the offence of assault with intent to commit robbery. In order that the writing contained in the letter, or the words spoken, be interpreted as a threat, the law required that the words used had to take the form of an accusation relating to a crime punishable by death, transportation or pillory, or be an accusation relating to an infamous crime. The Act of 1825 provided a list of offences that were, for the purpose of this offence, always to be taken to be infamous crimes. The category was to include not only every crime already deemed infamous but henceforth:

'every Assault with Intent to commit any Rape, or the abominable Crimes of Sodomy or Buggery, or either of those Crimes, and every Attempt or Endeavour to

In *King v Thomas Jones*,[68] the judges concluded that the imputation of sodomy was so alarming that it was sufficient to satisfy the requirement of force or terror. Jones, who had utilised this terror in order to gain property, was duly sentenced to death. A second case, *R v Hickman*,[69] offers further insight into the nature of this terror and violence. Again the prosecutor, acting under the threat of sodomy, paid money — this time to the accused Hickman. The victim explained that he 'parted with his money under an idea of preserving his character from reproach, and not from fear of personal violence'. The jury found the prisoner guilty. First, the decision draws attention to the nature of the terror associated with buggery/sodomy. It is a violence that destroys the character. It is such a corrosive force that to merely invoke the name is to be understood as an attack that might destroy rank, status, moral qualities and the personal. This conclusion is graphically followed in *R v Knewland and Wood*,[70] where Ashurst J observes:

> The bare idea of being thought addicted to so odious and detestable a crime, is of itself sufficient to deprive the injured person of all the comforts and advantages of society: a punishment more terrible, both in apprehension and reality, than even death itself. The law, therefore, considers the fear of losing character by such an imputation as equal to the fear of losing life itself, or of sustaining other personal injury.[71]

Second, in the Hickman proceedings, a special court of twelve judges went on to explain this force as a reflection. The question of the thing reflected in that apparition was considered by way of the issue of access to that terror: who has the capacity in a social order to resort to the name 'sodomy' and its silences, to invoke terror and call that silence truth? The offence of robbery performed by way of the invocation of the name buggery/sodomy is not about a total prohibition of the use of the name and the use of the terror associated with it, but about access to that name/terror. In reaching the conclusion that the use of silence and the naming of buggery/sodomy for the purpose of obtaining money or property may be an act of robbery, the judges do not seek to deny the

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commit any Rape, or the said abominable Crimes or either of them, and also every Solicitation, Persuasion, Threat or Menace, offered or made to any Person, whereby to move or induce such Person to commit or to permit the said abominable Crimes or either of them, shall be deemed and taken to be an infamous Crime within the Meaning of the said recited Act'.

The provision was consolidated in the *Larceny Act* 1861. At that moment in time, it was also rewritten so that the category of 'infamous crime' was reduced to the 'abominable Crime of Buggery' (s 46). Its continued viability was recognised in its re-enactment in 1916 in the *Larceny Act*. Finally, it was transformed and its viability modernised in English law in the creation of a new offence, blackmail, in the 1968 *Theft Act*.

68 *R v Jones* (1775) 1 Leach 139.

69 *R v Hickman* (1783) 1 Leach 227.

70 *R v Knewland* (1796) 2 Leach 72.

71 *R v Knewland* (1796) 2 Leach 72 at 78.

buggery/violence/terror conjunction, but demonstrate a determination to limit access to that violence.[72] Hickman's case suggests that the lexical economy and textual practice of juridical ghost writing are intimately connected with access to the power to name and thereby access to violence and terror. The command to silence is not only concerned with the specific ways in which the male genital body may be spoken in the law; it is also a reference to the distribution of those authorised to speak this body and thereby produce the violence/truth of the genital male body in its genital relations with other male bodies. The terror of the specter in the name 'buggery' is the mirror image of the terror and violence of law.

Another instance of law meeting its reflection in the context of buggery is to be found in the defence of provocation offered by those who kill in response to a 'homosexual advance'. Here an act of violence that is the subject of prosecution and is thereby in the first instance characterised as an act of violence outside the law is recognised as a reflection of the law. In the United States, the relation between these brutal acts of violence and the law is found in the name given to the defence against homosexual advance. It has been called the 'unwritten law'.[73] Another example of the doppleganger effect is to be found in the first action brought by Oscar Wilde against the Marquis of Queensbury. Queensbury, charged with criminal libel, pleaded the defence of justification. At the time, for Wilde's action to be successful, the libel the defendant was accused of had to be such as to threaten a breach of the peace. Wilde's charge worked with the idea that an accusation of sodomy was such a force and terror as to be a direct threat to the Queen's peace. As such, the invocation of sodomy was against good order and thereby against the criminal law. Queensbury's successful response draws attention to the force and terror produced by way of an accusation of sodomy not so much as a threat to social order, and thereby as something outsider the social order and the legal order of the Queen's peace, but as a reflection of it. In the success of the defence, the force and terror outside the law is made the law's violence.[74].

A Gothic Jurisprudence

You hide your face, and they are terrified;
you take away their breath
and they die and return to their dust

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72 See Lindgren (1984), p 702; Katz (1993), p 1567. It is interesting to note that, at the time, both buggery and robbery were capital offences. However, unlike buggery, when the accused was found guilty of robbery the sentence of death was rarely carried out. In *The King v Hickman*, the accused was found guilty and sentenced to death. However, the sentence was never carried out. Hickman was reprieved and at the end of the April Session 1784 received His Majesty's pardon on condition of being transported to Africa for fourteen years.

73 Merrill Umphries (2000). In Australia it is known as the homosexual panic defence.

74 Moran (1996).

You send forth your Spirit, and they are created;
and so you renew the face of the earth.

(Psalm 104 verses 30–31)

In my second reflection on the relation between law and the Gothic, I want to look at some recent debates within jurisprudence — in particular, what I want to call postmodern jurisprudence. I wish to argue that, at the end of the last millennium, a Gothic jurisprudence emerged in anglophone legal scholarship. What are the signs of the Gothic in recent jurisprudential writings?

They are to be found in a return to the sacred and in a re-evaluation and a recuperation of the iconography of the religious in law. Instances are to be found in Peter Goodrich's work that draws parallels between the rituals of the Eucharist and legal rituals.[75] They are also present in his more recent work that poses the problem of representation of law by way of the struggle over representation in the emergence of the Protestant church in northern Europe: iconoclasm.[76]

A particular influence here has been the work of the continental jurisprudential scholar Pierre Legendre. Legendre's work explores the relation between the sacred and the secular through a study of the emergence of the civilian legal tradition in the context of a culture dominated by the Catholic Church. The blurb on the inside of Goodrich's collection and translation of Legendre's work suggests that Legendre's work on law has a particular significance; his work will introduce us to the law as 'delirium' and 'passion'.[77]. These terms resonate with the Gothic's focus on sensation, on that which is repressed (and returns) on attributes associated with the sublime.

The references to Legendre in jurisprudential scholarship also point to another aspect of the turn to the Gothic: psychoanalysis. Lacan, in particular, has come to achieve a certain prominence in Anglo American legal scholarship. Evidence of this is to be found in the writings of Goodrich, Douzinas and Caudill.[78] As recent critical scholars of both melodrama[79] and the Gothic[80] have noted, psychoanalysis takes on cultural and historically specific forms — in particular, those of melodrama and the Gothic. Brooks notes that there is a 'convergence in the concerns of melodrama and psychoanalysis'[81] which he suggests requires that we think of psychoanalysis as 'a kind of modern melodrama'.[82] In the context of the Gothic, Mighall — reflecting on the resort to psychoanalysis in order to read Gothic texts — notes the way in which 'a psychological model ... actually mirrors many of the basic

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75 Goodrich (1990); Douzinas, Warrington and McVeigh (1991).

76 Goodrich (1999); Douzinas (1999).

77 Legendre (1997).

78 Caudill (1991), (1992), (1993).

79 Brooks (1995).

80 Mighall (1999).

81 Brookes (1995), p xi.

82 Brookes (1995), p x.

rhetorical and ideational properties of [the Gothic]'.[83] In contrast to Mighall, whose object of analysis is the canon of scholarship on Gothic fiction, my argument is not so much that critical jurisprudential scholarship presupposes the very thing that it seeks to explain, but more that, through psychoanalysis, scholars of jurisprudence are producing a very specific image of law. Through psychoanalysis, resort is being made to a Gothic imaginary already naturalised in the tropes of psychoanalysis and thereby contributing to the rise to a Gothic jurisprudence.

These various themes come together in some of the work of Peter Goodrich. In both *Oedipus Lex*[84] and *Law in the Courts of Love*,[85] the object of analysis is the power of the image. For Goodrich, the image is important as it is the means whereby 'the memory of Law — as custom and tradition, as precedent and antiquity'[86] is (re)produced. Goodrich's object of analysis and critique is the celebratory Gothic of English scholarship and legal practice. In juxtaposition to this he offers the repressed:

> The critical analytic suggestion embodied in this text thus concerns the politics of recuperation, of recovery of the traumas that law cannot consider, of recollection of the repressed and failed images, figures, texts, and thoughts prohibited by the prose of doctrine, by the language of judgment, by the protocols of a wisdom without desire.[87]

The return of the repressed for Goodrich has to be located in the context of — and is for him a prerequisite to — Justice. In this scheme of things, 'Justice' is 'both blindness and insight, both rage and reconciliation'.[88] His descriptions of justice offer a sensationalist jurisprudence and, I would suggest, an idea of justice closely associated with the sublime.

Another important source of Gothic themes on recent jurisprudential scholarship is to be found in the impact of the writings of Kafka and Derrida on legal scholarship. Others have noted the mediaeval Gothic iconography (particularly that of the Last Judgment) in Kafka's two texts that are most pertinent to law; *The Trial* and *The Castle*.[89]. Kafka's influence has been promoted in legal scholarship by way of Derrida's essay on his short story, 'Before the Law'.[90]. Derrida's analysis of Kafka's short story that, 'condenses

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83 Mighall (1999), p 249

84 Goodrich (1995).

85 Goodrich (1996).

86 Goodrich (1996), p 96.

87 Goodrich (1995), p x.

88 Goodrich (1998)

89 Hyde (1974).

90 Derrida (1992a). Derrida's other major text on law, *Force of Law: The Mystical Foundation of Authority* (Derrida 1992b), also tells a tale of law according to various Gothic tropes of ruins and spectres. Here the law as sublime takes the form of an originary violence.

the whole of "The Trial" in the scene of "Before the Law"'[91] offers a Gothic jurisprudence. Central to this conclusion is Derrida's reading of the theme of the nature of law found in Kafka's text. I want to argue that Derrida produces law according to the logic of the sublime. It is to the logic of the sublime and its relation to law that I now turn.

Derrida's starting point is the relation between the gatekeeper/door/castle and the one at the door, before the castle, in front of and facing the gatekeeper the countryman. By way of these two characters and their different positions, a series of binary oppositions is set in motion — of city and country; of nurture and nature; of dark and light.[92] These oppositions conjoin with other binaries that have a more obvious juridical focus; in the relation between positive law and the natural or moral law. At the same time, these binaries appear to be internal to positive law. They are given expression in the countryman's expectations that 'the Law, he thinks, should surely be accessible at all times and to everyone'.[93] Here law is clear, transparent, the fullness of meaning and the transparency of meaning in contrast to another side of law; of opacity, confusion, unknowability, knowable only to specialists — lawyers, gatekeepers.

In Kafka's tale, the opacity of the law is that which returns to confound the countryman's assumption and expectation of transparency. The tale tells of his experience of the return of this repressed image. I want to argue that Kafka's tale and Derrida's reading of it go beyond this. The nature of that beyond might be examined by way of a return to the gatekeeper. As the one who represents the law, the gatekeeper might be expected to know the law. However, Kafka's tale suggests otherwise. The gatekeeper only knows of other gatekeepers who regress endlessly into the distance and who at each portal are more powerful. The law remains unknown to them. The succession of gatekeepers provides an anthropomorphised form of the law as labyrinth. At the same time as the law is that which is lost or deferred in the experience of the labyrinth, the law is also that which lies beyond both the anthropomorphic figures of gatekeeper and countryman. Here Law is a third term to the binary structure.

I want to argue that this offers an image of Law as the sublime.[94] Derrida explains Law in this form as that which 'exclude[s] all historicity and empirical narrativity';[95] 'it must be without history, genesis, or any possible privation'.[96] It is invisibility, silence, discontinuity, the inaccessible, the impossible an absolute. It is 'obscene and unpresentable',[97] an infinity and an excess that violates all boundaries, puzzles and paralyses[98] a locus that is a

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91 Derrida (1992a), p 209.

92 Derrida (1992a), p 195.

93 Derrida (1992a), p 183.

94 Cf Derrida (1992a), p 190.

95 Derrida (1992a), p 190.

96 Derrida (1992a), p 191.

97 Derrida (1992a), p 205.

98 Derrida (1992a), p 196.

non-locus of terror.[99] As such, it doesn't merely mirror attributes of the evil Other to the countryman's expectations of knowledge, knowability, transparency that is the good; rather, Law as the third term is a founding supra-evil, an evil beyond good and evil, out of which all other binaries, narratives, histories flow. Through these various themes Derrida, following Kafka, tells the story of the nature of Law as a diabolical or dark romance.

Agamben has developed some of these themes in *Homer Sacer.*[100] They appear in a particular topographical context of sovereignty and its institutions. In *Homo Sacer*, Agamben locates characteristics that Derrida associates with law as the sublime in the practices and metaphor of the concentration camp. For example, law institutionalised in the camp is law without (human) origin. He explains this by reference to a quote from Deils, the head of the Gestapo: 'Neither an order nor an instruction exists from the origin of the camps: they were not instituted; one day they were there ...'[101] This law as sublime is reinforced and reinscribed in Agamben's repeated assertion that the law of the camp is law as exception. It is characterised in his description of this law as a 'zone of indistinction', which he describes as 'totalitarian'.[102] Its particular force is described in various ways. It is supremely destructive; this is law as a force that destroys the sense of 'subjective right and juridical protection'.[103] It collapses the distinction between law and fact, rule and exception; between law-making and the administration of law; between law's production and its application;[104] between legality and illegality, inside and outside; between exception and rule; between licit and illicit. Under this law, right and wrong become impossible distinctions: 'no act committed against them could appear any longer as a crime'.[105] This Law is also to be understood as a supremely creative force. It makes, 'everything ... truly ... possible'.[106]

The institutionalisation of this logic of law as the sublime in the Nationalist Socialist concentration camp is, for Agamben, closely associated with Schmitt's jurisprudence. Agamben suggests that Schmitt's jurisprudence is 'unwittingly Kafaesque'.[107] He illustrates the point by reference to an extract from Schmitt's essay, 'State Movement, People'. Here the Kafkaesque is in Schmitt's association between law and unreason. Law's corruption is to be found in the 'indeterminate' nature of juridical concepts that in turn give rise to 'juridical uncertainty'. The opacity of the law and the loss of direction are, in the extract from Schmitt offered by Agamben, not characterised by way of the structure of the labyrinth, but explained by way of an aqueous metaphor; we

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99 Derrida (1992a), p 203.

100 Agamben (1998).

101 Agamben (1998), quoted at p 169.

102 Agamben (1998), p 170.

103 Agamben (1998), p 170.

104 Agamben (1998), p 173.

105 Agamben (1998), p 171.

106 Agamben (1998), p 171.

107 Agamben (1998), p 172.

are condemned 'to a shoreless sea'. The corrupting force of 'indeterminate' judicial concepts infects the alternative vision of law as rule and reason. Schmitt concludes that this alternative is nothing more than 'superstition' and an archaic trace of the 'senseless' in law.

These themes are given particular concrete significance by Agamben in the context of the indeterminacy of the 'National Socialist notion of race'.[108] The indeterminacy of 'race' is the point of rupture that is the sign of the corruption of the legal body that opens the way for the sublime terror of law. Agamben's particular concern is the potential for the transformation of the exceptional — the sublime terror of law — to become the normal. The camp is an institutional metaphor that seeks to mark that transformation. Set up as a form of law that is a an exception and an exceptional response, through the camp 'the state of exception ... is realised normally'.[109]

For Agamben, the camp is not just the institutionalisation of an aberration in a particular historical moment. It has wider significance: 'the birth of the camp in our time appears as an event that decisively signals the political space of modernity itself'.[110] It arises in the context of the 'rupture of the old *nomos*.[111] The camp is endemic to the political system of the modern nation state. But it is hidden. It is always ready to assume new forms ('we must learn to recognize [it] in all its metamorphoses').[112]

Like Schmitt, whom he criticises, Agamben appears to be 'unwittingly Kafaesque'. Like Schmitt, he writes a jurisprudence of sovereignty according to Gothic themes. He puts into full play the nightmare vision of the sensational jurisprudence that Derrida perhaps more benignly writes of in his reflections on Kafka. For a different politics from Schmitt, Agamben produces the legal order according to the same logic of a diabolical romance.

Conclusion

This essay offers a preliminary analysis of the relation between law and the Gothic imagination. The scholarly writing on the wrongful act of buggery examined in the first part of this paper looks at the way those legal scholars and practitioners documented and produced the practice of law as a Gothic imagination with its themes of evil made manifest in particular acts, grotesque bodies and a violence so extreme that it threatened individual, social and political order. Law as a practice of repetition and citation might ensure the viability and durability of these themes in the production of the legal order in a variety of contexts. Law is a living archive through which the present might be haunted by a specific past as a logic of evil acts, corruption, monstrosity, dread and terror.

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108 Agamben (1998), p 172.

109 Agamben (1998), p 170.

110 Agamben (1998), p 174.

111 Agamben (1998), p 175.

112 Agamben (1998), p 175.

The examination of the recent Gothic turn in jurisprudential writing draws attention to a contemporary manifestation of the Gothic imagination. It has emerged in the context of an encounter with poststructural theory and the politics of postmodernity.[113] It appears as a response to the jurisprudential incorporation of poststructural theories of textuality that explain the text and its relation to truth by way of the loss of essence, a focus on surface rather than depth and the suspension of truth by way of the endless deferral of meaning in differance. When applied to the legal text, the text of law is rendered intelligible and unintelligible by way of metaphors of the labyrinth and the ruin. The socio-political context of this resort to Gothic themes, the postmodern, might be characterised as a response to 'an escalating anxiety regarding modernity'[114] to be found in the writings of Anthony Giddens[115] and Bauman[116] and work on risk analysis.[117] What juridical sensations, juridical insights and new juridical orders are opened up through the diabolical romance of this late twentieth century Gothic sensationalist jurisprudence?

Resort to the themes of the Gothic imagination as a critical and analytical tool raises some interesting questions about the terms of this late twentieth century jurisprudence. A return to the themes examined in the first section of the essay suggests that in many respects this contemporary jurisprudence offers a series of sensations and insights that are already 'unwittingly' saturated with an archaic juridical sensibility. At best, their novelty and insight perhaps draw our attention to some of the recurring themes through which law's intelligibility of the social order is produced. At worst, the new juridical orders they open up are all too familiar and deeply implicated in a long tradition of reactionary socio-cultural projects of social order. In many respects, the resort to the themes of law's Gothic imagination appears to be 'unwitting'.

One interesting silence in the recent resort to the Gothic imagination in jurisprudential writing relates to the will to salvation through law. Within the Gothic imagination of law, the subject is made legal subject as the hero who might use law's violence against evil to create new worlds and in the final instance appear untainted by the terror associated with such violence, saved from the chilling presence of a proximate death, having returned the undead to the garden of death. The experience of legal subjectivity is made an experience of terror and salvation. The legal body, the King's body, provides protection and a promise of salvation from the horrors that it invokes. Perhaps Agamben's anxiety about encounters with the law as sublime violence is connected to the silence in his analysis of his will to salvation through the law. Had he not been so 'unwittingly Kafkaesque', he might not have produced such a silence.

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113 Douzinas and Warrington (1991).

114 Botting (1996), p 169.

115 Giddens (1990).

116 Bauman (1991).

117 Beck (1992).

A recognition of the growing importance of the Gothic imagination within contemporary jurisprudence might ease the return of the repressed promise of salvation through law and draw attention to its limits. The encounter between law and the Gothic imagination offered in this paper might help to facilitate a more critical reflection on the relationship between law, jurisprudential scholarship and the diabolical romance tradition, and save the encounter from an 'unwitting' engagement with a set of reactionary consequences.

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