BEYOND THE PROVINCIAL: SPACE, AESTHETICS, AND MODERNIST LEGAL THEORY

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[Legal theories are characterised not just by their ideology or their analytic framework, but by their aesthetics. One central aspect of the aesthetic of legal theory is its construction of time and space, which I explore in this article. It is often said that modernism has prioritised time through notions of progress and evolution, and that postmodernism ought therefore to adopt spatial metaphors. I find this distinction unsatisfying: in modernism, time and space share central characteristics. Modernism spatialises time and reifies space and it is these common elements of flattening abstraction which are of paramount significance. Modernist legal theories too, whether formalist, critical, or pluralist, share a spatial and reified understanding of 'the law' as the rhetoric of law's 'province' or 'empire' itself suggests. These images of law, even when they attempt to multiply or radicalise the provincial imagery they adopt, do not go far enough. This article develops an analysis of the tropes of legal theory and an argument against the endemic reification of law. It is only by moving beyond the modernist reification of space that we can begin to develop a legal theory which is both genuinely critical and genuinely pluralist.]

I INTRODUCTION: SPACE/TIME AND MODERNISM

Olivier Messiaen's 'Quartet for the End of Time' has an Apocalyptic quality which stems not only from the millenarian ideas that are the composition's basis — the Day of Judgment and the Book of Revelation — but to the human conditions of its creation.

> Conceived and written in captivity, my Quartet for the End of Time was given its first performance in the Stalag VIIIA, January 15 1941, in Görlitz, Silesia, in atrociously cold weather. The Stalag was shrouded in snow. We were 30,000 prisoners ...[1]

Written amidst the ravages of war and the moral no less than the physical desolation of Europe, in the heart of darkness, in the depth of winter, Messiaen's music is steeped in despair. How did the world look in the snows of 1941, as if time itself had come to a stop, but as if the Thousand Year Reich was not getting a day older; and as if only the destruction of time could save the world from final devastation? Yet Messiaen sees something else here. The 'end of time', according

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1 Olivier Messiaen, *Quartet for the End of Time* (1942) [music]; Messiaen's explanatory notes are included in the recording by Erato (1993) 12.

to Messiaen's copious notes on his Quartet, is heralded by an 'Angel' belaureled with 'a tangle of rainbows', dense and rapturous chord clusters.[2]

Devastation makes us think of chaos, but when Messiaen looked around him, he saw not chaos but an excess of order. The catastrophe of totalitarianism represents the grim apotheosis of *modernism*, of system-building, both physical and ideological: the triumph of the single and totalising perspective which modernism assumed. Horkheimer and Adorno, also writing in the middle of the Second World War, declared that '[e]nlightenment is totalitarian'.[3] Harsh words, but there is nothing irrational, still less incoherent, about Stalinism or Fascism; indeed there is a kind of inexorability to its logic. It was a logic which destroyed Europe with exhaustive efficiency. Chaos could hardly have been worse.

The order of modernism has influenced our understanding of time — that time whose transcendence Messiaen imagines.[4] Indeed, from Isaac Newton to Richard Dawkins, one of the most enduring images of modernism has been that of the cosmos as *clockwork* — a mechanical instrument for the regulation of time.[5] It is an image which reflects, as Bergson argued, a *spatialised* image of time: something linear and precise, able to be mapped out, sub-divided and pinned down.[6] Our understanding of time has been carved up by modernism into discrete units. It is a process which Foucault sees as paradigmatic of the era: time is to be saved and spent like a currency; to be measured and defined like an object under a speculum.[7]

Boaventura de Sousa Santos, following Chaim Perelman, argues that, modernism having privileged temporal metaphors, postmodernism (despite the distinctly temporal resonance of the term) ought to 'resort to spatial metaphors.'[8] The use of spatial metaphors is consequently prominent in much contemporary theoretical writing: the topology of the map and the tropology of the site predominate. Even the name of this symposium issue, 'Law's Province', makes conscious use of a spatial metaphor. Such imagery reflects this critique of time.

[2] 'III *Abime des oiseaux*' and 'VII *Fouillis d'arcs-en-ciel, pour l'ange qui annonce la fin du Temps*,' in Messiaen, above n 1. See also the analysis in Erato, above n 1, 14-16.

[3] Max Horkheimer and Theodor Adorno, *The Dialectic of Enlightenment* (1972) 6. The first chapter of Jürgen Habermas, *The Philosophical Discourse of Modernity* (1987) presents very clearly the connections between 'subject-centred reason', monism, and totalisation.

[4] I should note that François Ost, in characterising the different sensibilities of time in law, connects postmodern law with what he calls '*temporalite aleatoire*.' The aleatoric is a schematic form of modernism, for it represents a radical democratic notion of strict equality and a kind of systemisation. It is to be distinguished, therefore, from the chaotic which is the true temporality of postmodernism: François Ost, '*Les Multiples temps du droit*' in J Austray *et al* (eds), *Le Droit et le Futur* (1995) 115, 139.

[5] See Richard Dawkins, *The Blind Watchmaker* (1988); Ivars Peterson, *Newton's Clock: Chaos in the Solar System* (1993).

[6] See Jacques Attali, *Histoires du Temps* (1982); Sebastian De Grazia, *Of Time, Work, and Leisure* (1962); John Riely, 'The Hours of the Georgian Day' (1974) 24 *History Today* 307; Edward Thompson, 'Time, Work-Discipline and Industrial Capitalism' (1967) 38 *Past & Present* 56; Stephen Toulmin and June Goodfield, *The Discovery of Time* (1967); Norbert Elias, *Time: An Essay* (1992).

[7] See generally Michel Foucault, *The Order of Things* (1973).

[8] Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (1995) 400. See also similar reflections in Peter Fitzpatrick, *The Mythology of Modern Law* (1992) 93.

To be sure, modernism has been preoccupied with temporal ideas of progress and advance — 'time's arrow', a clockwork universe, and the theory of evolution. Such an approach, however, inadequately explores the parallel influence of modernism on the construction of space. To simply replace 'time' with 'space' as the preferred metaphor ignores their deeper connections: in modernism, they are both treated as things which exist *aside from* our human construction and interpretation of them, as abstractions in which we happen to find ourselves rather than as regulatory constructions devised by human minds to serve specific social purposes. To distinguish between 'time' and 'space' or to express a preference misses the point. They exist together, as relative and human conceptual tools.

> In brief: every change in 'space' is a change in 'time'; every change in 'time' a change in 'space'. Do not be misled by the assumption that you can sit still in 'space' while time is passing: it is you who are growing older .... The change may be slow, but you are continuously changing in 'space' and 'time' — on your own, while growing and growing older, as part of your changing society, as inhabitant of the ceaselessly moving earth.[9]

Norbert Elias says that time was *built* as a functional human tool, a product of our capacity for synthesis and memory; has been *treated* as an abstraction, objective and reified, and is therefore *experienced* as a powerful instrument of social discipline. This is the heart of the matter, for these factors conceal each other and therefore legitimise its regulatory operation.[10] And the same can be said for our understanding of space. We see here the *reification* of dimension: its conversion into something God-given like the oceans, rather than man-made like the boats that float upon them.

Reification, the conversion of a human concept into an external thing, is therefore one of the central hallmarks of modernist thought — of our understanding of time and space alike. The analysis of legal theories normally proceeds through the articulation of distinctions — just as we insist in thinking of time *versus* space, we talk of positivism *versus* natural law, formalism *versus* critical legal studies, and so forth. But once again, these dichotomies ignore the characteristics they share under the influence of the ideas of modernism. In particular, all these approaches share in the reification of 'the law', another human invention, like time and space, which has come to be seen as a 'system', objective and abstract. In this essay, I want to explore some ways in which tropes of space express this modernist reification in law, and to begin to think about how it might be changed.

My argument, therefore, is against reification. It is also towards aesthetics. The aesthetic dimension, including the way space is understood in legal theory, illuminates for us important aspects of the different approaches taken by different theories, as well as revealing the imagery and vision of the world which has generated them. In particular, legal theory at the present time suffers from a disjunction between its changing intellectual focus, and the continuing modern-

[9] Elias, above n 6, 99-100.
[10] Ibid 45.

ism of its aesthetic — an aesthetic which remains governed by ideas of coherence and is revealed in the reification of space. A range of legal theories, despite their internecine squabbling, share these problems.

In short, then, this essay attempts to connect an aesthetic and comparative analysis of legal theory, with the idea of reification and the image of space as dominant tropes of modernism. The argument develops in two stages. In the first part of the essay, I look at the aesthetics of a range of modernist legal theories in order to demonstrate the recurrence of tropes of reified space and reified law, and the tension between contemporary intellectual currents and aesthetic desires.

To develop this argument, I focus on legal formalism, critical legal studies and legal pluralism. This is admittedly a partial selection. Most notably, the taxonomy I develop does not address the large and significant literature on feminist and critical race theory.[11] First, the inter- and trans-disciplinary nature of this scholarship means that its use of tropes of space is less generalisable than the theories I have chosen to focus on, and indeed examples from feminist discourse can be found in each of the three modernist theories I address. Second, my argument is directed towards the metaphorical and normative meaning embedded in a range of descriptive theories about the law. The legal theories which best demonstrate these ideas are characterised by an 'internal' rather than an 'external' perspective on the law; they adopt a hemeneutic rather than a rhetorical analysis of legal phenomena; their agenda is jurisprudential rather than political.[12] In all these ways, it is as a critique of the various *internal self-understandings* of law that my argument unfolds, intending to demonstrate what these different perspectives share despite their supposed differences. And in all these ways the (feminist) critique of law as a system of entrenched power and privilege — a critique which is external, rhetorical and political in nature — operates not as an alternative species of self-understanding, but as an alternative *critique* of it.

In the second part, I argue for an approach to law and legal theory which, by combining selected aspects of critical studies and legal pluralism, resists this reification. Finally, in the conclusion, I suggest that for legal theory to accomplish this re-imagination, there has to be an aesthetic no less than an intellectual shift in paradigms. In science, 'chaos theory' and in law 'critical pluralism' both

[11] See, eg, Katharine Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory* (1991); Nitya Duclos, 'Lessons of Difference: Feminist Theory on Cultural Diversity' (1990) 38 *Buffalo Law Review* 325; Lucinda Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Review* 886; Mary Joe Frug, 'Law and Postmodernism: The Politics of a Marriage' (1991) 62 *University of Colorado Law Review* 483; Regina Graycar and Jenny Morgan with foreword by Justice Elizabeth Evatt, *The Hidden Gender of Law* (1990); Angela Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Review* 581; Marlee Kline, 'Race, Racism and Feminist Legal Theory' (1989) 12 *Harvard Women's Law Journal* 115; Nicola Lacey, 'Feminist Legal Theory' (1989) 9 *Oxford Journal of Legal Studies* 383; Toni Morrison (ed), *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality* (1992); Carol Smart, *Feminism and the Power of Law* (1989); Patricia Williams, *The Alchemy of Race and Rights* (1992).

[12] For more on these distinctions see, eg, H L A Hart, *The Concept of Law* (1961); Peter Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (1986); David Couzens Hoy, 'Interpreting the Law: Hemeneutical and Poststructuralist Perspectives' (1985) 58 *Southern Californian Law Review* 135.

give us hints of this aesthetic change. And without such a movement, our ideas about the incorporation of subjectivity in the construction and interpretation of 'the law' will remain at odds with our vision of beauty.

The 'end of modern times', therefore, constitutes a liberation from the linearity and reification which Messiaen witnessed, and an escape into a new aesthetic. On the edge of this abyss Olivier Messiaen stands, Janus-faced, looking back at the wreckage wrought by modernism, and looking forward — albeit uncertainly — to the mysterious possibility of proceeding beyond it.

II LEGAL THEORIES IN MODERNISM

A *Denial: Space and Geometry*

A vast literature in the social sciences and in law addresses indeterminacy and incoherence, disorder and ambiguity. Legal theorists have responded to these tumultuous intellectual trends by strategies of denial, despair, or accommodation.[13] My purpose here is not to trace the precise contours of these three approaches, but rather to suggest how each embodies an aesthetic temperament as well as an intellectual position, and an aesthetic, moreover, which manifests the reification of space and of law.[14]

Despite the intellectual ravaging it has received, many theorists, including positivists and formalists, steadfastly maintain their belief in the coherence and certainty of 'the law'. John Austin and, in different ways, his modern heirs including H L A Hart and Joseph Raz, for example, share a definition of law which requires a linear pedigree recognised by singular state paternity. Law is thus a closed structure which establishes rules of recognition by which every law can be determined and related.[15] This legal primogeniture is still more apparent in Hans Kelsen, whose *General Theory of Law and State* describes law as a complex hierarchy of norms ultimately traceable to a *Grundnorm* from which everything else is derived. For Kelsen, anything less than this closed and determinate system does not constitute law at all.[16]

Part of both the charm and motivation of these ideas stems from the modernist ideals of order, consistency, and system they express. Lon Fuller recognised that this is desire, not reality.

[13] Roderick A Macdonald, 'Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law' (unpublished manuscript, 1994).

[14] I am speaking here of legal theory as embodying particular conceptions of space, rather than how legal systems construct and organise particular spaces. It is the understanding of law as space rather than its application in, of, or to space that concerns me: for this, see the developing literature of 'law and geography' discussed in Wesley Pue, 'Wrestling with Law: (Geographical) Specificity vs. (Legal) Abstraction' (1990) 11 *Urban Geography* 566, 576; Nicholas Blomley, *Law, Space, and the Geographies of Power* (1994).

[15] John Austin, *The Province of Jurisprudence Determined* (1832); Hart, above n 12; Joseph Raz, The *Authority of Law: Essays on Law and Morality* (1979); Joseph Raz, 'Authority, Law and Morality' (1985) 68 *The Monist* 295.

[16] See Hans Kelsen, *General Theory of Law and State* (1961).

> All theories of law have this in common, that they attribute 'law' to one source ... But even when one does not subscribe to any particular theory of the 'nature of law', one is apt, consciously or unconsciously, to embrace ... the 'fiction of the unity of the law'. We talk constantly as if there were a unified body of rules proceeding from somewhere which constitute 'the law'.[17]

Even a hard-nosed realist like Karl Llewellyn saw legal order as embodying an aesthetic in this way:

> Their beauty is functional; the prose is clean by the nature of the man, but it is thrice clean because hewn powerful to purpose. Carven pillar and keystone sing, but the song is the song of the arch they hold and bind.[18]

There is more going on here than the admiration of a worker for his tools. There is an aesthetic of organisation, of austere and unbending lines, which is admired for its own sake and not merely as a means to an end. There must be in law, says Llewellyn, something 'aesthetically satisfying' of itself, something which appeals to our desire for 'sense' and 'balance'.[19] 'Is it not fair to conclude, then,' asks Llewellyn, 'there can be no part of our institution of law which may not yield fresh light, if one knocks at it asking, there also, after Beauty?'[20]

Formalists like Ernest Weinrib were born under the star of this aesthetic. Formalism dismisses the relevance of other disciplines — sociology, economics, and literature — in explaining the structure and doctrine of 'law'. This is denial in full voice. Law is to be understood as 'immanently intelligible'[21] in its own terms, as a product of an internal logic and morality, and everything else is excluded, by fiat, from the province of law.[22] To those who are attracted to this vision, to strive for anything less than an hermetically sealed explanation of law seems but a 'shortening of ambition'.[23] But he justifies his approach solely in terms of 'coherence'. He aims to find in legal rules

> an internally coherent whole ... a single justification that coherently pervades the entire relationship ... the most abstract and comprehensive patterning of justificatory coherence [possible].[24]

[17] Lon Fuller, *Legal Fictions* (1967) 128.

[18] Karl Llewellyn, 'On the Good, the True, the Beautiful, in Law', in Karl Llewellyn, *Jurisprudence: Realism in Theory and Practice* (1962) 167, 173.

[19] Ibid 195.

[20] Ibid 196.

[21] Ibid 583. See also Ernest Weinrib, '"Legal Formalism": On the Immanent Rationality of Law' (1988) 97 *Yale Law Journal* 949, 984.

[22] See Ernest Weinrib, 'Causation and Wrongdoing' (1987) 63 *Chicago-Kent Law Review* 407; Ernest Weinrib, 'Corrective Justice' (1992) 77 *Iowa Law Review* 403; Ernest Weinrib, 'Right and Advantage in Private Law' (1989) 10 *Cardozo Law Review* 1283.

[23] Ernest Weinrib, 'The Jurisprudence of Legal Formalism' (1993) 16 *Harvard Journal of Law and Public Policy* 583, 594.

[24] Ibid 584-5. See Ken Kress, 'Coherence and Formalism' (1993) 16 *Harvard Journal of Law and Public Policy* 639. It is clear, for example, that although Weinrib claims that 'coherence is the criterion of truth,' he is not thereby appealing to the idea of coherence as it is commonly understood amongst modern philosophers: ibid 641, 649. For Weinrib's response, see Ernest Weinrib, 'Formalism and Practical Reason, or How to Avoid Seeing Ghosts in the Empty Sepulchre' (1993) 16 *Harvard Journal of Law and Public Policy* 683, 695.

The more abstract and coherent the explanation for laws or for conduct, the better.

But what exactly does 'better' mean here? Not 'better' in the sense of describing the complexities of people's conduct or the inconsistencies of their actual motivations. Not 'better' in the sense of providing the community with a richer set of moral principles to which it might aspire. Not 'better' in the sense of capturing the jumble of intentions and processes by which laws are actually developed. Indeed, Weinrib expressly refuses to provide an argument in favour of coherence as an ideal.[25] Rather, 'better' amounts to an aesthetic criterion. It is an appeal to the beauty of an internally-regulated system in which each part is related to each other part in set proportions such that there is an 'harmonious interrelationship'.[26]

The aesthetic of coherence runs through much modern legal theory like a refrain. Ronald Dworkin, too, urges a form of coherence, called 'integrity'. Although Dworkin's approach is hermeneutic and ostensibly pluralist where Weinrib's is hermetic and decidedly monist, each treats coherence as both a model for the functioning of the legal system, and a model for how to view it. Dworkin argues that integrity is a separate value in our legal system, and we ought therefore to strive to make that system as consistent as possible in the application of political principles.[27] But for Dworkin, the virtue lies not just in whether integrity exists, but whether it is seen to exist.

> Here, then, is our case for integrity, our reason for striving to see, so far as we can, both its legislative and adjudicative principles vivid in our political life ... [Integrity's] standing as part of an overall successful interpretation of these practices hinges on whether interpreting them in this way helps show them in a better light.[28]

It is the *desire* for integrity that motivates Dworkin. This is why he vents his spleen against writers in critical legal studies (CLS) who criticise not only the specific content of law, but its overall consistency.

> Nothing is easier or more pointless than demonstrating that a flawed and contradictory account fits as well as a smoother and more attractive one. The internal sceptic must show that the flawed and contradictory account is the only one available.[29]

Dworkin justifies his *preference* for an account rooted in the consistency of legal principles by an appeal to 'smoothness' and 'attractiveness' as criteria of judgment.

There is, of course, nothing necessarily wrong with seeing beauty in order and coherence, although perhaps it is an exhausted aesthetic. Modernism in art and

25 See Kress, above n 24, 646; Weinrib, above n 24, 695-6.

26 Weinrib, above n 23, 593. Perry also emphasises the aesthetic dimensions of Weinrib's analysis: Stephen Perry, 'Professor Weinrib's Formalism: The Not-So-Empty Sepulchre' (1993) 16 *Harvard Journal of Law and Public Policy* 597, 617.

27 Ronald Dworkin, *Law's Empire* (1986) 176-224, particularly 214-16.

28 Ibid 214-15.

29 Ibid 274; see also 272-5, 440-4.

music comes from just such a perspective. But the *desire* for this aesthetic in law works by the denial of all evidence to the contrary. One is struck, for instance, by the absence of human beings from the austere aesthetic of formalism. Weinrib treats human actors as nothing but abstract free agents. The reality of human conditions or specific problems is completely irrelevant to this equation. According to formalism, tort law, for example, should and does treat citizens as abstract agents bereft of context and personality. Law is envisaged as a system which functions for its own benefit, 'indifferent' and anterior to the 'goodness' or 'desirability' of particular human purposes or well-being.[30] It is a landscape unpeopled.

In their absence, there is the most remarkable reification. Weinrib claims, for example, that 'law's most abiding aspiration [is to be] immanently intelligible'; that legal systems 'striv[e] ... toward their own justificatory coherence'; that 'implicit in the law's conceptual and institutional apparatus ... is the claim to be a justificatory enterprise.' The claim to speak for 'law's own aspirations' is particularly prevalent.[31] But what is this 'law' that aspires and strives, and how does it do so? To this question there is no answer. People do not think and act and realise in this world; only law — a single, coherent, entity. Weinrib is at pains to remove from his equation real live lawyers thinking about real live law — in most unformalist ways — arguing that since coherence is law's aspiration, it can be criticised for falling short. Lawyers who think that law has certain instrumental goals 'are simply making a mistake'.[32] Law exists only as a dreaming thing, as a beauty in the eye of its beholder.

In whatever form it takes, this legal aesthetic depends upon the imagery of reified space. The *spatiality* of formalism is evident. Law is seen as a domain, and it organises relationships, abstractly and entirely, over a legal territory. For Weinrib, judgments of law have no temporal dimension, no history, no social context or evolution. Rather 'the law' is understood to exist all at once, organising principles over a space that law unproblematically and exclusively controls.[33]

One image best combines both the aesthetic of purity and coherence and the reification of space — linear geometry, a field that has always been associated with ideas of social ordering and with the notion of truth through abstraction. Early modern 'legal science' in particular used geometry as a point of reference and of inspiration. The comparison of Euclid to the great scholars of Roman Law was something of a commonplace in the 18th and 19th century. Certainly it was by no means extraordinary to see mathematicians, like Bacon, engaged in legal thought. Liebniz, to give an even more celebrated example, claimed that the ideal legal system was a moral derivative of his calculus.[34] Undoubtedly Bentham, whose panopticon may be taken as the epitome of a mode of legal order accom-

[30] Weinrib, above n 24, 693-5, 686.
[31] Weinrib, above n 23, 583, 591-3.
[32] Weinrib, above n 24, 697.
[33] William MacNeil, 'Living on: Borderlines-Law/History' (1995) 6 *Law & Critique* 167, 175.
[34] M Hoeflich, 'Law and Geometry: Legal Science from Liebniz to Langdell' (1986) 30 *American Journal of Legal History* 95, 99-102; Costas Douzinas, *Justice Miscarried: Ethics, Aesthetics and the Law* (1994) 17.

plished through the regimentation and control of space, likewise dreamt of reducing law to a system as abstract and precise as modernist science.[35] Neither have modern writers, positivists and formalists alike, been prepared entirely to surrender their aspirations for law to be accorded the imprimatur of a science.[36]

What, after all, is geometry but the abstraction of spatial form, land without people and shape without context? Geometry is the paradigm of that pure abstract reasoning which epitomises a formalist world-view. In fact, Weinrib takes the metaphor further, referring approvingly to the idea of the 'shapes' of moral experience. Formalism, on this account, treats law as a distinct 'form' or 'shape' which, to be adequately realised, must be kept 'internally coherent'.[37] His image of law, then, is hermetic, and the intrusion of external values would constitute a violation of geometry — an attempt, as he says, 'at squaring the circle.'[38] It is a decidedly monist and exclusory image.

The tropology of space still pre-dominates whether we turn to the 'province' of jurisprudence in Austin or law's 'empire' in Dworkin. This language is not merely a flourish: as we have already seen in the case of Weinrib, it reflects the values of legal monism these writers share. 'Law' is understood as a concrete entity through which the state exerts exclusive control over the whole society. In the heyday of modernism, the empires of Europe competed for sole and exclusive control over territory; no two countries could, on this model of power, share the one geographical space. The same could be said of two legal orders. In the rhetoric of empire, there is a fixation upon and an isomorphism between law and physical space.

Dworkin too believes in 'law's ambitions for itself', and even in 'law's dreams.'[39] Admittedly, he addresses the question of agency — of who psychoanalyses law's dreams, and who realises them. So while Weinrib sees law as an entity to be declared and thus discovered, Dworkin sees it as an entity to be interpreted and thus developed. This interpretative turn peoples the landscape in a way quite different from the empty planes of Weinrib, though often enough one finds myths and archetypes rather than human beings.[40] But in either case, 'law' is understood as a thing, tangible and finite, in sole possession of a space that can be mapped with some precision. It is in this sense that the yearning for coherence in law, which Weinrib and Dworkin share, is not only an aesthetic, but one based

35 See of course the discussion of Bentham in Michel Foucault, *Discipline and Punish: The Birth of the Prison* (1979).

36 For claims and counterclaims, which have only been intensified in recent years by the attempt to apply systems of artificial intelligence and information technology to legal rules, see Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 *Columbia Law Review* 605; Drucilla Cornell, 'The Violence of the Masquerade: Law dressed Up as Justice' (1990) 11 *Cardozo Law Review* 1047; Alan Wolfe, 'Algorithmic Justice' (1990) 11 *Cardozo Law Review* 1409; Robert Moles, 'Logic Programming – An Assessment of its Potential for Artificial Intelligence Applications in Law' (1991) 2 *Journal of Law and Information Science* 137.

37 Weinrib, above n 24, 684-5. The use of this metaphor in fact runs through this article.

38 Ibid 696.

39 Dworkin, above n 27, 407, and see 404-8.

40 Of the 'imaginary judge' who is the star of *Law's Empire*, '[c]all him Hercules' says Dworkin: ibid 239.

on the desire for order in reified space. Law exists as an object in a certain exclusive space, determined by provenance and allocated by province.

B *Despair*

Ironically, CLS, and I think the same can be said for much of the literature of feminist legal theory too, shares the aesthetic of coherence it criticises. Late modernity is characterised by an overwhelming anxiety, about losing the past and about the incoherence of the present with respect to it. This *anxiety* manifests itself in a variety of different responses which betray, in different ways, a continuing aesthetic *desire* for that coherence whose loss is feared. We have already seen one expression of this anxious desire in formalism's denial of contradictory evidence by a retreat to abstraction. But as the other side of anxiety is alienation, so the other side of denial is despair. In much CLS writing, there is a distance from the past — the coherent, innocent past — tinged with yearning.

Yearning begins life as nostalgia, which expresses the impossible distance we feel between 'then' and 'now', between the 'then' of our aesthetics — our desire for coherence — and the 'now' of our philosophy — a cynical contemplation of its impossibility.[41] But untempered, nostalgia turns to despair. We sense it in the nihilism of CLS, the so-called 'trashing' of the existing conceptual order.[42] Yet beneath their efforts at obliteration, as beneath all such efforts, ineradicable traces of desire remain. The attempt to develop, at the level of content, alternatives to legal positivism's structures and principles, merely replicates, at the level of structure, the same old problems. The substitution of 'new' rights for old, or 'new' hypotheses about human nature and human society for old, does nothing to transcend the indeterminacy of rights or the vacuity of abstraction: it merely replicates them.

Sometimes the irrepressible desire for certainty is merely hinted at, as when Arthur Leff confesses, *sotto voce,* 'Nevertheless: ... there is in the world such a thing as evil.'[43] Sometimes the whole intellectual edifice comes tumbling down. Roberto Unger, at the end of his seminal book, turns to 'the imperfections of knowledge and politics'.[44] He mourns this lack of perfection; he yearns for 'a complete and perfect understanding of reality'.[45] But only God can achieve this; only God can 'complete the change of the world'[46] which humanity by itself

[41] See Robin West, 'Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory' (1985) 60 *New York University Law Review* 145.

[42] See for example Joseph Singer, 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 *Yale Law Journal* 1; Mark Kelman, 'Trashing' (1984) 36 *Stanford Law Review* 293; David Cole, 'Getting There: Reflections on Trashing from Feminist Jurisprudence and Critical Theory' (1985) 8 *Harvard Women's Law Journal* 59; Allan Hutchinson (ed), *Critical Legal Studies* (1989).

[43] Arthur Leff, 'Unspeakable Ethics, Unnatural Law' (1979) *Duke Law Journal* 1229, 1249.

[44] Roberto Unger, *Knowledge and Politics* (1975) 290.

[45] Ibid.

[46] Ibid 295.

cannot accomplish: 'But our days pass, and still we do not know you fully. Why then do you remain silent? Speak, God'.[47]

A demand? An entreaty? A chastisement? Does not this assume that which it has been the earnest ambition of CLS, amongst a host of other movements, to abolish once and for all: the absolutism of truth and the possibility of comprehension, the immediacy of the speaking voice and the objectivity of the listening ear? Having been so vigorously swept out the front door, the hope of right answers somehow sneaks in through the back. It is an aesthetic desire *envisioned* as union and order, but *experienced* as despair, because it is everywhere observable only by its absence. The contradiction between aesthetic desire and human reality, the search for God and God's mute indifference, brings forth anger.

To foreshadow my argument briefly, legal pluralism provides a striking contrast in temperament. For pluralism, despite its limitations, which I will shortly address, is characterised by an aesthetic which in some senses *rejoices* in incoherence and multiplicity. It expresses faith in the value of 'people's law' and custom in the face of a legal system which claims to obliterate it.[48] Peter Fitzpatrick has rightly acknowledged that this is an act of insurrection against the legitimacy of legal centralism.[49] And although some writers have been able to conceal their normative intent, they have not always been able to conceal what Upendra Baxi has termed a somewhat 'millenarian' flavour to their work.[50] This confidence is a significant contrast to the denial and despair we have observed in other writers. It arises because pluralism is not wedded to the beauty of coherence and certainty. On the contrary, it relishes the weakening of state power and centralised order. There is a trust in disorder here and an attraction to the small scale, contingent and even contradictory workings of what Clifford Geertz called 'local knowledge.'[51] Accordingly, legal pluralism manages to combine its intellectual critique with a normative and aesthetic vision. Unlike CLS, desire and thought are made companionable.

C *Accommodation: Space and Geography*

The denial of incoherence is legal geometry — the abstraction and reification of space. The accommodation of incoherence is legal geography — the specificity and contextualisation of space.[52] Legal pluralism, the form of this geography, embraces variety in the way law claims to control space and so proceeds, as I

47 Ibid.

48 See Peter Fitzpatrick, 'Custom, Law, and Resistance' in Peter Sack and Elizabeth Minchin, *Legal Pluralism-Proceedings of the Canberra Law Workshop VII* (1985) 63; Edward Thompson provides a good example of this work of reclamation, and its emotional and normative basis: see 'Custom, Law and Common Right', 'The Moral Economy of the English Crowd in the Eighteenth Century', and 'The Moral Economy Reviewed' in Edward Thompson, *Customs in Common* (1991) 185, 197, 259.

49 Peter Fitzpatrick, 'The Rise And Rise Of Informalism' in Roger Matthews, *Informal Justice!* (1988) 178.

50 Upendra Baxi, 'Discipline, Repression, and Legal Pluralism' in Sack and Minchin, above n 48, 52-3.

51 Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (1983).

52 See Pue, above n 14, 576; see also Blomley, above n 14, *passim*.

noted, from a different aesthetic. Nevertheless, the priority of the spatial in this analysis of law is never questioned. Pluralism therefore *accommodates* incoherence within a framework which remains governed by modernist ideas of space.

In its simplest form, legal pluralism posits that more than one legal order inhabits the same physical territory. In this, it stands directly against both the explicit construction of legal space in formalism, and that which we have seen to be implicit in ideas of the 'province' of law, or 'law's empire'. On any such construction, 'law' is understood to be the monopolisation by a State, within a discrete physical space, of a particular species of norm creation. It is just this imperialism which pluralism rejects.

Nevertheless, to speak of a 'province' or 'empire' of law is already a move towards the imagery which legal pluralism pursues, for it suggests a geography in which there are other provinces, other empires. *Multiplicity in legal space* is pluralism's organising image. Law on this analysis is not an empire at all but rather a contested terrain.

This is not just a metaphor. Modern legal pluralism emerged out of the colonial experience: out of the attempt to impose an empire's legal order on to the existing, and sometimes resilient indigenous legal systems of a terrain. In its 'weakest' form, pluralism connoted only the way in which the dominant legal order chose to recognise or delegate power to these subservient orders. The territorial hegemony of 'empire's law' thus went unchallenged.[53] In a slightly stronger form, pluralism connoted the complex interaction between 'native' legal systems and the imposed law of the metropolis.

When later scholars began to explore the plurality of law within developed societies themselves, they brought with them this framework forged in the colonial experience.[54] Peter Fitzpatrick and Leopold Pospisil in Papua New Guinea, Boaventura de Sousa Santos in Brazil, and so on, began as chroniclers of the interaction of indigenous and imposed law, and only later translated their perspective to include developed or 'core' societies themselves.[55] Begun in 1962, the *Journal of Legal Pluralism* until recent times bore everywhere the marks of this colonial history. Its articles are empirical and anthropological in perspective; above all, they are spatial in orientation because they see the problem of law as the clash between 'indigenous' and 'State' laws within the same space.

[53] John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism & Unofficial Law* 1, 8. Michael Walzer, *Spheres of Justice: a defence of pluralism and equality* (1983), is likewise evidently spatial in metaphor, although not post-colonial in origin.

[54] The division between colonial and postcolonial pluralism, and capitalist pluralism, is dealt with in more detail in Sally Merry, 'Legal Pluralism' (1988) 22 *Law & Society Review* 869.

[55] See Peter Fitzpatrick, 'Law, Plurality, and Underdevelopment' in David Sugarman (ed), *Legality, Ideology, and the State* (1983) 159; Peter Fitzpatrick, 'Law and Societies' (1984) 22 *Osgoode Hall Law Journal* 115; Fitzpatrick, above n 48; Peter Fitzpatrick, '"The desperate vacuum": Imperialism and Law in the Experience of Enlightenment' (1989) 13 *Droit et Societé* 347; Leopold Pospisil, *Law Among the Kapauku of Netherlands New Guinea* (1956); Boaventura de Sousa Santos, 'The Law of the Oppressed: The Construction and Reproduction of Legality in Pasagarda' (1977) 12 *Law & Society Review* 5; Boaventura de Sousa Santos, 'Law, State, and Urban Struggles in Recife, Brazil' (1992) 1 *Social & Legal Studies* 235. It is an argument expressly confirmed in Santos, above n 8, 116.

It is this spatial incoherence which legal pluralism explores. Predictably, therefore, the metaphors of pluralism have been resolutely spatial: 'spheres of justice', 'legal levels', 'competing, overlapping, constantly fluid ... associations', and 'semi-autonomous social fields'.[56] These images all convey pluralism's quest to reach an understanding of law which acknowledges the multiplicity of normative orders within a single social space. The answers, of course, have differed widely. For some, the State's legal order is a bargaining chip in whose 'shadow' unofficial legal norms are generated by particular groups or individuals. State law thus influences but does not determine legal practice. For others, alternative legal orders exist and have continuing force outside of or 'without' the law.[57]

There is a shared imagery here: an understanding of law as comprised of overlapping *objects* in space. The problem of such an approach is exactly what one would expect: reification. For 'law' — whichever law is meant — is understood as an object with a definite and determined content. It is not the meaning of law, but its claim to exclusive authority which is being questioned. The very language of alternative legality as operating in the 'shadow' of law reveals this. 'The law' — formal or informal — is an object which can throw a shadow; a definite thing, which interacts with other things in legal space, and in whose shadow we dwell. Legal pluralism *multiplies* legal systems but it does not doubt their objective and defined content. On this analysis, we can know what a particular 'legal order' demands, although there may be many such orders in competition or engagement. Legal centralism is like monotheism in that it posits one all-powerful god. Pluralism replaces one god with a pantheon, but there is nothing atheistic about it.

The first stage of 'modern pluralism' was motivated by a clear political agenda which *required* the reification of the legal order. Whether in colonial societies, Brazil or the inner city, 'pluralism' stood for resistance to the established legal order. Consequently, it was an analysis motivated by the spatial totality of that order in the first place, and by the desire to carve out a niche for the powerless which would be protected from invasion by its own total authority therein. Law's monopoly of space, according to this political pluralism, was both the problem and the solution.

A second phase, including the writings of Sally Falk Moore, Pospisil, and Weyrauch, for example, somewhat disanchored pluralism from the politics of resistance, demonstrating the operation of conflicting normative orders within a variety of different contexts ranging from factories to gypsies.[58] Now it was not

[56] See the excellent summary of these approaches in Griffiths, above n 53, 15-36.

[57] Rosemary Mnoonin and Leone Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950; Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) 19 *Journal of Legal Pluralism and Unofficial Law* 1, 8, 23; Harry Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (1985); Robert Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991); Jerold Auerbach, *Justice Without Law?* (1983).

[58] Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law & Society Review* 719; Leopold Pospisil, *Anthropology of Law: A Comparative Perspective* (1974) 97-126; Walter Weyrauch and Maureen Bell,

just a case of a State legal order *versus* a subjugated group, but rather of the conflict between various orders claiming normative authority — unions, businesses, syndicates, communities, churches. Falk Moore, for example, analyses social space (for example, a factory) as a site of overlapping 'social fields', such as State law, the union, organised crime, and so on, each of which impose certain norms of conduct which can be appropriately characterised as legal.[59] The social terrain is subject to several laws simultaneously. Nevertheless, Falk Moore conceives of law as the interaction of semi-autonomous fields and not of semi-autonomous individuals. Each 'law', on this analysis, has a certain determinate shape, size, and content, although it is changeable under the influence of different fields acting in accordance with different (and equally determinate) 'laws' of their own. In other words, the individuals who are subject to law are understood as the *inhabitants* of interacting social fields and not their authors. We are still seen to live 'in' a legal system as we are seen to live 'in' space.

A third phase of pluralism, including the literature on 'law and geography', and the work of Santos, likewise continues to conceive of pluralism as a problem of overlapping space, of multiple 'maps' of the law. By insisting on the need to pay attention to variations in the realisation of law from geographic specificity to geographic specificity, the (local) objective and definable reality of law and the (general) objective reality of space is assumed.[60] This modernist conception of the relationship of law and space is not unavoidable. Notably in the work of Nicholas Blomley, space and law are both treated as indeterminate and constitutive. There is an attempt here to move from a model of 'law' and 'space' as two separate variables impacting one upon the other, towards an understanding of their mutual construction.[61] Nevertheless, this sensitivity to the relativity of space remains an exception. Even amongst pluralist theories, law has been reified. Whether 'state law' or 'people's law', legal systems are still understood as separate and determinate objects in contention.

III AGAINST REIFICATION

Two lines of argument emerge from this discussion. First, legal theories, whether of geometry or geography, remain governed by modernist conceptions of reified space. The reification of law which we see in both formalism and pluralism is an aspect of this. The reimagination of legal theory therefore requires a more sophisticated recognition of the indeterminacy of 'the law' and 'legal systems'. Second, legal theories, whether of denial or despair, remain governed by modernist aesthetics of order and coherence. The reimagination of legal theory therefore requires a new aesthetic which appreciates the value of disorder. This question of vision is by no means secondary. A paradigm shift is marked by aesthetic no less than epistemological. The shift from the pre-modern to the

'Autonomous Law-Making: The case of the "Gypsies"' (1993) 103 *Yale Law Journal* 323; Auerbach, above n 57.

59 Falk Moore, above n 58.

60 See Pue, above n 14; Santos, above n 8.

61 Blomley, above n 14, 27-51.

modern was marked by a change in music and art no less than in science and technology. We are going through such a shift now, and clues to the aesthetics and the metaphors which we will need in order to come to terms with it, lie all around us.

To address these two arguments requires an integration of CLS and legal pluralism, which has two corresponding aspects. First, pluralism must take from CLS an indeterminacy of meaning to accompany its familiar insistence on the multiplication of the sources of that meaning. Such a step serves to counter the reification of legal space, and is the focus of my argument in the following sections of Part III. Second, CLS must take from pluralism its celebration of disorder and multiplicity. Such a step serves to advance a new aesthetic ideal, and is the subject of the concluding remarks of this essay.

A *Dimensions of Indeterminacy*

On the indeterminacy of legal meaning, CLS has been exceedingly vigorous. Pluralism on the other hand has tended to reify a particular 'legal system', of whatever kind, as if its internal principles and meaning could be determined with precision — as if 'the law of the state' or 'customary law' or 'the tax laws of a local Mafia', the common law of England or of a tribe in Papua, could be objectively interpreted. This, then, has been the strength of CLS and the weakness of legal pluralism. But when it comes to the multiplicity of legal *sources*, CLS has been weaker. There is still, in much critical writing, an overweening faith in the exclusive authority of 'mandarin materials' to determine legal ordering. In the next few pages, I suggest three levels at which the indeterminacy of legal sources and legal meaning can be combined — institutional, social, and individual.

I do not wish to be mistaken for a structuralist on a bad day. These three levels are simply examples of the ways in which indeterminacy manifests itself, and they are themselves mutually interactive. My argument is therefore about the human dimension which makes laws and theories (including pluralist ones) relatively indeterminate, and which the spatial obsessions of reified law ignore. Law does not just exist in four pre-given dimensions, but as a human intellectual creation: a fifth dimension. We are not located 'in' law, understood as an external and objective phenomenon, any more than we are located 'in' time and space. Rather, we consistently reinvent them through acts of symbolism and interpretation.

First, institutional indeterminacy: a function of the multiple entities, formal and informal, responsible for the interpretation of legal texts. Let us not imagine that there is some magical osmosis between word and world. It is not only legislators and judges who decide what a law 'means', but also academics and lawyers, journalists and politicians, police and bureaucrats.[62] At each step along the way, there is a five-dimensional act of legal symbol-making and interpretation. The reification of the law as if it were a thing or things whose 'province' could be

[62] See Robert Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57, 122.

'determined' misses these points. For example, perhaps the single most important development in the history of Western law was the reception of Roman law into medieval Europe, a process accomplished above all by academics in a movement distinct from either the political or the narrowly 'legal' professions.[63]

To take another example, consider drug policy. One central issue which arose throughout the world in the administration of new drug laws in and after the 1920s was whether it was legal for doctors to prescribe 'dangerous drugs' simply to 'maintain' the addict on a controlled dose of their drug of addiction. Australian regulations in several jurisdictions expressly prohibited this.[64] Despite the clear words of the statute, and over the objections of other departments and legal advice, the maintenance of a sizeable number of middle-class addicts continued for over thirty years, as a settled policy requiring the connivance not only of State law enforcement agencies and health departments, but the Commonwealth government which effectively administered this policy.[65] What was 'the law' in this case? Was the Department of Health 'wrong'? Surely this is an unhelpful formulation. Law is a matter of authoritative interpretation, and in a world of conflicting interpretations, the question of meaning resolves itself, as the realists said, into the question of who decides. Law does not exist without legal interpretation, exercised by a raft of institutions all of which refract and influence what is *experienced* as law.

Second, not only institutions, but communities, serve a constitutive role. In *Order Without Law*, Bob Ellickson brings R H Coase's celebrated story of the rancher and the farmer out of the realm of fable and into the 'real' world. Coase had argued that legal principles were a bargaining chip used in informal negotiations between groups which operate 'in the shadow of the law'. According to Ellickson's case study of the area around Shasta County, California, questions of cattle trespass, fencing rules, and so on, were in fact resolved through the application of quite *different* norms. Ellickson argued that this community continually 'got the law wrong' in the principles it applied; yet the cattlemen, despite all evidence to the contrary, resolutely believed that the insurance companies and the courts were making the mistake.[66]

Here I think Ellickson misses the point. The practice of cattlemen and farmers demonstrated a consistent understanding of 'the law,' and although it might be different from the principles applied in the courts from time to time, this understanding has an enduring quality and a distinct meaning. The legal texts of judicial decisions may be an important aspect of what counts as 'law,' but social practices are also interpretative. In this context, it is not helpful to try and

[63] Santos, above n 8, 57-60; Harold Berman, *Law and Revolution: The Formation of The Western Legal Tradition* (1983); Francis de Zulueta and Peter Stein, *The Teaching of Roman Law in England Around 1200* (1990).

[64] Supplement to New South Wales Government Gazette No 120, 30 August 1927, r 22; Dangerous Drugs Regulations 1930 (Vic), Gazette No 12, r 16.

[65] Desmond Manderson, *From Mr Sin to Mr Big* (1993) ch 5.

[66] R H Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law & Economics* 1; Ellickson, above n 57, 52, 92-103.

contrast 'official' with 'unofficial' law, or 'law' with 'non-law'. There was no such conflict, by and large, in the consciousness of the Shasta County community.

Third, the proposition that law involves both an indeterminacy of meanings and a multiplicity of sources applies to individuals as well as to groups. This psychological and personal dimension most actively undermines the reification of 'the legal system' as an entity capable of objective definition. Law involves the interpretation of norms and the mediation of concepts in a way which is experienced differently for each of us. For the most part, I do not experience 'law' as saying one thing, and 'informal norms' as urging another. On the contrary, the two come together in my mind and mutually influence my understanding. The result is that law means something different to me than it means to you, as does a piece of music or a book.

One might argue that a personal understanding of legality is not 'the law'. From the legal realists to postmodernists like Dragan Milovanovic, from CLS' hermeneutics of suspicion to Ronald Dworkin's hermeneutics of credulity, law has been treated almost exclusively in its juridical, not to mention juridogenic, dress.[67] But as Marc Galanter said, law is to be found in the courtroom no more than health is to be found in hospitals.[68] For most of us most of the time, law wears mufti. Undoubtedly, we are all gravely affected by legal texts and judicial decisions — either because we read them or hear about them — and by the pronouncements of law made by judges or lawyers or academics. But these influences intermingle with our other normative beliefs, cultural, religious, literary, or personal; and also mingle with myths, archetypal and urban alike, about legal obligation.[69] All these influences affect our personal knowledge of what we believe the law requires of us.

The human dimension of misreading is necessary to any genuine pluralism, for it rejects the reification of 'law', 'system', 'culture', or 'community', as a thing which can think or read. Law is not manufactured by 'a multiplicity of closed discourses' precisely because it is only realised through the actions of particular human beings who exist simultaneously in *several* discourses and who are, therefore, themselves plural.[70] We must go beyond understanding law as a system (like positivism), a clash of systems (like pluralism), or even as the interaction of sub-systems (like autopoiesis). Legal pluralism in its original incarnation, operating according to a spatial understanding of 'law's empire', saw informal norms as operating first 'under the law', and then in the 'shadow of the law'.[71] Later writers have suggested that is more accurate to understand norm-creation as

[67] See Llewellyn, above n 18; Hart, above n 12; Dworkin, above n 27; Dragan Milovanovic, *Postmodern Law and Disorder: Psychoanalytic semiotics, chaos and juridic exegeses* (1992).

[68] Galanter, above n 57. See also Margaret Davies, *Asking the Law Question* (1994).

[69] Harriett Hawkins, *Strange Attractors: Literature, culture and chaos theory* (1995) 69, makes a similar point about the chaos of literature.

[70] For further on the notion of hermetic discourse, see Gunther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 *Cardozo Law Review* 1443, 1457; see also Charles Sampford, *The Disorder of Law* (1989).

[71] Coase, above n 66; Mnoonin and Kornhauser, above n 57; Thompson, above n 48; Galanter, above n 57.

a process which goes on 'without the law'.[72] But pluralism in fact operates 'within the law', and indeed within ourselves.[73]

A variety of recent scholarship has begun to address this question. In the recent work of Peter Fitzpatrick, for example, the notion of 'integrative pluralism' suggests that ultimately what law means is a question for each of us to resolve, integrating in our minds a whole variety of normative demands.[74] And Santos likewise moves towards an idea of 'inter-legality', 'of different and sometimes conflicting legalities', according to which codes and norms are mixed in reality and in the contents of our minds.[75] In the *favela* of Rio, for example, state law and the law of the shanty, moral and procedural principles alike, are all interconnected. They form, in the mind of the *presidente* of the Residents' Association, for example, a whole.[76] There is no conflict between the demands of one system of law and another here; only an interplay which finally resolves itself as 'the law': the resolution of a particular conflict.

At times Santos rejects the idea that law can properly be thought of as a system or systems at all. Although Santos prefers instead the metaphor of the map, with its geographical and spatial overtones, he pluralises it and therefore proceeds beyond its modernist instantiation. Each of us carries many maps around with us, varying in scale, projection, and symbolism. One need only recall the elaborate symbolism and ornamentation of medieval maps, with their interlaced depiction of spaces physical, relational, and mythological, to appreciate how various, how subjective, how political and even deceptive is the work of map-making.[77] Modern maps use a different symbolism, attempting to achieve an equality of perspective by capturing a part of the world as seen from above or beyond its boundaries — from some all-seeing and external point. This does not suggest that maps are now any less politico-cultural and partial than they were, but only that the contours of that partiality have changed. A map is, and always was, a way of defining identity by relating individual to social space, and law itself is an active and contingent agent in the socially loaded process of mapping.[78]

B *Reimagination: Space and Chaotics*

The map is an appropriate metaphor to begin the reimagination of legal theory through a critical legal pluralism which *refuses* to reify the phenomenon of 'the law'. It is a metaphor about how we understand space. But there are different ways of understanding space, as we have seen. Formalism, I have suggested, is

[72] Ellickson, above n 57; Arthurs, above n 57; Santos, above n 55.

[73] See Roderick Macdonald, *'Les Vieilles Gardes: Hypotheses sur l'emergence des normes, l'internormativite et le desordre a travers une typologie des institutions normatives'* in J Belley (ed), *Le droit soluble: contributions quebecoises a l'etude de l'internormativite* (1996).

[74] Fitzpatrick, 'The desperate vacuum', above n 55; Peter Fitzpatrick (ed), *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (1991).

[75] Boaventura de Sousa Santos, 'Law: A Map of Misreading' (1987) 14 *Journal of Law & Society* 279, 297-8, 305.

[76] Santos, above n 8, 124-249.

[77] See Blomley, above n 14, ch 3. See, also, Mark Monmonier, *How to Lie with Maps* (1991).

[78] See Judith Butler and Joan Scott (eds), *Feminists Theorise the Political* (1992).

legal geometry and pluralism is legal geography: they are different ways of mapping finite law in finite space. Metaphorically, the science of space best suited to the reimagination I have suggested might be dubbed 'legal chaotics'. Undoubtedly, for many scientists, chaos theory remains a means towards the achievement of modernist goals of certain and determinative knowledge. Nevertheless, ideas of chaos must be seen in the broader context of a range of other scientific developments which have come to the fore in recent times. Out of the rubble of the world which Messaien saw laid waste by the cataclysmic clash of modernist ideologies — capitalist, fascist, socialist — chaos theory emerged as part of a general scientific and epistemological turning point: indeterminacy, uncertainty, and quantum theory also come to mind. And in this context of *multiple* challenges to the New(tonian) World Order, chaos theory is significant because it manifests a trend towards an interest in space relativised rather than reified, non-linear rather than linear, and complex rather than simplified.[79]

How, then, does chaotics invite a new understanding of space? Take the fractal.[80] A fractal is a way of measuring that degree of roughness or irregularity in an object, which maintains its complexity regardless of the scale of analysis adopted. A coastline is a good example. If you look at a map, say of a country, it has a certain irregularity to it: you see tangled lines that represent rugged cliffs or meandering rivers.[81] If you enlarge the scale, this tangled quality does not disappear; rather, new details appear, new complexities which were not apparent previously. Bays and inlets turn out, on closer inspection, to have bays and inlets of their own. No matter how detailed the map, there is a certain degree of complexity — a fractal dimension — which does not change. The measurement of the length of a coast consequently depends entirely on the scale of measurement adopted, which determines those irregularities which are noticeable, and those which are not. The result is, in mathematical terms, something remarkable: an infinite line within a finite space.

In law, the fractal adds complexity to the geometry and the geography of the map.[82] It demonstrates Santos' and Lon Fuller's point, which the cartographer knows full well: the answer to the question 'what map should we use?' depends on why we want to know. Moreover, to concentrate on the State-wide — or the supra-national — emanations of law is to ignore the differences in how different

[79] James Gleick, *Chaos: Making a New Science* (1987); John Casti, *Complexification: Explaining a Paradoxical World Through the Science of Surprise* (1994). A further, if rather fragmentary, explanation of the relationship of chaos to postmodernism and law is to be found in Milovanovic, above n 67, 117-18 129, 228-40. See also R Scott, 'Chaos Theory and the Justice Paradox' (1993) 35 *William & Mary Law Review* 329; G Reynolds, 'Chaos and the Court' (1991) 91 *Columbia Law Review* 110.

[80] The seminal work is Benoit Mandelbrot, *The Fractal Geometry of Nature* (1983) .

[81] Gleick, above n 79, 98. I use the word 'tangled' with care, since it is not only typical of the descriptions of fractal geometry in Gleick, for example, but at the same time establishes a connection with the dense interwoven harmonic 'tangles' in the linguistic and harmonic language of Messiaen's *Quartet for the End of Time*, above n 1.

[82] Milovanovic, above n 67, 230-3, 242-5, relying in particular on Deleuze and Guattari, provides a different interpretation. Focusing on the fractal as a fraction of a dimension, he treats it mainly as a metaphor for indeterminacy of meaning. The meaning of a text, he argues, is never either 0 (wrong) or 1.0 (right); rather, it lies in between as a 'semiotic fractal,' filling the space of meaning only partially.

communities, for example, understand and receive law. To focus on the 'community' as a homogeneous group of perceptions is to ignore the divisions within that community. Even to focus on sub-groups is to ignore the differences between individuals' own understanding of law. In resisting the reification of law, pluralism must appreciate the idea of the fractal: the diversity of interpretative communities has no final resting point, because the law is a network of interactions characterised by a high fractal complexity. Law's parameters — its coastline — can never be finally determined. This suggests not only a purposive approach to theory, but a humble one. Law, too, is an *infinite* line nested in finite space.

A second aspect of chaotics moves the discussion from theory to praxis, from comprehension to prediction, and from the present to the future. Chaos betokens, above all, the unpredictability of human affairs. A chaotic system is *determinate*, and indeed often it operates according to a few clearly defined rules. But the sensitivity of such a system to its initial conditions renders *predictability* impossible and long-range weather forecasts pretty well meaningless. There are so many variables at work here, a tiny variation in any one of which might have greatly magnified effects over the system as a whole, that prediction rapidly becomes impossible.[83] Chaos develops because these systems are dynamic: the rules which govern their operation interact with each other. It is this interaction which makes the function they describe non-linear rather than linear. Most typically, interaction occurs because the output from applying the rules which operate in the system becomes an input in the next operation of the system, thus creating a vast feedback loop.[84]

In law, one cannot speak of the word 'system' as anything other than metaphor, for meaning is constituted by a vast range of variables and actors, all mediated through the interpretative prisms of our minds. The reduction of 'law' and 'power' to the emanations of particular state institutions, is a fallacy of profound proportions. But let us bracket this and think only of the legal system as a series of actors in a web of influential communities: judges and lawyers, bureaucrats and police. The unpredictability of law stems from the fact that each of these 'variables' has their own responses to a legal question, and these responses influence the responses of other actors, influencing their responses in a never-ending cycle of intensifying perturbation. It serves us well to understand that this process is itself a dynamic one, and its results non-linear. For law is generated by the constant reiteration of rules and understandings, a feedback loop as unpredictable as a game of Chinese whispers. Furthermore, we cannot think of judges or bureaucrats as generic or systemic. They are individuals whose responses are subjective and — even if only slightly — unpredictable. The initial conditions, therefore, cannot be specified in advance, and subtle and unexpected differences can have vast effects.

[83] Roger Penrose, *Shadows of the Mind: a search for the missing science of consciousness* (1994) 21-4 emphasises that this relies on the *practical* impossibility of definition and prediction, despite the theoretical determinism of the system.

[84] The question of non-linearity is returned to frequently in Gleick and others: eg Gleick, above n 79, 23-4, 27.

To accept the limits of predictability in law is perhaps to recommend a certain caution in the implementation of legal regulation, for it contrasts the modernist dream of order with the significance of the practical limits to human knowledge.[85] Inasmuch as chaotics argues against our ability to predict the consequences of legislative control, it stands in opposition to the micro-regulatory practices of modern law. This approach is not quietism; on the contrary, it is the standard model which encourages passivity. Modernism assumes almost without exception that 'systems' are normally linear in function. Imagine a diagonal line on a graph, the end product of a linear equation: the implication of this model of the world is that the scale of action corresponds geometrically to the scale of transformation. But non-linearity turns that on its head. Small variables have disproportionate results as they magnify and feed back through the system. The model of chaos implies the importance, and indeed the imperative, of 'local knowledge' and local action.[86] There is an endemic overstating of the power of law on a macro level in our society. Social change does not take place by legislative pronouncement: it takes place through local action, and by the aesthetic communication of particularity.

IV CONCLUSION: TOWARDS AESTHETICS

The move from modernism to postmodernism in law reflects a change in the conceptualisation of space from geometry to geography to chaotics, from the linear to the non-linear, and from the ordered to the disordered. We are living, I am suggesting, through a paradigm shift in the epistemological foundations of society. Scientific theory is a good exemplar of this change, just as it has been, according to Jean-François Lyotard for example, a significant beacon of the nature and crisis in the modernist paradigm.[87] But a shift in epistemological paradigms requires a shift in aesthetics, which will neither deny, despair, nor merely accommodate change, but will rather embrace and develop it.[88] Legal

[85] It also suggests a suspicion of those theorists who claim to be interested in law as the science of prediction: 'The prophecies of what the courts will do, and nothing more pretentious, is what I mean by law': Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 461; or in the realists' assertion that law itself is 'generalised predictions of what courts will do': Llewellyn, above n 18, 56.

[86] Geertz, above n 51; Michael Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy* (1958).

[87] The relationship of science to legal theory is a notable feature of Santos' writing. There is, in particular, an excellent summary of the tenets of Newtonian science, and the breakthroughs of this century which have undermined it: Santos, above n 8, 17-22. Nevertheless, this analysis is concerned mainly with an explication of the 'crisis' of rationalist science as an exemplar of modernism generally, rather than a consideration of any of the aspects of a new scientific paradigm — the same is largely true of the analysis of modern science in Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (1984). Chaos is treated, in Santos, as a destabilising feature of science rather than as a new and suggestive orthodoxy: Santos, above n 8, 19, 25-6. As we have already seen in relation to legal pluralism, there is a tendency here to treat the 'dominant paradigm' (of modernist epistemology) as a more powerful and unchallenged villain than it really is.

[88] For the developing idea of aesthetics and law see, Daniela Pacher, 'Aesthetics vs. Ideology: The Motives Behind "Law and Literature"' (1990) 14 *Columbia-VLA Journal of Law and the Arts* 587; Drucilla Cornell, 'Toward a Modern/Postmodern Reconstruction of Ethics' (1985) 133 *University of Pennsylvania Law Review* 291; Wilf Stevens, 'Imagining Justice: Aesthetics and

theory always embodies an aesthetic element, as we have seen, and to date this aesthetic has been resolutely modernist in character. The transition, therefore, requires a new aesthetic which has the capacity to harness the *aesthetic* power of chaos, and thus to reunite the intellectual and the aesthetic dimensions of legal theory.

The aesthetics of modernity spoke to the necessity of order and coherence, the beauty of clockwork time and geometric space. In this paradigm, Hobbesian and Newtonian, the opposite of order was anarchy, and another name for anarchy was chaos.[89] But this dichotomy has been shattered. 'Is this the face of chaos?' asked the *Scientific American,* more than a little astonished. Chaos, it turns out, is beautiful and colourful; in architecture, art, and human life, we value the non-linear and the fractal and, on the contrary, find linearity to be deeply alienating.[90] Chaos, then, is not to be confused simply with a lack of order. There is order in chaos, but not order of the human kind — instead there are patterns beyond human prediction and depth that beyond understanding. Chaos is above all an appeal to complexity, and to the surprise it promises. These elements of unpredictability — our expulsion from the divine and unchanging order of Paradise — permit us to give up the ideal of absolute control and regulation over the natural (or social) world. It requires us to abandon the relentless and arrogant system-building of modernity and direct our attention instead to the poetry and power of the local and the particular. In this sense, the new science is ultimately empowering. The beauty of chaos is that butterflies matter.

The aesthetic of critical pluralism, in keeping with this aesthetic spirit, celebrates multiplicity in stark contradiction to the legal trinity of coherence/order/control. Uncertainty, indeterminacy, unpredictability, particularity: these are not *failures* of analysis if we abandon the equation of order with beauty and chaos with ugliness. Pluralism *is* local knowledge and local action, a recognition of the cultural, communal and individual construction of legality. No reification or systemisation of 'space' or 'time' can capture the complexity of legal meaning as each of us experience it, because each of us experience it differently.

Modernism seems to have missed the beauty of pluralism. Though liberal theory claims to value it, it does so as a kind of safety valve; unprepared to decide which 'good life' is objectively to be preferred, we allow people and communities to make their own choices with a minimum of interference — not because these differences are themselves desirable, but because liberalism has no

Public Executions in Late Eighteenth-Century England' (1993) 5 *Yale Journal of Law and the Humanities* 51; Stephen Gey, 'This Is Not a Flag: The Aesthetics of Desecration' (1990) *Wisconsin Law Review* 1549; Roberta Kevelson (ed), *Law and Aesthetics* (1992); Costas Douzinas, *Justice Miscarried: Ethics, Aesthetics and the Law* (1994); Ian Ward, 'A Kantian (Re)turn: Aesthetics, Postmodernism, and Law' (1995) 6 *Law & Critique* 256; Desmond Manderson, 'Statuta v. Acts: Interpretation, Music, and Early English Legislation' (1995) 7 *Yale Journal of Law and the Humanities* 317.

89 Thomas Hobbes, *Leviathan* (1st published 1651, 1946 ed); Sir Isaac Newton, *Philosophiae Naturalis Principia Mathematica* (1st published 1687, 1966 ed). The closeness of the original publication dates is of course by no means coincidental and reflects the emergence of just this shared modernist sensibility.

90 See Hawkins, above n 69, 164-7.

way of arbitrating between them. Pluralism is valued as a necessity and as a process, because it allows *us* the kind of life *we* want.[91]

Thus, within a modernist State, social communities often seem to be expected to position themselves in one of two characteristic ways: by assimilating, or through the creation of kinds of ghettoes. Both are static conceptions which limit the perturbations of a society by expecting one tradition to absorb another, or by isolating one from another. The former, the assimilation valued by modernist monism, is the modernism of denial, for it conceives of a single community as a product of homogeneous space and linear time. The latter, the 'ghettoisation' of modernist pluralism, is the modernism of despair, for it conceives of multiple communities as a product of reified space and frozen time — as unchanging and impermeable.

In despair or denial, communities are preserved, but as antiquities not traditions, as 'distinct' but not as interactive. Monist or pluralist, this is a social form of that modernist abstraction manifested most clearly in the famous 'geometric straight-line approach' of Piet Mondrian, blocks of pure colour kept rigidly separate by unbending black boundary lines. The aesthetics of critical pluralism must go further. It must celebrate diversity not as a means to an end, but as an end itself. It is an expression of teeming life, a disorder and a multiplicity and therefore intrinsically beautiful, just as the diversity and interaction of the ecosystem is intrinsically beautiful. Such a concept of legal pluralism is not about preserving intact the hermetic integrity of any particular 'community', for example. On the contrary, beauty lies in their conjunction, in the way tiny perturbations may have enormous and unpredictable influence. The result is a vibrancy and change which is worth celebrating, not just in spite of, but because there is no predicting where it will end up. Unger and Santos have written in utopian vein on the creative and spiritual benefits to be obtained by living on the margins and the frontiers, by living a life governed by re-invention and destabilisation.[92] The study of chaos and its marvellous complexity, is a study of the frontiers of change — of the wonderful things that happen when the going gets turbulent.

This perspective requires, above all, an aesthetic shift because, within modernism, diversity and non-linear change have always been seen as threatening. Modernism encourages fear at the thought of unpredictable movement, and we see this fear all around us: in the fear of social change, the paranoia about drugs, the hatred of immigration, the clamouring for the death penalty. The aesthetic of pluralism, on the contrary, sees the beauty of turbulence and, in our own lives as in our societies, appreciates the whorls and eddies of everyday life. It replaces fear with hope for, after all, there can be no hope in a world without uncertainty.

[91] Thus Nicholas Rescher, *Pluralism: against the demand for consensus* (1993) 4, describes pluralism as 'damage control' given the inevitable continuance of dissensus in society. It is an approach which finds echoes in classic works of liberalism such as John Stuart Mill, *On Liberty* (1857), and John Rawls, *A Theory of Justice* (1972).

[92] Roberto Unger, *False Necessity: Anti-Necessitarian Social Theory In the Service of Radical Democracy* (1987) 531-2; Milovanovic, above n 67, 234-6; Santos, above n 8, 491-9. Santos most notably relates these ideas to chaos theory.

I freely concede the somewhat naïve and unbounded optimism of my rhetoric. There is indeed, for many groups in society, an everyday turbulence, the product of their relentless oppression, which is in no way desirable. The turbulence occasioned by homelessness, poverty or the instability of discrimination, is hardly beautiful. However the purpose of a utopia is not as an architect's blueprint but rather as an artist's sketch: it expresses an aspiration not a programme.

> We are not compelled to accept or reject an aesthetic vision ... [w]e must ask whether the imaginative vision [it] presents is attractive or repulsive, whether it is 'true' not to this world, but to our hopes for the world.[93]

Legal chaotics, a pluralism of change, does not claim that all instability is desirable or all legal intervention misplaced. Power is itself a 'strange attractor' which *distorts* the free flow of turbulence. Instead, critical legal pluralism offers an alternative vision of legal possibility and creative freedom, against which the present reality can be judged, and towards creating the conditions under which such a society could freely evolve, our efforts can be directed. Gaston Bachelard said in *The Poetics of Space*: 'an empty drawer is *unimaginable*. It can only be *thought of*.'[94] There is a fundamental difference between imagining and thinking and although both are crucial intellectual functions, their spirit and purpose differs.

Finally, having focused on different ideas of space in legal theory I conclude, as I began, with the related question of time. There is another clue to the aesthetic and metaphorical shift marked by the 'end of [modern] time' in the work of Olivier Messiaen, for in his work there is always an intense focus on the symbolic and emotional meaning of rhythm. Rhythmic forms are charged with extraordinary significance throughout his work.

> Rhythm, by its very essence, is change and division. To study change and division is to study Time. Time — measured, relative, physiological, psychological — divides itself in a thousand different fashions.[95]

The modernist reification of time and space is one thing: linear, absolute, objective. It divides the world into isolated and equivalent parcels, symbolised by clockwork, the metronome and serial composition. What would time unreified be? It would be rhythm. Rhythm is changeable, subjective, and contextual. It exhibits a care for relationship for it exists only in combination. As we become absorbed in rhythm, we learn the lesson of our interdependence and mutual constitution. The natural world — and *a fortiori* the human world — is not a giant clock, nor we but cogs within it. The mutability of rhythm rather than the immutable regularity of clockwork governs the movement of the world.[96] All of this is a metaphor for a new kind of approach to legal relations. The work of Olivier Messiaen suggests not only the 'end of time' but the beginning of rhythm.

[93] Robin West, 'Jurispudence as Narrative: an aesthetic analysis of modern legal theory' (1985) 60 *New York University Law Review* 145, 209-10.

[94] Gaston Bachelard, *The Poetics of Space* (1994), xxxvii.

[95] Messiaen in Erato, above n 1, 13.

[96] See Peterson, above n 5.