THE HETERONOMY OF FLESH:

A MINOR JURISPRUDENCE OF THE USE OF THE HUMAN DEAD AND TISSUES

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Abstract

The dissertation addresses historical and contemporary legal literatures—generally literatures that have not succeeded in becoming convention (Peter Goodrich)—that assert or rely on the human body's "jurisgenerativity" (Robert Cover) to evaluate and determine what should be lawfully done with the human dead or tissues. These literatures demonstrate the limits of doctrinal legal methods and conventional jurisprudence which ordinarily deploy concepts of property or personhood. Instead of property or personhood, these literatures require the jurisprudent to attune to the heteronomy of flesh, a law engendered in the materiality of the body decomposing, cut into parts, or as fragments falling away from the individual. It requires the jurisprudent to reach past divisions of *nomos* and *physis*, playing with the normativity of corporeal forms. Drawing on concepts of critical legal theory including heteronomy (Stewart Motha, Jean-Luc Nancy); lawscape (Nicole Graham, Andreas Philippopoulos-Mihalopoulos); jurisgenesis and biogenesis (Robert Cover, Margaret Davies); antirrhesis and the antinomian (Peter Goodrich, Marty Slaughter); and office and technics of jurisdiction (Olivia Barr, Shaunnagh Dorsett and Shaun McVeigh, Marc Trabsky), the author suggests how these literatures and their engagement with human corporeality can be re-read to foster alternate approaches to the laws of the dead and bodily matter. This leads the author to conclude the dissertation by gesturing to the possibility of a minor jurisprudence (Peter Goodrich, Shaun McVeigh, Panu Minkkinen) where the jurisprudent writes as flesh (Gilles Deleuze and Felix Guattari), inspired by re-readings of the failed literatures he covered, so to inhabit different modes of relating with corporeality.

To my dear loves, Connor and Prudence

And to Zachary, my brother, whose death I mourn.

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where many revisions were done. These haunts supplied me inspiration and comfort whilst undertaking the most challenging scholarly endeavour of my life so far.

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My doctoral studies started in September 2018 with a very different dissertation in mind. The Covid-19 pandemic struck in March 2020 and totally disrupted my life with "lockdowns," "social bubbles," and "working from home." My life became small, sad and chaotic for two years until, in June 2022, I moved to Halifax where the pandemic seemed, at least, less devastating. The original idea for my dissertation (which would have involved social research in prisons) no longer seemed feasible by June 2020, and by July 2020, I decided to lean into the upheaval and select another topic, based on stronger interests of mine. I am so glad I did. It filled my life with purpose during the height of the (ongoing) pandemic, and challenged me as a scholar to deepen and refine my engagement in the field of law and the humanities, especially by means of critical legal theory.

Finally, my brother. My brother Zachary died at the age of 31 in September 2023. He was a framer (having trained in carpentry), musician and songwriter. His death coincided with my first term teaching at the University of Kent and whilst I was revising my dissertation. He died of a fentanyl overdose, after struggling with his drug use and the deterioration of his mental health for years. Whilst he overdosed multiple times in 2023, the coroner's post-mortem suggests the reason he was not successfully revived this time was owing to the nature of another drug with which the fentanyl was cut and that counteracted the effects of Naxolone. Zachary and I had a difficult relationship. During my PhD, he only spoke to me when he wanted money, which I gave repeatedly until, in August 2022, I finally told him I could not afford to do so any longer. To my knowledge, Zachary did not understand what I did. My mother reports that Zachary did and was proud of me. Regardless, I loved him. My joy of writing, of words, of imagination, came from us playing together. He is a constant in me even as so much changes.

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Chapter 1— Introduction: Law and Bodily Matters

Without capacity for human subjectivity, a thing would ordinarily be a candidate for property, relegated to the world of objects which can be appropriated and owned.[1] Yet common law courts have been reluctant to characterize dead bodies or bodily materials as such.[2] The human dead and tissue can be possessed and transferred between persons in a chain of circulation, like property.[3] One can enter contracts or other legal relationships (such as bailments) that establish entitlements and duties to bodily material like sperm as if they were chattels.[4] But neither the dead body nor bodily material can generally be sold "at arm's length" and converted into monetary value,[5] or subject to liens and attachments in cases of debt.[6] The presumptive outcome for the human dead is a "dignified" and "final" disposal, which possession and use of the dead body are limited to effecting,[7] bearing little connection to the normative premises of private ownership; and tissues, such as those removed during surgery, must be discarded promptly, securely and finally as medical waste.[8] Their quality as

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[1] Jesse Wall, *Being and Owning: The Body, Bodily Material, and the Law* (Oxford: Oxford University Press, 2015) [J. Wall (2015)].
[2] Heather Conway, *The Law and the Dead* (Abingdon: Routledge, 2016), 2 [Conway (2016)].
[3] Ibid, 67-69; see e.g., *Doodeward v Spence* (1908), 6 CLR 406 at 414 (High Court of Australia) [*Doodeward* (1908)]; *Miner v CPR* (1910), 18 WLR 476, 3 Alta LR 408 (Alberta Supreme Court) [*Miner* (1910)]; *Phillips v Montreal General Hospital* (1908), 33 Que SC 483, 1908 CarswellQue 8 at para 16 (Quebec Superior Court) [*Phillips* (1908)]; regarding reference to a chain of circulation, see Karl Marx, *Capital Volume 1* (London: Penguin, 1976).
[4] *Lam v University of British Columbia,* 2015 BCCA 2, paras 112-118 [*Lam* (2015)].
[5] *Mason v Westside Cemeteries Ltd*, 1996 CanLII 8113 (ONSC), para 34.
[6] *Miner* (1910), *supra* note 3 at 414; also see *Jones v Ashburnham* (1804), 4 East 455 at 465, 102 ER 905 (UK); *R v Fox and Ors* (1841), 2 WB 246, 114 ER 95 (UK). Notably, though, prior to 1804 it appears that the writ of *capios ad satisfortendum* was used to bring attachments to dead bodies of debtors so to force relatives to pay what was owed, see Thomas McKendree Chattin Jr., "Property Rights in Dead Bodies" (1969) 71:3 *West Virginia Law Review* 377 at 378 [Chattin (1969)]; Walter F Kuzenski, "Property in Dead Bodies" (1925) 9:1 *Marquette Law Review* 17 at 18 [Kuzenski (1925)]. Chattin wrote (p 378) that in *Jones* (1804), Lord Ellenborough "declared that such practices were unlawful as being *contra bonis mores* [because] [s]uch practices were inconsistent with the law declared by Blackstone, for if there could be no 'property' in the dead then it would follow that there could be no property attachment of the dead."
[7] Conway (2016), *supra* note 2 at 67-69; see e.g., *Buswa v Canzoneri,* 2010 ONSC 7137, para 7 [*Buswa* (2010)]; *Krauch v Degen Estate*, 2021 NSSC 108, para 34 [*Krauch* (2021)].
[8] See e.g., Ministry of Environment, "C-4: The Management of Biomedical Waste in Ontario" (2019), online: <https://www.ontario.ca/page/c-4-management-biomedical-waste-ontario>; also see RRO 1990, Reg 347.

objects thereby appears incomplete, apparently placing them in special categories between personhood and property. But then those special categories are not always the case, either. There are dead bodies or bodily materials that *are* traded as commodities, like mummies, relics and anatomical specimens;[9] and there are remains and tissues that are put to uses other than a dignified mortuary disposal or as medical waste, like in dissection, transplantation and exhibition.[10] The rights, duties and other "standard incidents"[11] that comprise ownership in law—and the presumed finality of disposal—are variably present across cases without logical distinctions between.[12] Such ambiguities confound the common law, particularly as jurists insist on an internally coherent image or story of law that confers clear and stable meaning and order on the relations between humans and things.

Many legal theorists remain undeterred in their search for logical distinctions between cases; distinctions which may explain away differences, reconciling disparate uses of human

[9] See discussion of Griffith C.J. in *Doodeward* (1908), *supra* note 3 at 413; *Phillips* (1908), *supra* note 2 at paras 8, 10 and 16; *R v Price* [1884] 12 QBD 247 at 253 (Court of Queen's Bench) [*Price* (1884)]; also see Damien Huffer and Shawn Graham, "The Insta-Dead: The Rhetoric of the Human Remains Trade on Instagram: (2017) 45 *Internet Archaeology*, https://doi.org/10.11141/ia.45.5. Also see e.g., SkullStore associated with the Prehistoria Natural History Centre in Toronto, Canada, online: https://www.skullstore.ca/collections/humans#. Canada does not have legislation that prohibits the trade of mummies or mummified parts generally, although the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970 establishes certain limits, such as state obligations to prevent the import and export across national boundaries of 'anatomy' that countenances cultural property (except with certain permits). The convention was ratified on 28 March 1978, and is reflected in Canada's *Cultural Property Export and Import Act*, RSC 1985, c C-51 and accompanying regulations. Provincial human tissue and anatomy acts put significant limits on the sale or trade of human bodies or parts or tissue taken from the body of a deceased person in the context of organ and tissue donation. For example, section 15 of Manitoba's *The Human Tissue Act*, CCSM c H180, prohibits the purchase, sale or exchange for valuable consideration of the tissue, body or any parts of it donated under the *Act* (except blood and blood constituents).

[10] Also see discussion in J.G. Castel, "Some Legal Aspects of Human Organ Transplantation in Canada" (1968) 46:3 *Canadian Bar Review* 345; Ruth Richardson, *Death, Dissection and the Destitute* (Chicago: University of Chicago Press, 2001) [Richardson (2001)].

[11] A.M. Honoré, "Ownership," in Anthony Gordon Guest, ed, *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford: Oxford University Press, 1961), 370 [Honoré (1961)].

[12] J. Wall (2015), *supra* note 1.

matter within the law's twinned narratives of property and personality.[13] To these theorists, the dead body and bodily material must behave for law as concepts of property and personality describe, otherwise (or so it seems to me) theorists risk the internally coherent story of law. Jesse Wall, for example, argues that a just and exact system of law would be grounded in the moral status of the person:[14] human matter necessary for a person's subjectivity (the seat of their moral status) would be primarily subject to the protections according to consent; whilst materials contingently associated with the person would be governed fully according to the law of property allowing others to claim superior rights.[15] The uncertainty posed by human remains and tissues would thereby be resolved by restoring the boundaries of property and personality at the interstice of subjectivity, patent in decision-making over one's "own" tissues whilst alive but sustained too after death in the attitudes and conduct of those who recognize the tissue as *of* someone. To these categorizations, Amitpal Singh adds that—apart from tissues that are obviously only contingently associated with a person (like hair for most people, or a cell line, once detached)—bodily matters integral to subjectivity can be further delineated as "mine" in the sense of ownership, or "me" in the sense of personality, depending on their degree of personal importance.[16] By focussing on the degree of integrality, Singh advances the case that people could claim tissues as "mine" or as "me" irrespective of whether they remain part of (attached to) their body, or separated (or detached);[17] instead it would depend on the context of the claim, namely its proximity to

[13] See e.g., Chattin (1969), *supra* note 6; Honoré (1961), *supra* note 11; Kuzenski (1925), *supra* note 6; J. Wall (2015), *supra* note 1; also see e.g., Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (London: Hart, 2009) [Hardcastle (2009)]; Stephen A Munzer, *A Theory of Property* (Cambridge: Cambridge University Press 1990), chapter 3 [Munzer (1990)]; J.E. Penner, *The Idea of Property in Law* (Oxford: Clarendon Press, 1997) [Penner (1997)]; Margaret Jane Radin, *Reinterpreting Property* (Chicago: The University of Chicago Press 1993) [Radin (1993)]; Muireann Quigley, "Property in Human Biomaterials—Separating Persons and Things?" (2012) 32:4 *Legal Studies* 659 [Quigley (2012)].
[14] J. Wall (2015), *supra* note 1.
[15] Ibid.
[16] Amitpal C Singh, "The Body as Me and Mine: The Case for Property Rights in Attached Body Parts" (2021) 66:3 *McGill Law Journal* 565 [Singh (2021)].
[17] Ibid.

core functions of one's existence. That change would restore for Singh the symmetry of the kind of interest in bodily matter and the remedy for its interference (torts of detinue or conversion with respect of what is 'mine' as property like a kidney, and battery for those that are "me" like the heart),[18] which, even if without practical consequence, would keep law's concepts logically pure. Both legal theorists thereby consider the coherence of law as a fundamental quality, even as they recognize "[t]here are disparate social meanings, as well as differing biological and functional capabilities that accompany the separation of different body parts."[19]

To maintain a coherent story of law, theorists like Wall and Singh set apart from law the disparate meanings and capabilities that factor in experience, treating them as matters generally outside legal concern. Instead, social meanings and capabilities are only limitedly allowed to commerce with the system of private law, principally through individuals' expressions of autonomy where their consideration is circumscribed and slotted into the law's narratives in clear and predictable ways (as consent, or control over property). Using the terms of legal philosopher Neil MacCormick, autonomy—in the sense of a "law" originating intrinsic to the self—acts on and is acted upon by the multiplicity of social and physical life but in a way that is ultimately private or specific to an individual.[20] The "Law" so called, by contrast, is heteronomous (in the sense of heteronomy), in that it originates in institutions and practices extrinsic to the individual self where its standards and forms can be generalized and universally applied in the coordination of conduct.[21] Necessarily in MacCormick's formulation, and theorists who implicitly rely on it, heteronomous Law must be generalizable and universal; to legitimately impinge on autonomy, heteronomous Law must cohere as a

[18] Ibid.
[19] Ibid, 600.
[20] Neil MacCormick, "The Relative Heteronomy of Law" (1995) 3:1 *European Journal of Philosophy* 69 [MacCormick (1995)].
[21] Ibid.

singular story which can be posited, objectified and imposed on individuals irrespective of differences in how they, in the particularity of their private lives, interface with the world (which general jurisprudence, particularly its analytic kinds, is tasked with clarifying).[22] Law then requires differences in bodily matter to either reliably correspond to generalizable categories, like property, or be filtered through expressions of autonomy which already have a determinate place within the legal system.

Ordinarily then, legal theorists orient to the problem of the human dead and tissue by searching for a logical break between those matters that form part of the constitution of the subject, and those that render the body and its derivative parts and materials into objects. Differences between theorists lie in where that break is found and how it is rationalized in their specific telling of the story of law.[23] But each share in how the problem, and their approaches, are fundamentally structured, so the effects of their inquiries are much the same: either more property, or more person.[24] But neither property nor personality can fully explain how the human dead and tissues are handled and disposed;[25] as suggested above and described below, many bodily matters transgress both categories of property and personality, and others have no obvious connection with either. There are many, apparently irreconcilable, facets to the laws that govern or are countenanced by the dead body, and contrary to the efforts of legal theorists,[26] these facets do not lend well to being puzzled back together to form an internally coherent story of law. Like law generally, there is no ultimate

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[22] Ibid. Regarding the task of general jurisprudence, see e.g., Julius Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control, a Study in Jurisprudence* (Buffalo, NY: Hein and Co., 1946).
[23] These differences are described in a later chapter.
[24] A related point is made by Roxanne Mykitiuk, "Fragmenting the Body" (1994) 2 *Australian Feminist Law Journal* 63 [Mykitiuk (1994)].
[25] Ibid; also see Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates about Property and Personality* (London: Ashgate, 2001) [Davies and Naffine (2001)]; Ngaire Naffine, "'But a Lump of Earth'? The Legal Status of the Corpse" in Desmond Manderson, ed, *Courting Death: The Law of Mortality* (London: Pluto, 1999), 95-110 [Naffine (1999)].
[26] See e.g., Hardcastle (2009), *supra* note 13; Munzer (1990), *supra* note 13; Singh (2021), *supra* note 16; J. Wall (2015), *supra* note 1.

principle from which all expressions of the system of law are derived.[27] Instead, the legal theorist must take seriously the heterogeneous world in which law partakes and, indeed, from which law is inseparable, which render law itself manifold. Such an approach draws on insights of postmodern jurisprudence, or legal theory, where the "coherence of a work" (law generally, and laws regarding bodily matter) and "its totality" are impossibilities.[28]

To make sense of the human dead and tissue in law, the legal theorist benefits from shifting attention to what can be called the atmospherics of law. As the critical legal theorist Illan rua Wall describes, that shift renders law part of an involuted, kinetic flux of affections, which are felt in the body, real in effect and have a material, if not physical, substance.[29] That shift requires the theorist to, as the critical legal theorist Stewart Motha appeals, disrupt old divisions between *nomos*—the law as a product of human practice, technique or *techné*—and *physis*—the processes of so-called nature—enabling one to trace the relations comprising law as extensive with the social *and* physical world.[30] Or, as Margaret Davies puts it, theorizing together the normativities of physical, biological and social life and non-life as habits which take form probabilistically.[31] By withdrawing from the received, unitary stories of law, and leaning into law as atmosphere, the legal theorist can submit to the currents of

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[27] Costas Douzinas, Ronnie Warrington and Shaun McVeigh, *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (London: Routledge, 1991), 48 [Douzinas et al. (1991)].
[28] Ibid, 49.
[29] Illan rua Wall, *Law and Disorder: Sovereignty, Protest, Atmosphere* (Abingdon: Routledge, 2021) [I.R. Wall (2021)]; also see Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (Abingdon: Routledge, 2014) [Philippopoulos-Mihalopoulos (2014)]; Andreas Philippopoulos-Mihalopoulos, "Atmospheres of Law: Senses, Affects, Lawscapes" (2013) 7 *Emotion, Space and Society* 35 [Philippopoulos-Mihalopoulos (2013)].
[30] Stewart Motha, '"The End Begins": Law (*Nomos*) and Nature (*Physis*) as Genre: For Peter Fitzpatrick: In Memoriam' (2021) *Law, Culture and the Humanities*, online: https://doi.org/10.1177/17438721211030139 [Motha (2021)]; Stewart Motha, "My Story, Whose Memory: Notes on the Autonomy and Heteronomy of Law" (2022) 87:B *Studies in Law, Politics and Society* 1 [Motha (2022)].
[31] Margaret Davies, *EcoLaw: Legality, Life and the Normativity of Nature* (Abingdon: Routledge, 2022) [M. Davies (2022)]; Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Abingdon: Routledge, 2017) [M. Davies (2017)]; also see Elizabeth Grosz, *The Incorporeal: Ontology, Ethics and the Limits of Materialism* (New York City: Columbia University Press, 2017) (Grosz (2017)]; Elizabeth Grosz, *Chaos, Territory, Art: Deleuze and the Framing of the Earth* (New York City: Columbia University Press, 2008) [Grosz (2008)].

death which overflow in meaning, and enable and demand the multiplication of extant and potential lifeforms.[32] The dead body, as an artefact of death, consumes and multiplies the laws that orient to or even brush up against the remains, transgressing and surpassing the neat binaries of person and property that legal philosophers have long deployed to fix its legal meaning. Put differently, as the critical legal theorist Peter Fitzpatrick said: "law's deathly claim to fix, determine and hold life, to deny its protean possibility," is an impossibility that "den[ies] law's vibrant responsiveness" and, relatedly, the constitutive uncertainty posed by the annihilation met in death.[33] He continued: "Death is the horizon of the law not just in the standard and simple sense that law kills or that it fixes and positions [incompletely], but also and conjointly in the sense that death impels a responsiveness to all that is beyond fixity and position."[34] Likewise the body, especially but not exclusively in parts, is never the fixed possession of an individual alone but always porous, always depending on and relating to that "outside" the body.[35] The ontological vulnerability of human bodies, as critical legal theorist Martha Albertson Fineman characterizes it,[36] or relationality, as Marilyn Strathern and Jennifer Nedelsky put it,[37] disrupts the putative bounds of the "abstracted, disembodied, rational, universal rights bearing, contracting, possessive individual."[38] That ontological

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[32] Georges Bataille, *Death and Sensuality: A Study of Eroticism and the Taboo* (New York: Walker and Company, 1962).
[33] Peter Fitzpatrick, "Death as the Horizon of the Law" in Desmond Manderson, ed, *Courting Death: The Law of Mortality* (London: Pluto Press, 1999), 19-33 at 9 [Fitzpatrick (1999)].
[34] Ibid, 21.
[35] Stacy Alaimo, *Bodily Nature: Science, Environment, and the Material Self* (Bloomington: Indiana University Press, 2010) [Alaimo (2010)]; Robyn Longhurst, *Bodies: Exploring Fluid Boundaries* (London: Routledge, 2001) [Longhurst (2001)]; Margrit Shildrick, *Leaky Bodies and Boundaries: Feminism, Postmodernism and (Bio)Ethics* (London: Routledge, 1997) [Shildrick (1997)].
[36] Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008) 20:1 *Yale Journal of Law and Feminism* 1 [Fineman (2008)]; Martha Albertson Fineman, 'Reasoning from the Body: Universal Vulnerability and Social Justice' in Chris Dietz, Mitchell Travis and Michael Thomson, eds, *A Jurisprudence of the Body* (London: Palgrave, 2020), 17-34 [Fineman (2020)].
[37] Marilyn Strathern, *Kinship, Law and the Unexpected: Relatives are Always a Surprise* (Cambridge: Cambridge University Press, 2005) [Strathern (2005)]; Jennifer Nedelsky, *Law's Relations* (Oxford: Oxford University Press, 2012) [Nedelsky (2012)].
[38] Mykitiuk (1994), *supra* note 24 at 79.

connectedness propels an ecological form for law that exceeds the individual body, accreting as diverse patterns of normativity that hold forms of life and non-life together (and others apart).[39]

This dissertation reflects the work that I have done over five years, motivated by the sense that the law in relation to the dead body and bodily viscera was more than personality and property; and it has culminated in what I feel embodies a contribution to debates in legal theory over the status of the human dead and tissue within the common law. In contrast to prior interventions, I advance the theory that attuning to atmospherics, including increasingly complicated fluxes of affect and materiality brought on by technological and social developments,[40] allows the legal theorist to sense different, often elided yet formative relations for law and bodily matters.[41] It allows the legal theorist to grapple with law in the situation of its context; to grapple with how law *matters*, what law *does*, and *for whom*, apart from the tidy stories jurists tell. Advancing such a theory is facilitated by tracing law where human remains and tissue undergo change, generally in the process of disposal, which compels me to reach beyond the apparently stable, self-evident substances or essences that some attribute to kinds of bodily matter. In doing that I engage in a "deconstructive"[42] analysis, in that the focus on events of disposal, destruction and transformation "disturb[s] [received genres for doing law] by way of exploring what systematically drops through its grid

[39] Davies (2022), *supra* note 31; also see Anna Grear, "Foregrounding Vulnerability: Materiality's Porous Affectability as a Methodological Platform" in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks, eds, *Research Methods in Environmental Law* (London: Elgar, 2017), 3-28 [Grear (2017)]; Joshua DM Shaw and Roxanne Mykitiuk, "Jurisgenerative Tissues: Sociotechnical Imaginaries and the Legal Secretions of 3D Bioprinting" (2023) 34 *Law and Critique* 105 [Shaw and Mykitiuk (2023)].
[40] See discussion in Anna Grear, "Law's Entities: Complexity, Plasticity and Justice" (2013) 4:1 *Jurisprudence* 76 [Grear (2013)].
[41] Philippopoulos-Mihalopoulos (2014), *supra* note 29.
[42] Alecia Y Jackson and Lisa A Mazzei, *Thinking with Theory in Qualitative Research: Viewing Data Across Multiple Perspectives* (Abingdon: Routledge, 2012), 22-23 [Jackson and Mazzei (2012)].

and, by so disturbing it, to open it up,"[43] in search of "what is not present"[44] and yet makes a difference in what appears in experience. Instead of "gathering"[45] qualities and fixing them with pins—as taxonomists of property and personality do—I strive to trace cinders, "neither quite present nor absent,"[46] which nonetheless diffuse, fill and yet exceed atmospheric space, propelling the making of new senses and forms in the social and physical world.[47] The vital thrust to this deconstructive analysis is the jurisprudent stepping in tandem with the materiality of the body and bodily viscera, which together trace the outer limits of, as well as the conditions of law's expression beyond, the distinctions conventionally ascribed to them.

I began the dissertation asking how law differentiates between different types and forms of human remains; and how these differentiations affect the treatment of those remains and the experiences of living humans in relations with them. In a sense then I started as convention in legal scholarship would have me: considering how to contribute to jurisprudential and doctrinal understandings of the "legal status, treatment and disposition of human remains."[48] But in orienting to the questions, I was drawn to re-framing them so to attend to an apparent, yet unacknowledged distinction between bodily matters classified and treated as waste and others as non-waste (whether as property or of the person). As research unfolded, my theorizations eventually outlived these questions and the utility of this specific binary. The case-studies I traced, and readings I pored over, trafficked other, albeit

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[43] John Caputo, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (Fordham University Press, 1997), 77 [Caputo (1997)].
[44] Jackson and Mazzei (2012), *supra* note 42 at 22.
[45] Caputo (1997), *supra* note 43 at 33.
[46] Ibid, 34; also see Jacques Derrida, *Cinders* (Lincoln: University of Nebraska Press, 1991) [Derrida (1991)].
[47] Caputo (1997), *supra* note 43 at 31.
[48] Tanya D Marsh, *Disposition of Human Remains: A Legal Research Guide* (William S Hein & Co, 2015), 1 [Marsh (2015)]. Regarding doctrinal analysis, I understand it as the jurist's task of identifying, describing and clarifying law's rules and reasoning as that takes place in case law, according to norms and principles "intrinsic" to the legal system. See e.g., Kate Falconer, "Dismantling *Doodeward*: Guided Discretion as the Superior Basis for Property Rights in Human Biological Material" (2019) 42:3 *UNSW Law Journal* 899, 903 [Falconer (2019)]; also see Terry Hutchinson and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 17:1 *Deakin Law Review* 83 [Hutchinson and Duncan (2012)].

related, meanings and concepts pertaining to affects like desire, disorder and the monstrous which were, like cinders,[49] animating how law took form. Tracing these affects led me to follow, as best I could, the movements of the living in relation to the human dead and tissue, and the movement of such matters themselves, and how their movements mediated varied institutions and cultural referents imbedded in the experience of law.[50] The dissertation thereby shifted from being more conversant with the priorities of the common lawyer (whose preoccupation is with extant concepts of property and personality), to the student of the law felt, lived and breathed (which can incorporate yet extend beneath and beyond concepts of property and personality).

The principal insight I offer in this dissertation pertains to the heteronomy of human flesh. I deploy the term *heteronomy* with different emphasis than MacCormick, mentioned above, whose formulation of autonomy and heteronomy is derived from that of Immanuel Kant.[51] Following Kant, MacCormick conceived heteronomy as the posited law of state institutions (in other words, as generalized, universalized and public norms which may be enforced irrespective of one's autonomy).[52] MacCormick's heteronomy remained comfortably wedded to a science of analytical jurisprudence, where "[a]utonomy and heteronomy [were] simply […] opposed to each other."[53] But as Motha reminds us, autonomy and heteronomy 'cannot simply be opposed to each other' since they are complicatedly imbricated: "[t]he desire and agency of the subject is conditioned by heteronomy, but not overdetermined by

[49] Derrida (1991), *supra* note 46.
[50] See e.g., Olivia Barr, *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place* (Abingdon: Routledge, 2016) [Barr (2016)]; Marc Trabsky, *Law and the Dead: Technology, Relations and Institutions* (Abingdon: Routledge, 2019) [Trabsky (2019)]; also see my earlier attempt at such in Joshua David Michael Shaw, 'Confronting Jurisdiction with Antinomian Bodies' (2020) *Law, Culture and the Humanities,* https://doi.org/10.1177/1743872120942770 [Shaw (2020a)].
[51] MacCormick (1995), *supra* note 20; regarding Immanuel Kant, see Immanuel Kant, *The Metaphysical Elements of Justice* (Cambridge, MA: Hackett, 1999) (the original text was published in the eighteenth century).
[52] MacCormick (1995), *supra* note 20.
[53] Stewart Motha, "Veiled Women and the *Affect* of Religion in Democracy" (2007) 34:1 *Journal of Law and Society* 139, 149-150 [Motha (2007)].

it."[54] Recognition of their complex relations also enables the theorist to describe, beyond posited law, the "presence of an external or different law: of myth, extraneous forces, drives, legal institutions and history."[55] Heteronomy refers then to heterogeneous affections which converge on and pattern social and physical action, but not in singular directions; rather these affections always draw forms out from under received principles and potentiating something else, making law a much more messy, indeterminate and hybrid force. With that shift in emphasis, Motha notes resonances between this rendering of heteronomy and 'recent strands of new materialist thinking and attention to affect in legal studies,'[56] like Andreas Philippopoulos-Mihalopoulos' *lawscape*, where the affections within *and* between bodies, in excess of human intention, co-constitute the law of a space.[57] Likewise I see the affections, movements or actions of bodily matters in death and in their partings from the living as heteronomous, generative of normativities that make a difference in experience of their lawful use and disposal. Throughout the dissertation I develop arguments around the heteronomy of flesh, although it accretes in its most jurisprudential form in the concluding chapter.

[54] Ibid.
[55] Motha (2022), *supra* note 30 at 15.
[56] Ibid, 19.
[57] Andreas Philippopoulos-Mihalopoulos, "Lawscape" (2020) *International Lexicon of Aesthetics*, online: http://doi.org/10.7413/18258630100 [Philippopoulos-Mihalopoulos (2020)]; also see Nicole Graham, *Lawscape: Property, Environment, Law* (Abingdon: Routledge, 2010) [Graham (2010)]; Andreas Philippopoulos-Mihalopoulos, "In the Lawscape" in *Law and the City* (Abingdon: Routledge, 2007). I will further define the lawscape in Chapter 3.

The heteronomy of flesh is described according to three idioms of materiality—decompositions, cleavages and adulterations[58]—which appear to bear on law's forms.[59] I refer to them as idioms in that, in the cases under study at least, bodies and bodily viscera tend to disperse according to certain patterns. But like idioms generally, their principles of action are situationally constructed, articulated in the middle of cultural and physical inheritances with the added opportunity for transference and variability in everyday use. These three idioms of materiality are demonstrative of the heteronomy of flesh, in that the movements of bodies and bodily viscera accrete as norms for social action, mediating expressions of the lawful at the scale of human conduct. Importantly I must clarify that my argument is not a call for some fascist biopolitical order sourced in the appearance of "natural" bodies; that law should bend to the "natural" powers of strong bodies.[60] Rather my argument depends on, following material and corporeal feminists like Elizabeth Grosz and Jane Bennett, recognition that bodies and bodily parts—whilst immersed in interpretive acts—are distinctly generative of social forms that participate in the construction of one's cultural and political milieu.[61]

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[58] These idioms in particular resonated with me upon reading M.M. Slaughter's 'Sacred Kingship and Antinomianism: Antirrhesis and the Order of Things" (1992) 4 *Law and Literature* 227 [Slaughter (1992)]. I draw on Slaughter throughout the dissertation.

[59] I think of idioms as a helpful heuristic for thinking through certain movements of matter. In reading the literary theory of Frédéric Neyrat, for example, the materiality of text and textual forms stood out to me, and provoked the idea that idioms can be thought of as expressive of certain principles for movement. That seems supported, too, in discussions of legal materiality generally as well as material metaphors. See Frédéric Neyrat, *Literature and Materialisms* (Abingdon: Routledge, 2020) [Neyrat (2020)]; Andreas Philippopoulos-Mihalopoulos, "The Flesh of the Law: Material Legal Metaphors" (2016) 43:1 *Journal of Law and Society* 45 [Philippopoulos-Mihalopoulos (2016)]; Alain Pottage, "The Materiality of What?" (2012) 39:1 *Journal of Law and Society* 167 [Pottage (2012)]. I believe something akin to my sense of it is described in Federico Pérez, "Excavating Legal Landscapes: Juridical Archaeology and the Politics of Bureaucratic Materiality in Bogotá, Colombia" (2016) 31:2 *Cultural Anthropology* 215.

[60] Vulgar readings of Nietzsche may suggest this, for example, as Miguel Vatter notes; see Miguel Vatter, "Biopolitics: From Surplus Value to Surplus Life" (2009) 12:2 *Theory and Event*, doi:10.1353/tae.0.0062.

[61] Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Durham: Duke University Press, 2010) [Bennett (2010)]; Elizabeth Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (Bloomington: Indiana University Press 1994) [Grosz (1994)].

In the next section I detail some prior accounts of the atmosphericity of law generally, and particularly as those have been applied to study the lawful use and disposal of the human body.[62] I stress that, whilst these priors accounts were advances in scholarship, they leave the materiality of bodily matters unexamined in any specific sense.[63] The materiality of bodily matters is then demonstrated with reference to cultural and body studies,[64] to acquaint the reader with the theories which I hope to transplant and graft into legal theory. I often call back to these literatures throughout the dissertation, so their treatment here is an important introduction. The third section then describes the method of 'minor jurisprudence'[65] which enables, specifically for my case-studies, the pairing of atmospheric encounters with law and theories from cultural and body studies. Fourth, the chapter describes the case-studies through which I describe the three idioms of materiality, and the structure of their presentation in the dissertation. The chapter closes by considering why I orient to death and bodily viscera and why this is a generative field of social and jurisprudential inquiry.

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[62] Regarding the lawful use and disposal of dead bodies, see e.g., Barr (2016), *supra* note 50; Trabsky (2019), *supra* note 50. Regarding death or bodies generally see Sabrina Gilani, "On the Discursive-Material Enactment of Criminal Violence: How Death and Injury Come to Matter to the Criminal Law" (2020) *Law, Culture and the Humanities*, https://doi.org/10.1177/1743872120966814 [Gilani (2020)]; Sabrina Gilani, "Bionic Bodies, Posthuman Violence and the Disembodied Criminal Subject" (2021) 32:2 *Law and Critique* 171 [Gilani (2021)]; Joseph Pugliese, *Biopolitics of the More-Than-Human: Forensic Ecologies of Violence* (Durham: Duke University Press, 2020) [Pugliese (2020)].

[63] Shaw (2020a), *supra* note 50.

[64] See e.g., Alaimo (2010), *supra* note 35; Bennett (2010), *supra* note 61; Abigail Bray and Claire Colebrook, "The Haunted Flesh: Corporeal Feminism and the Politics of (Dis)Embodiment" (1998) 24 *Signs: Journal of Women in Culture and Society* 35 [Bray and Colebrook (1998)]; Diana Coole, "The Inertia of Matter and the Generativity of Flesh" in Diana Coole and Samantha Frost, eds, *New Materialisms: Ontology, Agency and Politics* (Durham: Duke University Press 2010), 92-115 [Coole (2010)]; Grosz (1994), *supra* note 61; Annemarie Mol, *The Body Multiple: Ontology in Medical Practice* (Durham: Duke University Press, 2002) [Mol (2002)].

[65] See e.g., Mark Antaki, "Making Sense of Minor Jurisprudence" (2017) 21 *Law Text Culture* 54 [Antaki (2017)]. Antaki writes (p. 56) that: "If we take jurisprudence to be the posing and answering of the question 'what is law?' (see the first few lines of Hart 1961, perhaps the most 'major' of jurisprudes), 'Law As…' could appear as an inflection, perversion, even hostile take-over of the jurisprudential enterprise. 'Law As…' could nudge or push jurisprudence from the logical to the analogical, from the definitional to the metaphorical, from 'is' —and not just 'and' […] — to 'life' (if not 'as'), a move we see and experience in, among other places, W.H. Auden's *Law Like Love*. This move is also one from the propositional to the poetic, from intellectual mastery to experience (from *logos* to *mythos*?)."

1.1. Atmosphericity of Law

Law's atmospherics have been explored among the living and non-living, the organic and inorganic, human and non-human.[66] This engages literatures of sociolegal and critical legal theory plaited with other fields or disciplines of social research in a transdisciplinary manner.[67] Conventionally, the sociolegal theorist studies law or legal phenomena as a matter of social inquiry, attempting to conceptualize how legal structures, consciousnesses or forms emerge and operate in social situations.[68] The critical legal theorist is the sceptic forensically searching for law's source in structures, ideologies and performances of domination and control, informed by perspectives marginalized in law's violence and that, when voiced, belie myths that locate law's legitimacy in universal reason and enfranchisement.[69] Although some scholars have insisted on drawing distinctions between the two, a transdisciplinary approach to theorizing legal and social phenomena reaches past any such boundaries.[70] Outstretched beyond these boundaries, the legal theorist carries out their scholarship differently than if located in discrete camps, fields or disciplines: seeking "productive friction and creative mispairings"[71] from within and outside legal theory, within and outside social theory and within and outside art, craft, play, among other aspects of life, which allow the theorist to imaginatively trace connections between phenomena otherwise elided.[72] Philippopoulos-Mihalopoulos recently named such an approach "law and theory,"[73] and Davies has referred

[66] See e.g., Jamie Murray, "Placing the Animal in Dialogue Between Law and Ecology" (2018) 39 *Liverpool Law Review* 9 [Murray (2018)].
[67] Andreas Philippopoulos-Mihalopoulos, "Introduction: The *And* of Law and Theory" in *Routledge Handbook of Law and Theory* (Abingdon: Routledge, 2019), pp. 1-12 [Philippopoulos-Mihalopoulos (2019)], 4-6.
[68] See David Cowan and Daniel Wincott, "Exploring the 'Legal'" in *Exploring the "Legal" in Socio-Legal Studies* (London: Palgrave, 2016), 1-31; David N Schiff, "Socio-Legal Theory: Social Structure and Law" (1976) 39:3 *The Modern Law Review* 287.
[69] See Emilios Christodoulidis, "Critical Theory and the Law: Reflections on Origins, Trajectories and Conjunctures" in Emilios Christodouloidis, Ruth Dykes and Marco Goldoni, eds, *Research Handbook on Critical Legal Theory* (London: Elgar, 2019), 2-26.
[70] Philippopoulos-Mihalopoulos (2019), *supra* note 38.
[71] Ibid, 5.
[72] Ibid, 5-6.
[73] Ibid, 5.

to it as "critical-socio-legal theory;"[74] but, irrespective of any given moniker, the point is to think creatively and critically across distinctions when doing legal theory. Doing so allows one to, as Wall describes, trace law as immanent to atmosphere, emerging from affections borne by the movement of and between bodies and objects in space, and capable of becoming "engineered" through modes of governance that affects how matter communicates.[75]

The atmospherics of law refers to how law creates; how law matters in the generation and experience of life and death. It may be challenging to find one's footing with something as expansive as atmosphere, so first consider a constituent part: "form." The Concise Oxford Dictionary defines *form* as, in part:

> 2. shape, arrangement of parts, visible aspect (esp. apart from colour), shape of body. 2. Person or animal as visible or tangible (*saw a form, the form of my son, before me*). [~~3. (Philos.) essential nature of a species or thing.~~] 4. Mode in which thing exists or manifests itself (*in, under, take, the form of*); species, kind, variety; cf. content. […] (my strikeout)[76]

Black's Law Dictionary defines *form* as:

> 2. The outer shape or structure of something, as distinguished from its substance or matter <courts are generally less concerned about defects in form than defects in substance>. 2. Established behavior or procedure, usu. According to custom or rule <the prosecutor followed the established form in her closing argument>. 3. A model; a sample; an example <attorneys often draft pleadings by using a form instead of starting from scratch>. 4. The customary method of drafting legal documents, usu. With fixed words, phrases, and sentences <Jones prepared the contract merely by following the state bar's form>. 5. A legal document with blank spaces to be filled by the drafter <the divorce lawyer used printed forms that a secretary could fill in>.[77]

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[74] Margaret Davies, "Doing Critical-Socio-Legal Theory" in Naomi Creutzfeldt, Marc Mason & Kristen McConnachie, eds, *Routledge Handbook of Socio-Legal Theory and Methods* (Abingdon: Routledge, 2020), 83-96 [M. Davies (2020)], 88.
[75] I.R. Wall (2021), *supra* note 29 at 27.
[76] *The Concise Oxford Dictionary* (Oxford: Oxford University Press 1987), <form> [*Concise Oxford Dictionary* (1987)]. There are undoubtedly more current dictionaries, although this one will do. I inherited this dictionary from my mother; it was hers upon graduating high school. I pored over its contents regularly as a child—supplementing that with encyclopaedia from the library—and continue to reference it. It remains in my study, as a constant companion and reminder (unless I have reason to believe there has been some language change or development in language that warrants a more current dictionary). There are many pieces of my mother that form part of this dissertation, but this dictionary is perhaps the most explicit.
[77] *Black's Law Dictionary* (Eagen, MN: Thomson Reuters 2014), <form>.

Having regard to these definitions, I offer my own: the specific operations that make up law that, if understood and conceptualized, can explain what law does and how law does it distinctly from other phenomena. I can further re-state my definition of law's form so to reconsider the specific operations of law through the "outer shape or structure"[78] of things and the "arrangement of parts,"[79] as I am not so concerned with the internal nature or essence of law (although its substance may play some part in how law's form operates and, thus, may warrant oblique, indirect or provisional inquiries). Instead, I want to grope around, sensing law at its extremity, at its surface, or the "mode in which [law] exists or manifests itself (*in, under, take, the form of*)."[80] This form can be, in part, tangible, in that law's form can be made up of behavioural, cognitive, ecological and even planetary relationships between organic and non-organic matters, which are experienced, or by which we are otherwise affected, concretely. Although, that claim should not be mistaken as a fetish for that which is visible, that which is particular or that which is authorized; there are also abstractions and other intangible things that may be said to contribute to the making and performance of law's form or forms.[81]

Critical legal theorist Peter Goodrich, for example, elaborates a "materialist rhetoric of law" that takes there to be no unitary content to law; his "materialist rhetoric of law" is not really interested in a concept of law as such.[82] Goodrich is instead concerned with the institutionalization of discourse that mediates law's expression and social significance, of the conditions of 'intra-discourse' formation that work immanently or internally to the discourse to define meaning and effects within a discourse, as well as conditions of inter-discourse

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[78] Ibid.
[79] *Concise Oxford Dictionary* (1987), *supra* note 65.
[80] Ibid.
[81] Elizabeth Grosz makes the argument, upon which I rely, for philosophical studies of materiality. The incorporeal and immaterial should not be lost in our shift to materiality, see Grosz (2017), *supra* note 31.
[82] Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (London: Palgrave 1987) [Goodrich (1987)].

formation that enable meaning (and thus effects of discourse) to transform through their encounter with meanings, and effects, external to them.[83] For Goodrich, attending to the effects of law as a discursive formation enabled him to describe law, in terms of how it *specifically* operated, without the foolish pursuit for law's essence and deadening law to mere mechanism.[84] There is a form to law, or rather there are forms of law; law is "a specific stratification or 'register' of an actually existent language system," which has a history and social significance important to theorizing law.[85]

When I invoke *form* I do not mean it as static. Rather form is imbricated in the dynamism of social and physical life and non-life, which are always processual.[86] I see this in Goodrich, too, in that institutionalization, intra-discourse and inter-discourse are processes of formation.[87] Accordingly, when I say *form* I do not mean to invoke a return to legal formalism like Ernest Weinrib counsels, who sees "[l]egal formalism [as] the effort to make sense of the lawyer's perception of an intelligible order"[88] or that "[t]he function of law for the formalist is to express [an] immanent rationality in the doctrines, institutions and decisions of positive law." Weinrib sees form as:

> the ensemble of characteristics that constitute the matter in question as a unity identical to that of other matters of the same kind and distinguishable from matters of different kind. Form is not separate from content but is the ensemble of characteristics that marks the content as determinate, and therefore marks the content as a content.[89]

Weinrib continues by stating:

> [f]orm and content are correlative and interpenetrating. If any content were formless, it would lack the very determinateness which makes it possible for us to experience it as a something, and it would therefore be, so far as we are concerned, an indeterminate something or other that is nothing in particular. If a form, on the other hand, were without content, it would not be a form *of* anything and therefore not a form at all. Form therefore

[83] Ibid.
[84] Ibid.
[85] Ibid, 1.
[86] Gilbert Simondon, *Individuation in Light of Notions of Form and Information* (Minneapolis: University of Minnesota Press, 2020) [Simondon (2020)].
[87] Goodrich (1987), *supra* note 66.
[88] Ernest J Weinrib, "Legal Formalism: On the Immanent Rationality of Law" (1988) 97:6 *Yale Law Journal* 949, 951 [Weinrib (1988)].
[89] Ibid, 958.

> *is* content and content form, with the distinction between them being notional, not ontological. A thing's form is not a new thing existing separately from that of which it is the form. Rather, form discloses the intelligibility of the thing's content, so that the form is the content qua intelligible and, conversely, the content is the form qua determinate.[90]

In other words, Weinrib defines three aspects of a form: (a) "as having a certain character,"[91] (b) as "a principle of structure or unity,"[92] and as "signif[ying] the genericity of the thing's character."[93] This analytic jurisprudence assumes a sanitized intelligibility to the form and its content that prioritizes a knowing subject distant from and placed over an object to be described.[94] As I hope will be clear, no judgement can be exercised according to this ideal;[95] subject and object are always imbricated together in an inescapable milieu and acting on each other, thus obscuring a direct path of knowing;[96] necessarily injecting a creative indeterminacy to thought.[97] Formalist modes of thought may be constitutive of concepts and their implementation in concrete life—indeed, the formalism of orthodox legal thought may serve as a critical infrastructure for the emergence of disciplinary methods and institutions of the common law—but just because this formalism creates a state of affairs does not mean it is not "transcendental nonsense."[98] As Margaret Davies argues, there is a plurality to life in the sense that there are always "things that are irreducible, external or totally 'other;'"[99] as philosopher William James put it, "something always escapes,"[100] and this plurality "was fundamentally opposed to rationalism and idealism—approaches that [James] argued,

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[90] Ibid, 959.
[91] Ibid.
[92] Ibid, 960.
[93] Ibid.
[94] Sara Ahmed, *Queer Phenomenology: Orientations, Objects, Others* (Durham: Duke University Press, 2006) [Ahmed (2006)].
[95] Ibid.
[96] Ibid.
[97] Ibid.
[98] Ibid; regarding the phrase "transcendental nonsense," it is borrowed from Felix S Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35:6 *Columbia Law Review* 809 [Cohen (1935)].
[99] M. Davies (2017), *supra* note 31 at 11.
[100] William James, *A Pluralistic Universe* (London: Longmans, Green and Co. 1909).

carved singular and discontinuous concepts out of the complex and continuous 'perceptional flux.'"[101] Davies continues:

> We could compare this idea to [feminist physicist] Karen Barad's view that the world becomes made and known through 'agential cuts' in the flow and movement of intra-activity. The cut can produce a system or unity but this is contingent, fictional even, and should never be taken as fixed or permanent.[102]

Or as critical legal theorist Ngaire Naffine writes, there is a 'separateness and completeness of what [formalists] call the legal plane' that assumes "law operates in its own 'artificial world,' much like a hot-house flower."[103] But as Naffine suggests, through posing the question "whom is law for?", this could not be farther from the "truth" of how law operates.[104] Forms that make up law are consequent to how law is actually experienced, answering for whom law is: such as who is held up, prioritized, and dominant; and who is diminished, concealed, and subjugated through the operation of law.[105] Davies adds that the forms of law may exceed language and find expression in patterns of action, in physical objects that participate in systems of social ordering and in the environment in its spatial configurations and affective dimensions.[106]

Law's form is on the extremity, surface or structure of the law-environment interface—the affection between law and that which is external to it—rather than attempting to define law's essence. The key term, *affection*, is understood here through the thought of philosopher Baruch Spinoza among others as a relation, a mediation between effects, and not as an entity.[107] Spinoza in *Ethics,* published in 1677, proposed that everything was of the same substance, which could be differentiated into "bodies" that have both the capacity to

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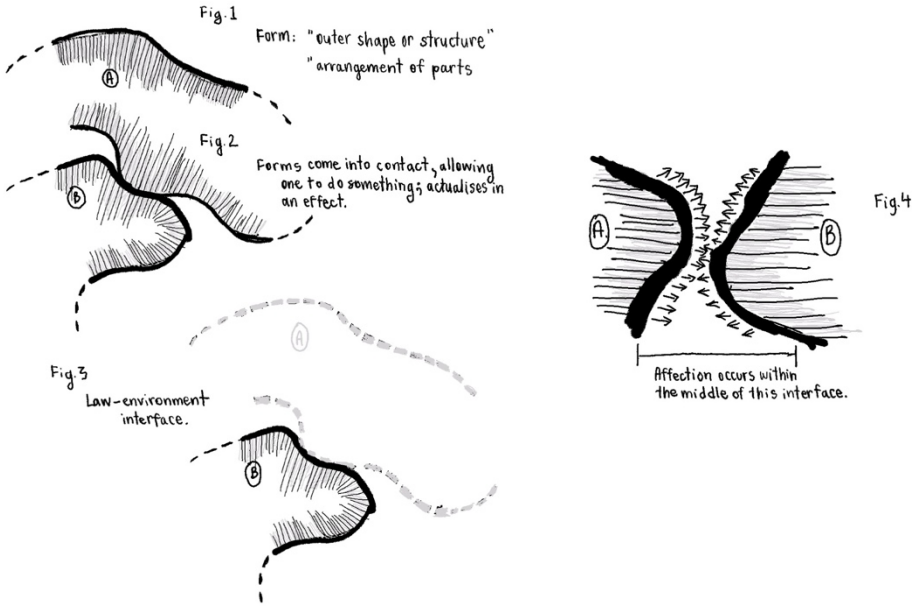
[101] M. Davies (2017), *supra* note 31 at 11.
[102] Ibid.
[103] Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (London: Bloomsbury, 2009), 3 [Naffine (2009)].
[104] Ibid.
[105] Ibid.
[106] M. Davies (2017), *supra* note 31; M. Davies (2022), *supra* note 31.
[107] Baruch Spinoza, *Ethics* (Cambridge, MA: Hackett, 1992), originally published in 1677 [Spinoza (1677)]; also see Gilles Deleuze, *Spinoza: Practical Philosophy* (San Francisco: City Lights, 1988) [Deleuze (1988)].

affect other bodies and to be affected.[108] The affection between the bodies—the relationship through which one body affected another—was the primary unit of Spinoza's *Ethics* through which he understood what was positive as the propagation and enlargement of bodies through their affections, and the negative as the attenuation and extinction of bodies through their affections.[109] Deleuze alone and with his oft-collaborator Félix Guattari[110] took up the concept of affection and added to it the concept of the assemblage or *agencement*: the condition of "a collection of things which have been gathered or assembled."[111] A body is a temporary expression of other assembled bodies, an effect of the complex of affections that take form between them, which exist simultaneously in affective relation with other bodies.[112] Michel Foucault's notion of the *dispositif* similarly evoked *agencement*—the assembling of objects, discourses and effects—to describe the authorized force of institutions through which the affections between objects, discourses and effects are conduced to strategic directions.[113]

[108] Spinoza (1677), *supra* note 91.
[109] Ibid.
[110] Deleuze (1988), *supra* note 91; Gilles Deleuze and Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (Minneapolis: University of Minnesota Press, 1987) [Deleuze and Guattari (1987)].
[111] Deleuze and Guattari (1987), *supra* note 110.
[112] Ibid.
[113] Interview with Michel Foucault, "The Confession of the Flesh" in Colin Gordon, ed, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (London: Pantheon, 1980), 194-228.



Figures 1, 2, 3 and 4. *Law's forms.* Law's forms are represented here in a metaphorical sense as partial presences, which come in contact with others and in the resulting space between them generate an affection which transduces an effect felt or experienced as law. Figure 1 represents the form as an 'outer shape or structure' and the 'arrangement of parts.' Figure 2 represents forms coming into contact, allowing one form to do something that actualizes in an effect. Figure 3 represents the same contiguous forms but puts focus on object B as 'law' interfacing with environment composed of other objects. Figure 4 represents a magnified view of the interface between objects, where an affection occurs within the middle of the interface.

With these concepts in hand, as critical legal theorist Alain Pottage does, law's form may be understood as dispositif assembled from material and immaterial actants that exist in affective relation to one another in the time and place of a given situation: a localized, temporary effect that emerges from within the middle of an affection between objects, discourses and other effects, converging, refracting off each other.[114] I cannot say that law is wholly in object A or object B (see Figures 1 to 4), nor can I say there are determinate properties of object A and object B that combine, logically in causal relation with law. Instead, law emerges as a refraction in the middle of the affection between A and B (and potentially

[114] Pottage (2012), *supra* note 59.

more), in a complex synthesis. Critical legal theorist Anna Grear describes the *dispositif* as ecological; for Grear law exists as an assemblage that 'is ineluctably entangled' with its environment, emerging from the messy flux of affections between parts.[115]

As the concept of affection suggests—and as elaborated through dispositif and ecology—forms are affectable, affecting and themselves the product of affections within and between forms, which suggests the ubiquity and multiplicity of movement rather than stasis. Relatedly, I think of movement as forming part of the histories of arrival to forms, drawing upon Sara Ahmed's queer phenomenology, so that while we may often come to and experience forms as unchanging, discrete objects, this is a consequence of fetish that severs the movements important to authorizing forms from perception, and brackets out the ongoing movements of forms.[116] An alternate is needed where plenitude is conferred on forms, accreting in relations with others,[117] allowing for affections to proliferate and make themselves noticeable and affective.[118] Those affections are what make up law in actuality, always in flux and vulnerable to transformation. Herein lies law's atmosphere as the effect of affection.[119]

Wall helpfully clarifies that the affections which compose the law and law's material expression, "cannot be reduced to emotions [for] [t]hey circulate *between* bodies, sticking to them in different ways."[120] Their spread alter bodily comportments, the space of our bodies in relation to others, congealing in the collective affordance of behaviour that we may recognize

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[115] Grear (2017), *supra* note 34 at 24.
[116] Ahmed (2006), *supra* note 78.
[117] Danish Sheikh, "Staging Repair" (2021) 25 *Law Text Culture* 144, 146 [Sheikh (2021)]; Eve K Sedgwick, *Touching Feeling: Affect, Pedagogy, Performativity* (Durham: Duke University Press 2003), 149. Sheikh, in describing a minor jurisprudence of repair, cites Sedgwick. Danish writes: 'in contrast to [a] paranoid form of reading, [Sedgwick describes] a reparative impulse, which is "additive and accretive … it wants to assemble and confer plenitude on an object that will then have resources to offer to an inchoate self".'
[118] I.R. Wall (2021), *supra* note 29.
[119] Ibid.
[120] Illan rua Wall, "Policing Atmospheres: Crowds, Protest and 'Atmotechnics'" (2019) 36:4 *Theory, Culture and Society* 143, 146 [I.R. Wall (2019)].

as lawful, unlawful or even that which has no clear valence and yet, despite the limits of our perception, moves with law's ebbs and flows.[121] Nor can atmospheres be reduced to the encounters between forms that generate them; atmospheres exceed forms and encounters between forms.[122] Atmospheres gush forth from affection, drawing affections elsewhere, always potentiating something other. Wall also emphasizes that atmospheres are everywhere, conducing life not only in exceptional irruptions, but as the "ordinary affects" borne by bodies in their everyday meetings and partings.[123] Wall with Daniel Matthews explain:

> [A] focus on affect […] authorized three related issues. First, it privileges the body as a site of intensity. Affects are felt in the stomach, on the skin, on the tip of one's tongue, *before* they can be linguistically coded or narrated; indeed, even before they can be authorized or represented. In this way, studies of affect examine the material and sensate body's complex and overlapping perceptive faculties and the unique capacity of subjects to render themselves—or otherwise be rendered—sensitive to a given set of forces, objects and relations. Second, studies of affect seek to draw attention to the *background ordering* of social life by examining how agentic capacities are very often shaped by forces that are *prior to* or simply *other than* those proffered by reason-giving subjects. An attention to affective life aims to draw out the ways in which latent and unarticulated anxieties, hopes, fears, loves and hates mobilise subjects in ways that orthodox accounts of agency fail to describe […] to examine the *background affective ordering* of lawful and social relations. Third, a focus on affect foregrounds the significance of the material ordering of social space, emphasising the role that non-human elements play in creating distinct affects and atmospheres […] [such as in] critical legal geography […]. Close attention to the spatial dynamics of streets, supermarkets, hospitals and cities helps us draw out an account of everyday legal *aesthesis*.[124]

An atmospheric approach to law's relations to the dead are relatively undertheorized, and undertaken by few (albeit a growing coterie of) scholars.[125] Marc Trabsky, for example, draws on such an approach to study the institutional practices of coroners and death

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[121] I.R. Wall (2021), *supra* note 29.
[122] Illan rua Wall, "'No Justice, No Peace': Black Radicalism and the Atmospheres of the Internal Colony" (2022) *Theory, Culture and Society*, https://doi.org/10.1177/02632764221106392 [I.R. Wall (2022)].
[123] Daniel Matthews and Illan rua Wall, "Legal *Aesthesis*: Affect, Space and Encounter" (2022) *Law, Culture and the Humanities* https://doi.org/10.1177/17438721211056512, 4.
[124] Ibid.
[125] See e.g., Barr (2016), *supra* note 50; Trabsky (2019), *supra* note 50. Also see critical legal studies of law and death generally, such as Imogen Jones, "Objects of Crime: Bodies, Embodiment and Forensic Pathology" (2020) 29:5 *Social and Legal Studies* 679.

investigations in early Australia,[126] and Olivia Barr does so in the study of burial of Australian-settlers,[127] which create and shepherd relations between (select members of) the living and the dead. For Trabsky, coroners and their death investigations factor into the organization of the settler-city and its ideational projects. Coroners would "hawk" or carry the dead from among the living—where the dead posed physical and cultural threats—to the city's heterotopic mirror: the cemetery. As heterotopia (to borrow a term from Foucault), the cemetery was a place, set apart from the living, that could "neutralize, or invert the set of relations that they happen to designate, mirror, or reflect."[128] In the situation of Australia this was to obscure the violence of the settler state and to contribute to a civilizing process integral to empire.[129] In a similar vein, Barr argues that interment was a key technology to an itinerant common law, performed by settler-Australians as they would walk the dead to gravesites just outside their early settlements.[130] Burial fastened the common law of England to the territories of Australia, delimiting space for that jurisdiction's ongoing renewal and to the extirpation of the claims of the Indigenous peoples. An advantage to the metaphor of atmosphere lies in its expansiveness; both Trabsky and Barr are not concerned with law's relations with the dead in some narrow, doctrinal sense that carves out those relations from the rest of the world that law touches but does not necessarily announce. Law's relations with the dead—or even human remains more narrowly—braids together with larger formations, such as those that succour settler-colonialism, public health, criminal justice or environmentalism, among other projects.

Trabsky and Barr are not so concerned with the legal materiality of the human dead and tissues *per se*; instead, their atmospheric accounts of law describe the materiality of that

[126] Trabsky (2019), *supra* note 50.
[127] Barr (2016), *supra* note 50.
[128] Michel Foucault, "Of Other Spaces" (1986) 16:1 *Diacritics* 22, 24; also see Trabsky (2019), *supra* note 50.
[129] Trabsky (2019), *supra* note 50.
[130] Barr (2016), *supra* note 50.

which *surrounds* the dead body *yet* factors in their use and disposal.[131] I see this as a limitation to their advances, since the braiding of the human body with larger formations incorporates more than the movement of the living in relation to the corpse (such as the living hawking or walking or perfecting, by some other means, the transfer of human remains). The dead body, as physical matter, also forms part of the movements that solidify as lawful institutions.[132] Joseph Pugliese, a critical legal theorist, demonstrates this possibility in the description of "forensic ecologies" of death, where the remains of non-human animals and environmental annihilation trace enduring war.[133] The dispersal of bodily viscera—mutilated beyond recognition, and decomposing amongst ash and cinders on the charred surface of the earth—act on those who encounter them, storying the laws of war and occupation in their pungent smell, gruesome appearance and consuming silence. These wretched forms act as records of "lawful" death and "unlawful" lives, traces of the violence committed to those bound by barbed wire and concrete walls in the prescription of one's disposability.[134] Pugliese thereby foregrounds the materiality of death and the dead body in his description of (wartime) legal institutions, an improvement from Barr and Trabsky; although, Pugliese does so limitedly, in that the materiality of the dead function *ex post facto* in the evaluation or interpretation of lawful conduct. Nonetheless Pugliese shifts attention in the direction I mean:

[131] Shaw (2020a), *supra* note 50.
[132] Shaw (2020a), *supra* note 50.
[133] Pugliese (2020), *supra* note 62.
[134] Ibid.

an atmospheric rendering of law where the distinct affections of the dead body and bodily viscera are duly considered.[135]

For law is breath expelled by the body, in life and death. It is warmth felt on a cold corpse as a family huddles to mourn, the undertaker digs and the body is disposed. It is condensation on a medical waste bin holding an amputated limb. The breath is wet, sticking, congealing around legs, arms, heads, forming a thick of currents that pull or push us this way or that way. It is fœtid, compelling some to flee or fear or anguish, whilst others consumed in attraction drop to their bellies and wriggle, wildly, in the middle of it, pulling the scent over them and anyone or anything they encounter. As that breath spreads, there are cleavages, commons and places in between that form, becoming law lived as a replete and variegated atmosphere that blankets and enfolds the world: law's breath institutes imaginaries that vibrate with feeling. And in its inspiration—as breath withdraws into the body—our imaginaries expand, sublimating in the recesses of our lungs, the depths of the ocean or the floor of the valley, becoming something other before it is expelled and surrounds us once more. A tempestuous fog among gravestones through which order and authority appear to us with the solidity of a wisp but the force of a gale. A tingling sense that a piece of 'meat' birthed from your body is of you, but not you, but sometimes maybe is you, but is also your

[135] Critical legal theorist Sabrina Gilani approaches the materiality of the body also, albeit with emphasis on the techniques (technological in the common sense of the word, like x-rays and crime-scene photography, and in more discursive forms through judges' words) that mediate juristic treatments of the materiality of the human body in criminal trials. See Gilani (2021), *supra* note 62. Materialities of the human body appear for courts not as objective facts, but as 'artefacts' born of techniques and their attendant affections involved in constructing exhibits of human interiorities (p. 180). Such practices produce the body for legal judgment, creating the 'violated body, the body in pain, the body that has been wronged, the body that is the object of legal intervention' as well as 'an account of the criminal law's ideal subject […] foregrounding […] a "human" subject that is rational, animate, agentic' for whom punishment is appropriate and necessary (p. 179). I feel that the materialities of the body are backgrounded by her focus on the practices that construct these materialities, even as they ostensibly form the topic of her analysis. This brings Gilani's work closer to Trabsky and Barr for me. So even as Gilani represents an advance in scholarship on critical legal studies of death and the body, it does not take seriously the materiality of the body as an actant.

child's or at least of your child, compelling you to care for it—to tend to a relation. Law is replete; the "law is all over."[136] To pretend otherwise is a constraint.

1.2. Materiality of Human Flesh[137]

The atmospherics of law are succoured by flattening the edifice of law and other phenomena onto a single ontological plane, conceiving law as a composite of affections extensive with other social and physical forms.[138] That flattened ontology—where ontology is understood as forms of existence continuous with one another—opens law, allowing engagements with its plurality, whilst nonetheless allowing jurisprudents to consider what is it about the arrangements of parts that make "law" distinctive in experience and effect.[139] But before doing so I think it helps to put law aside, just for a moment, so to consider how a flattened ontology bears on understandings of the human body generally. Scholars of body and cultural studies—particularly through the works of material, corporeal feminists—have previously theorized the human body and its constituent parts according to such a flattened ontology. They conceive the body as an assemblage, agencement or dispositif of forms that conduce the body as a provisional effect of their encounter.[140] The body as affection. Further, in disassembling the body, the condition of the body's enactment is exposed in forms that are physical and corporeal *as well as* complicatedly social. As material, corporeal feminists have long argued, the body is a socially mediated fabrication.

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[136] Austin Sarat, "'.. The Law is All Over': Power, Resistance and the Legal Consciousness of the Welfare Poor" (1990) 2 *Yale Journal of Law and the Humanities* 343, 343.
[137] This section draws significantly from the literature review published in Shaw and Mykitiuk (2023), *supra* note 39, which was done contemporaneously with the preparation of this dissertation and formed part of the research process of both. Accordingly, portions of my argument with Roxanne Mykitiuk are identically constructed. Where it felt possible, I added or altered the argument to suit the context of the dissertation.
[138] M. Davies (2017), *supra* note 31.
[139] Ibid.
[140] See e.g., Alaimo (2010), *supra* note 35; Bennett (2010), *supra* note 61; Bray and Colebrook (1998), *supra* note 62; Coole (2010), *supra* note 62; Grosz (1994), *supra* note 61; Mol (2002), *supra* note 62.

The body as affection takes place repeatedly. Social and physical forms fold in together and interact, temporarily articulating what in experience we recognize as an individual's one, continuous body.[141] The body does not have any clear overarching plan or system of meaning that reliably identifies and makes sense of its differentiations.[142] Any plan or system of meaning is partial and situationally realized, sometimes over long durations but nonetheless as the provisional effect of "connections made among [other] bodies," as well as other matters, in the context of an event.[143] In other words, bodies are body-events which are "capable of infinite connections and variations."[144] Further, connections between matter not only condition the body's expression but also potentially transform the constituent materials, so that the body cannot merely correspond to the summation of material parts. The body's constituent materials are themselves temporary, volatile and prone to assuming novel qualities, allowing a porosity to the human body that can dissolve any reliable distinction between it and the physical and social environment, whilst providing the specific conditions of a body's articulation.[145]

The human body then exists only in the process of it becoming a body.[146] Erin Manning, a cultural theorist and dance scholar, goes so far as referring to the body as movement; the body is always moving, always becoming through movement, always exceeding itself in the action of *bodying*.[147] This processual quality extends to the constituent materials that compose the body.[148] Even a purportedly stationary body, like the body of a person who is bedridden, moves, in that corporeal matter (organic, molecular, atomistic)

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[141] Alaimo (2010), *supra* note 35; Bray and Colebrook (1998), *supra* note 62.
[142] Bray and Colebrook (1998), *supra* note 62 at 58.
[143] Ibid.
[144] Ibid, 57.
[145] Alaimo (2010), *supra* note 35.
[146] Erin Manning, "Always More than One: The Collectivity of *a Life*" (2010) 16 *Body and Society* 117 [Manning (2010)].
[147] Ibid; Erin Manning, *Always More than One: Individuation's Dance* (Durham: Duke University Press 2013) [Manning (2013)].
[148] Grosz (2017), *supra* note 81.

exists dynamically in a vibrant ecology beneath and beyond the appearance of skin. Indeed, skin itself is not a static membrane; it undergoes constant transformation at the scale of the cell. The body never stops moving; the duration of the body's movement potentiates the next movement in an unending choreography propelled by the incipiency of the body's virtuality (or "biogram").[149] This movement does not originate in consciousness; nor can it be fully controlled or regulated by a knowing mind. The body's biogram emanates from the pre-conscious effect of affective connections brought together through the articulation of the body, which render certain directions, comportments or gestures possible.[150]

Manning conceptualizes the body as more-than-one.[151] She understands the articulated body (the *one*) incapable of accounting fully for the constituent materials that fold in together and interact (the *more*) to condition the body's emergence.[152] The body always potentiates more than what is articulated in a given moment. The biogram is not exhausted by the body that is produced in movement, nor is it impervious to new affective connections. As more-than-one, biograms are open processes that harbour potentially infinite bodies, allowing for transformation in a body's movement[153] and new ontological possibilities for the body and surrounding milieu.[154] Similarly, feminist philosopher Elizabeth Grosz argues that the individualized body is preceded and exceeded by forces that condition its actualization and future transformation.[155] The body's actualization is a phase, "engendered, prompted by instability, and is itself a reordering at a different level and in a different manner of

[149] Erin Manning, *Relationscapes: Movement, Art, Philosophy* (Cambridge, MA: MIT Press 2009) [Manning (2009)].
[150] Ibid.
[151] Manning (2010), *supra* note 145; Manning (2013), *supra* note 146.
[152] Manning (2010), *supra* note 145; Manning (2013), *supra* note 146.
[153] Manning (2009), *supra* note 149.
[154] Erin Manning, "Wondering the World Directly – or, How Movement Outruns the Subject" (2014) 20 *Body and Society* 162 [Manning (2014)].
[155] Grosz (2017), *supra* note 81; also see Elizabeth Grosz, "Identity and Individuation: Some Feminist Reflections" in Arne de Boever et al., eds, *Gilbert Simondon: Being and Technology* (Edinburgh: Edinburgh University Press, 2012), 37-56.

instability."[156] The process of individuating a body is a mediation between conflicting forces that precede and exceed the body. The resulting "disparation" between forces is overcome through a creative, "transductive" movement that transforms, and re-orders, those forces so that the body is actualized as a metastable condition of potentials temporarily (re)distributed in a field.[157]

All matter is understood by Manning,[158] Grosz,[159] among others,[160] to be the provisional effect of such individuations. But the living body is distinct in that it "is a system of individuation, an individuating system and also a system that individuates,"[161] whilst for non-living matter its individuation "may be effected through a single encounter."[162] Living bodies are comprised of ever-complexifying folds, processes and movements—such as with molecules, tissues, organs and physiological systems, among other corporeal matter—which proliferate interiorities and milieus. The proliferation of interiors and milieus within and beyond the living body generates further, increasingly involuted individuations previously incapable of actualization.[163] In this way, living bodies are endlessly productive of different orders or kinds of individuations than is possible in the absence of biological life, such as the collective individuations constituted in social and cultural life.[164] A different spatio-temporality to matter is made possible through the ontogenetic capacities of biological life:[165] an ontogenesis of flesh through which ontologies are mediated through the intercorporeal encounters between bodies, and bodies and things.[166]

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[156] Grosz (2012), *supra* note 154 at 39.
[157] Ibid, 42-43.
[158] Manning (2010), *supra* note 145; Manning (2013), *supra* note 146.
[159] Grosz (2012), *supra* note 154; Grosz (2017), *supra* note 81.
[160] Simondon (2020), *supra* note 86.
[161] Grosz (2017), *supra* note 81 at 182, quoting Gilbert Simondon.
[162] Grosz (2012), *supra* note 154 at 47.
[163] Grosz (2017), *supra* note 81.
[164] Ibid.
[165] Ibid.
[166] Shaw and Mykitiuk (2023), *supra* note 39.

Importantly for corporeal, material feminists, the body is not some mere mass of matter. The ontogenesis of flesh goes some way in describing that. But in another sense, the body "'knows the world 'laterally, by the *style*.'"[167] As feminist philosopher Diana Coole writes, with quotations from Maurice Merleau-Ponty:

> [T]he phenomenological body 'is not a mass of matter, it is rather a standard of things,' a level around which divergences form, a 'measurant of the things' that thereby brings 'an ideality that is not alien to the flesh' and which grants it 'its axes, its depth, its dimensions.' The body is accordingly 'a frontier which ordinary spatial relations do not cross.' Corporeal space is lived spatiality, oriented to a situation wherein the lived/living/lively body embarks on an architectural dance that actively spatializes (and temporalizes) through its movements, activities, and gestures. The body introduces patterns, intervals, duration, and affects into […] space from within it, and it continuously reconfigures its own corporeal schema in responding to and recomposing its milieu (*Umwelt*).[168]

The "patterns, intervals, duration and affects" introduced by the body can form metastable relations with the social and physical environment: where the body's tendencies come to form mutually compatible relations with the milieu.[169] However, all matter, not just the body, exists in flux. Any stability gained is a brief appearance, the effect of persistent existence and continued work on both the part of the body and milieu, whose essence is ever elusive as conditions of being undergo continuous change.[170] The body's relation to its milieu can be enlarged, attenuated or otherwise modified through social intervention, potentially allowing for capacities immanent to the body to be differently expressed or for those capacities to undergo change.[171] And like its milieu, the body is socially and culturally imbricated, subtending the individuation of bodily forms, generating opportunities to regularize their relation or to create novel conditions under which they can exist.

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[167] Coole (2010), *supra* note 62 at 102.
[168] Ibid, 102. Coole quotes from Maurice Merleau-Ponty's lectures entitled *Nature* (Evanston, Ill: Northwestern University Press 2003).
[169] Coole (2010), *supra* note 166.
[170] Grosz (2008), *supra* note 31.
[171] Ibid.

Despite the potential for metastability the tendencies of the human body often conflict with others. The body's patterns, intervals, duration and affects violate expectations, actually challenging the existence of others or, at least, perceived as such. These expectations take on complicated forms when psychically and socially mediated in human societies. For example, both feminist geographer Robyn Longhurst and cultural theorist Margrit Shildrick argue that the body necessarily (at the scale of ontology) "leaks," transgressing societal expectations, becoming marked in a process of abjection in the sense that the body's *bodying* repulses and alarms others.[172] In making this claim, Longhurst and Shildrick consider abjection alongside anthropologist Mary Douglas' idea of dirt as a "by-product of a systematic ordering and classification of matter, in so far as ordering involves rejecting inappropriate elements."[173] Like dirt, the uncontrollable secretions of the body are constructed as transgressive by a social order that hierarchizes bodily fluids upon "different indices of control, disgust and revulsion."[174] Because the leaky body resists control, it overflows space, threatening to dissolve the social order that marks the body in abjection.[175] That social order—developed from invaginations that close off individuals from others as autonomous subjects in control of their faculties—continually enacts technologies of surveillance and control within space to suppress the leaky body's violable potential and maintain its preferred spatialization of the body as individual, closed and stable.[176] That

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[172] Longhurst (2001), *supra* note 35; Shildrick (1997), *supra* note 35. Also see Alaimo (2010), *supra* note 35; Grosz (1994), *supra* note 61.
[173] Longhurst (2001), supra note 35 at 30; also see Shildrick (1997), *supra* note 35. Regarding abjection generally, see Mary Douglas, *Purity and Danger* (London: Routledge 1966); Julia Kristeva, *Powers of Horror: An Essay on Abjection* (New York City: Columbia University Press, 1980).
[174] Longhurst (2001), supra note 35.
[175] Ibid, 55.
[176] See Longhurst's study of body seepage among heterosexual men in bathrooms, ibid at 68-75. Similarly, the ideal self, formed in a process of abjection, internalises the social order as a psychic map (or homunculus, corporeal schema, etc.) that allows them to cognise their body as severable from objects and other subjects in space, maintained recursively in the attempt to deny and overcome their leakiness, see Steve Pile, *The Body and the City: Psychoanalysis, Space and Subjectivity* (London: Routledge, 1996), 90, 168-169 [Pile (1996)]; Grosz (1994), supra note 61 at 56, 60-61; Elizabeth Grosz, "Space, Time, and Bodies" in *Space, Time, and Perversion* (London: Routledge, 1995), 85 [Grosz (1995)].

social order becomes lived out in physical space, built on the architectonics of the ideal-abject body externalized in social conduct.[177]

Related to the "leaky" body is the figure of the monster, such as in disability, race and sexuality, whose morphological difference forms intense sites of abjection.[178] Distinctly, the monster not only exhibits difference from the preferred body, but also evinces one's identification with the monstrous. The monster figures difference and sameness which, as Shildrick argues, disrupts the security of the idealized body by exposing its fragile existence, "promis[ing] to dissolve"[179] the boundaries of the "putative norm"[180] and the security, propriety and naturalness of being within the norm. The monster's difference is patent. But its relation to sameness is less so; a spectre that arrives in social organization often without awareness. As Shildrick writes:

> Set against [the] potentialities [for difference in the world], the concept of the humanist subject of modernity, supposedly fully present to himself, self sufficient and rational, can be maintained only on the basis of a series of exclusions. That which is different must be located outside the bounds of the proper, in black people, in foreigners, in animals, the lower classes, and in women. A politics of identity and difference secures those borders which mark out the places which are safe and which unsafe, and who is due moral consideration and who not. The binary structure that characterizes Western epistemology is no less entrenched in the ontology of self and other, or in the categories of sameness and difference. But despite the foundational claims, identity is a matter of process, and spatiality and presence are the characteristic *achievements* of the Western subject. As Donna Haraway puts it: 'what counts as human and as non-human is not given by definition, but only by relation, by engagement in situated, worldly encounters, where boundaries take shape and categories sediment' (1994: 64). But those boundaries are never finally secured, not because the claims of the excluded may become too insistent to resist, but because exclusion itself is incomplete.[181]

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[177] Pile (1996), *supra* note 176; Henri Lefebvre, *The Production of Space* (London: Blackwell, 1991) [Lefebvre (1991)].
[178] Margrit Shildrick, *Embodying the Monster: Encounters with the Vulnerable Self* (London: Sage, 2002) [Shildrick (2002)].
[179] Margrit Shildrick, "Posthumanism and the Monstrous Body" (1996) 2:1 *Body and Society* 1, 2 [Shildrick (1996)].
[180] Ibid, 3.
[181] Ibid, 5-6.

1.3. A Minor Jurisprudence: Toward an Embodied, Materialist Theory

The nature of this dissertation requires me to skirt the usual questions asked by Anglo-American jurisprudents about the nature and legitimacy of law. Jurisprudence done in major keys—namely the analytic and moral traditions—may have uses in some settings;[182] however, these traditions seldom allow jurisprudents to theorize what law does, which in the calamity of pandemics, racist and imperialist regimes of violence, and the existential threat of climate and other planetary crises, is arguably more important to jurisprudents as keepers of laws, and as members of earth-bound communities.[183] As Wall puts it, asking "what is Law?," seldom addresses how "law matters in the world;" instead, the question long familiar to the orthodox canon tends to exclude "those histories, those inequalities, those injustices [that] *constitute* actually existing law" so that the scholar is no longer engaged with the study of actual social formations, but rather a projection, sanitized of experience and convenient for extant structures.[184] Accordingly, I consider jurisprudence in a different key; namely, what might be called "minor jurisprudence."[185] A minor jurisprudence is, as Goodrich describes, that which "rends, and thence performs a rendering through which the excluded, the others of law, the laws of others, and in methodological terms the peripheral passions, enthusiasms, tones and relationships, movements and moods, potentially intervene"[186] and open law and our experience of it.

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[182] Stone (1946), *supra* note 22.
[183] See Illan rua Wall, Sahar Shah and Freya Middleton, "Introduction: Critical Attractions" in Illan rua Wall et al., eds, *Critical Legal Pocketbook* (London: Counter Press, 2021), 1-10 [I.R. Wall et al. (2021)].
[184] I.R. Wall (2021), *supra* note 29 at 24.
[185] Peter Goodrich, "How Strange the Change from Major to Minor" (2017) 21 *Law Text Culture* 30 [Goodrich (2017)]; Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (London: Routledge, 1996) [Goodrich (1996)]; Shaun McVeigh, "Conditions of Carriage: Finding a Place" (2017) 21 *Law Text Culture* 165 [McVeigh (2017)]; Panu Minkkinen, "The Radiance of Justice: On the Minor Jurisprudence of Franz Kafka" (1994) 3:3 *Social and Legal Studies* 349 [Minkkinen (1994)].
[186] Goodrich (2017), *supra* note 185 at 30-31.

Minor jurisprudence draws from social theorists Deleuze and Guattari's notion of minority;[187] by minority, Deleuze and Guattari mean the mode by which one orients in the world so to encounter meanings which are buried or dissimulated (and, accordingly, minoritized).[188] To encounter minoritized or minor meanings allows the scholar to reflect upon how these meanings may already matter in life and how they might be taken up, creatively and imaginatively, in the making of novel polities.[189] Such a method involves "the deterritorialization of language, the connection of the individual [text, actor, etc.] to a political immediacy [that exceeds major narratives or stories], and [mapping] the collective assemblage of enunciation."[190] Applied to law, the minor jurisprudent thereby attempts to encounter expressions of law or legal meaning suppressed under a dominant, traditional approach to reading a text or institutional practice.[191] These minor, marginalized meanings to law and legal phenomena are identified immanently through the text or practice itself, having regard to techniques or practices that give rise to them—prioritizing their material and aesthetic effects, rather than their representational content.

There are myriad applications of minor jurisprudence. For example, law in a minor key has been described with respect of a jurist's everyday practices or movements,[192] the

[187] Ibid; McVeigh (2017), *supra* note 185.
[188] See e.g., Gilles Deleuze and Félix Guattari, *Kafka: Toward a Minor Literature* (Minneapolis: University of Minnesota Press, 1989) [Deleuze and Guattari (1989)]; Deleuze and Guattari (1987), *supra* note 110; also see Lisa A Mazzei et al., "Enactments of a Minor Inquiry" (2020) 26:3-4 *Qualitative Inquiry* 306 [Mazzei et al. (2020)].
[189] Deleuze and Guattari (1989), *supra* note 188.
[190] Ibid, 18.
[191] Goodrich (2017), *supra* note 185; McVeigh (2017), *supra* note 185; also see Barr (2016), *supra* note 50.
[192] Barr (2016), *supra* note 50; Olivia Barr, "A Moving Theory: Remembering the Office of Scholar" (2010) 14 *Law Text Culture* 40 [Barr (2010)]. Also see Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Abingdon: Routledge, 2012) [Dorsett and McVeigh (2012)].

composition of a novel,[193] a scholar's oeuvre,[194] filmmaking,[195] theatric performance[196] and a video game,[197] among other texts or practices, with varying degrees of proximity to "formal" legal systems, existing sociolegal forms and predominant approaches to jurisprudence. The texts or practices under study may be historical, or they may be contemporary, cultural media; in either case, allowing for a kind of a "history of the present"[198] that demonstrates how certain "power struggles, modes of control, alliances and associations"[199] "shap[ed] [and shape] our present."[200] Law, in a minor key, may be already actually affecting the composition of social or physical life, in the sense of the 'living law' described by the early-twentieth century jurisprudent Eugen Ehrlich,[201] and thereby taken up deliberately by the scholar or with different effect; or they may be inchoate or speculative, constructed explicitly for the critique of and imagining alternatives for law.[202] These minorities may also, at least in part, participate in state-enforced institutions or practices, or resist, deviate, extend or otherwise transform them.

[193] Minkkinen (1994), *supra* note 185; Andreas Philippopoulos-Mihalopoulos, "Law, Space, Bodies: The Emergence of Spatial Justice" in Laurent de Sutter and Kyle McGee, eds, *Deleuze and Law* (Edinburgh: Edinburgh University Press, 2012), 90-110 [Philippopoulos-Mihalopoulos (2012)].
[194] Panu Minkkinen, "'Life Grasps Life': Wilhelm Dilthey's Minor Jurisprudence" (2017) 21 *Law Text Culture* 143 [Minkinnen (2017)]; Edward Mussawir, Jurisdiction in Deleuze: The Expression and Representation of Law (Abingdon: Routledge, 2011) [Mussawir (2011)].
[195] Edward Mussawir, "The Cinematics of Jurisprudence: Scenes of *Law's Moving Image*" (2005) 17:1 *Law and Literature* 131 [Mussawir (2005)].
[196] Sheikh (2021), *supra* note 117.
[197] Joshua DM Shaw, "A Minor Jurisprudence of Play: Becoming Jurisprudents Through Play in the *Majora's Mask*" in Dale Mitchell, Ashley Pearson and Timothy Peters, eds, *Law, Video Games and Virtual Realities: Playing Law* (Abingdon: Routledge, 2023) [Shaw (2023)].
[198] See David Garland, "What is a 'History of the Present'? On Foucault's Genealogies and Their Critical Preconditions" (2014) 16:4 *Punishment and Society* 365 [Garland (2014)], 367; also see Michel Foucault, *Discipline and Punish* (London: Penguin, 1977), 31.
[199] Garland (2014), *supra* note 198 at 375.
[200] Ibid, 373.
[201] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Piscataway, NJ: Transaction Publishers 2001).
[202] See e.g., Sheikh (2021), *supra* note 117.

Doing minor jurisprudence involves close readings and viewings, and annotating and mapping, which immerse the jurisprudent in materials under study.[203] This is not coding *per se;* social researcher Maggie MacLure describes such an analysis as involving:

> poring over the data, annotating, describing, linking, bringing theory to bear, recalling what others have written, and seeing things from different angles. I like to do it 'manually' too, with paper and pen, scribbling a dense texture of notes in margins and spilling over onto separate pages.[204]

Accordingly, I too annotate, diagram and map by hand, deconstructing texts, media or performance into constituent elements. I can then trace relations between and within these constituent elements, figuring how they assemble as legal practices, following nodes and circulations of power as "flows incessantly [moving] in between the most 'internal' [of forces like that in bodily matter] and the most 'external' of forces [in social and ecological collectives]."[205]

Tracing also helps as "a technique that [can] spark wonder and creativity in [me as] the analyst"[206] diffracting experience so to "take [me] away from clearly demarcated entities

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[203] Minor inquiries are not, and do not, entail discrete methods; they are theory-driven, post-coding forms of qualitative inquiry which might suggest the absence of a method. In a sense, I am, indeed, anti-method to the extent that methods are viewed mechanistically, separable from theory and transducers of positivist facts. I certainly am not alone in this: the peer-reviewed journal *Qualitative Inquiry* has published special issues alongside individual submissions that decry the restrictions of method, which are cited throughout this section; the opening chapter to Erin Manning's *The Minor Gesture* entitled 'Against Method' sets out the case; and Deleuze, a common reference among post-qualitative scholars, claimed "thought does not need a method." See Erin Manning, *The Minor Gesture* (Durham: Duke University Press, 2016); Gilles Deleuze, *Nietzsche and Philosophy* (New York City: Columbia University Press, 2006), 110; Tim Barlott et al., "Becoming Minor: Mapping New Territories in Occupational Science' (2017) 24:4 *Journal of Occupational Science* 524.

[204] Maggie MacLure, "Classification or Wonder? Coding as an Analytic Practice in Qualitative Research" in Rebecca Coleman and Jessica Ringrose, eds, *Deleuze and Research Methodologies* (Edinburgh: Edinburgh University Press, 2013), 163-183, 175 [MacLure (2013)]; also see Maggie MacLure, 'The Wonder of Data' (2013) 13:4 *Cultural Studies <-> Critical Methodologies* 228; Jasmine B Ulmer and Mirka Koro-Ljungberg, "Writing Visually Through (Methodological) Events and Cartography" (2015) 21:2 *Qualitative Inquiry* 138; also see Rosi Braidotti, *Metamorphoses: Towards a Materialist Theory of Becoming* (London: Polity, 2001) [Braidotti (2001)]; Rosi Braidotti, "A Theoretical Framework for the Critical Posthumanities" (2019) 36:6 *Theory, Culture and Society* 31 [Braidotti (2019)].

[205] Braidotti (2001), *supra* note 204 at 6.

[206] Svend Brinkmann, 'Humanism after posthumanism: or qualitative psychology after the "posts"' (2017) 14:2 *Qualitative Research in Psychology* 109, 118 [Brinkmann (2017)].

to *blurred* boundaries and the *emergent enactment of those boundaries*, disrupting the binary thinking that separates out Self and Other, representer and represented, being and doing" (emphasis in original).[207] Such diffractions create "contingent associations […] that exist in creative tension," composing new senses, feelings or understandings in my experience of law.[208] Those differences then allow me to pull at, fray, singe and plait different strands of theory to make sense of, and act from, this new experience.[209] I understand myself as finding and creating conditions that open up, and re-assemble my experience within, what philosopher Wilfrid Sellars referred to as, "the logical space of reasons."[210] Sellars understood "normativity [to] [run all the way] through the processes and states that we refer to as *knowing*" (emphasis in original).[211] Svend Brinkmann, a critical psychologist and methodologist, explains in relation to Sellars that:

> [W]hen we call it 'knowledge,' we are not talking about what caused it empirically but about whether it can be justified normatively. That is, we place it in what Sellars called 'the logical space of reasons,' 'of justifying and being able to justify what one says.' […] If this line of thinking is valid, we can be said to know something only if our knowledge can be placed and justified in a normative space of reasons, which is our practical reality.[212]

Holding Sellars close, then, practices like tracing diffract experience, producing difference that must be reconciled within a normative space of reasons. Social action is potentiated

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[207] Bronwyn Davies, "Animating Ancestors: From Representation to Diffraction" (2017) 23:4 Qualitative Inquiry 267 [B. Davies (2017b)], 267; also see Bronwyn Davies, "Reading Anger in Early Childhood Intra-Actions: A Diffractive Analysis" (2014) 20:6 *Qualitative Inquiry* 734 [B. Davies (2014)]; Laura L Ellingson and Patty Sotirin, "Data Engagement: A Critical Materialist Framework for Making Data in Qualitative Research" (2020) 26:7 Qualitative Inquiry 817 [Ellingson and Sotirin (2020)]; Tyson E Lewis and James Owen, "Posthuman Phenomenologies: Performance Philosophy, Non-Human Animals, and the Landscape" (2020) 26:5 *Qualitative Inquiry* 472; Joseph D Sweet et al., "Becoming Research with Shadow Work: Combining Artful Inquiry with Research-Creation" (2020) 26:3-4 *Qualitative Inquiry* 388.
[208] Ellingson and Sotirin (2020), *supra* note 207 at 821.
[209] Lisa A Mazzei, "Beyond an Easy Sense: A Diffractive Analysis" (2014) 20:6 *Qualitative Inquiry* 742 [Mazzei (2014)].
[210] Wilfrid Sellars, *Empiricism and the Philosophy of the Mind* (Cambridge, MA: Harvard University Press, 1997).
[211] Svend Brinkmann, "Could Interviews Be Epistemic? An Alternative to Qualitative Opinion Polling" (2007) 13:8 *Qualitative Inquiry* 1116, 1123.
[212] Ibid, 1123.

within normative space according to how difference in experience *matters* immanently within that space; how difference affects and gives rise to new entanglements of knowing and doing of which the scholar and others form a part.[213] This knowledge is not causal or rational in the sense empirical positivism conceives it; instead, knowledge, and the actions that emanate from knowledge, are made up of pragmatic, everyday judgements about associations or interrelations between matter, which are inescapably normative.[214] This normative space of reasons, like the events of construction and encounter from which 'data' is found and justified, is not fixed. It is unstable; a territory that is under continuous transformation.[215] The flux of data collection, analysis and theory is always provisional; an agential 'cut' that may matter differently in different situations and from different perspectives as normative space is reassembled.[216] There are always weft yarns behind the clean image of an agential cut, allowing for discontinuous threads to be pulled out and re-weaved in an ongoing process of becoming knowledge.[217] In this way, jurisprudential inquiry in a minor key is never finished; it is "anti-foundational"[218] or "nomadic,"[219] opening the scholar to new attunements with the world.

The attunements that matter most in this dissertation involve the materiality of law and of human bodies and parts. My methods had to be capable of responding to such matters, to allow me to encounter, sense and theorize how such matters relate to discourse; relate to

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[213] Elizabeth A St Pierre and Alecia Y Jackson, "Qualitative Data Analysis After Coding" (2014) 20:6 *Qualitative Inquiry* 715 [St Pierre and Jackson (2014)]; also see Jackson and Mazzei (2012), *supra* note 42.
[214] Louise Lambert, "Becoming Teacher, Becoming Researcher: Reconsidering Data Analysis in Post-Qualitative Practitioner Research" (2019) 1:2 *Practice* 151 [Lambert (2019)].
[215] St Pierre and Jackson (2014), *supra* note 213.
[216] Aaron M Kuntz and Marni M Presnall, "Wandering the Tactical: From Interview to Intraview" (2012) 18:9 *Qualitative Inquiry* 732 [Kuntz and Presnall (2012)]; Travis M Marn and Jennifer R Wolgemuth, "Purposeful Entanglements: A New Materialist Analysis of Transformative Interviews" (2017) 23:5 *Qualitative Inquiry* 365 [Marn and Wolgemuth (2017)].
[217] Kuntz and Presnall (2012), *supra* note 216.
[218] Hillevi Lenz Taguchi and Anna Palmer, "Reading a Deleuzo-Guattarian Cartography of Young Girls' 'School-Related' Ill-/Well-Being" (2014) 20:6 *Qualitative Inquiry* 764, 764.
[219] Braidotti (2001), *supra* note 204; Braidotti (2019), *supra* note 204.

meaning; relate to the production of law and *vice versa*. The minor jurisprudence I undertook then relied on insights of 'new materialists' in social research,[220] and increasingly in legal geography and legal materialist literatures.[221] New materialists sometimes invoke the notion of minority, as Deleuze and Guattari used it, which renders the reference apt.

A new materialist methodology stresses: the mutual, constitutive intra-action of matter and discourse on each other; the positionality of the scholar—including the physical space, time, feelings and the theories of the research-assemblage upon which they rely—has agency and participates in the messy production of "data" under observation;[222] and the importance of playing with the research-assemblage so to intra-act with, and produce different performances in, the "data" (in other words, to encounter the performativity of discourse *and* matter).[223] Such a methodology is often paired with theory-driven, post-coding forms of qualitative inquiry,[224] which are germane to minor inquiries in social research generally and, I believe, minor jurisprudence specifically.

New materialists sometimes invoke the language of cartography in describing their methods.[225] A new materialist cartography can be understood as:

> Using a cartographic approach informed by Deleuzo-Guattarian theory, we have played with a peculiar interview encounter and mapped the micropolitics of data collection in the interview. Considered the 'method of the anti-method,' a cartography pursues 'processes and flows rather than structures and stable forms.' A cartographic unprocess charts the nuances and intricacies of relational affects, tensions/differences, and transformation of unraveling and interconnected events. Rather than simply dissecting, defining, and categorizing the components of a research encounter, a cartography articulates the social production of affective flows and processes. A cartography maps the relations between interconnected elements, how they assemble and disassemble, how they affect and are affected, and what they produce. Mapping (creating a

[220] See e.g., Nick J Fox and Pam Alldred, "New Materialist Social Inquiry: Designs, Methods and the Research-Assemblage" (2015) 18:4 *International Journal of Social Research Methodology* 399 [Fox and Alldred (2015)]; Nick J Fox and Pam Alldred, *Sociology and the New Materialism: Theory, Research, Action* (London: Sage, 2017) [Fox and Alldred (2017)].
[221] Davies (2020), *supra* note 9.
[222] Brinkmann (2017), *supra* note 206; see e.g., Marn and Wolgemuth (2017), *supra* note 216.
[223] Fox and Alldred (2015), *supra* note 220.
[224] St Pierre and Jackson (2014), *supra* note 216 at 717; also see Jackson and Mazzei (2012), *supra* note 42.
[225] See e.g., Braidotti (2019), *supra* note 204.

> cartography) opens up new realms of creativity and offers a productive tool for exploring complex, sociomaterial phenomena.[226] [references omitted]

Mapping "relations between interconnected elements"[227] captures immaterial ideas which are represented in discourse, as well as the performances of matter that act on and affect others, and the intra-actions that compose, and occur between, both. This is a processual form of inquiry, through which relations between discursive and material elements are encountered within the duration of an event or practice or a way of doing; this "by definition never concludes but results in a living of the theories to which one subscribes."[228] This is also a profoundly reflexive and ethical task since, as Aaron Kuntz notes, the "creative capacity [to create such a cartography] is animated by an ethical force to generate different relations and effects than we encounter today […] it is an ethical enactment, a way of differently becoming that derives from a virtuous positioning in our world."[229]

With respect to the materiality of law, critical legal theorists Hyo Yoon Kang and Sara Kendall describe it as "the legal meaning or quality of the elements that fabricate law," or the ways by which those elements come together and matter as law in situations where those elements are encountered.[230] Studying the materiality of law entails:

> […] an approach to analysing legality by considering the material manifestations of its formal language and interpretation. It authorized law as both the hermeneutic and a material phenomenon: as uniquely engaged with issues of interpretation and judgment, yet also mediated by and produced through materials, techniques and practices.[231]

Similarly, Pottage encourages the legal scholar to attend to law not merely as the enunciations of rules.[232] Instead, they should also search for the actants—human and non-

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[226] Tim Barlott et al., 'The Dissident Interview: A Deterritorializing Guerilla Encounter' (2020) 26:6 *Qualitative Inquiry* 650, 651.
[227] Ibid.
[228] Aaron M Kuntz, "Standing at One's Post: Post-Qualitative Inquiry as Ethical Enactment" (2021) 27:2 *Qualitative Inquiry* 215, 216 [Kuntz (2021)].
[229] Ibid, 2.
[230] Hyo Yoon Kang and Sara Kendall, "Legal Materiality" in Simon Stern, Maksymillian Del Mar and Bernadette Meyler (eds) *The Oxford Handbook of Law and Humanities* (Oxford: Oxford University Press, 2019), 20-37, 34 [Kang and Kendall (2019)].
[231] Ibid, 25.
[232] Pottage (2012), *supra* note 59 at 179-181.

human, animate and inanimate—that constitute legal phenomena as those matter to us in a particular time and place.[233] This requires, as feminist jurisprudent Joanne Conaghan argues, a legal theory and method that "anchor[s] [legal] concepts and categories to materiality not as representations of the real (thus falling back into the linguistic/reality divide) but as materially situated and intra-active."[234] Understanding law as merely a representation or construction of a specialized discourse would be incomplete; what *matters* as law in a particular place is a bricolage of the material and immaterial phenomena, which, in conjunction with one another in complex, co-constitutive directions, form legal meaning and techniques that affect social life.[235]

Davies describes this methodological move to the materiality of law—such as that done by legal geographers and new materialists[236]—as a "flattening" of ontology onto a single ontological plane of forms capable of affecting one another, where "ideational entities such as law or the self are *effects* as well as causes"[237] so that "'law' can be seen as an effect of ongoing and repeated socio-material actions *as well as* the concepts and imaginaries that influence action and relationships' (emphasis in original).[238] Flattening also requires the theorist to approach the study of law reflexively, "plac[ing] the researcher or observer where she belongs—in the thick of the world […]"—doing research in the flux of matter and meaning through which legal phenomena emerge and matter.[239] This means the theorist must "not […] study these actions and relationships as facts but [rather] conceptualise the patterns and dynamics involved, relying where possible on […] work […] [that has] studied elements of

[233] Ibid, 181.
[234] Joanne Conaghan, "Feminism, Law and Materialism: Reclaiming the 'Tainted' Realm" in Margaret Davies and Vanessa E Munro, eds, *The Ashgate Research Companion to Feminist Legal Theory* (Abingdon: Routledge 2013), 31-50, 46 [Conaghan (2013)].
[235] Ibid, 47; Pottage (2012), *supra* note 59 at 181.
[236] M. Davies (2020), *supra* note 73 at 90.
[237] Ibid, 93.
[238] Ibid.
[239] Ibid.

law-society empirically."[240] Through this new materialist approach to law, Davies describes the scholar as "trac[ing] the ways in which forms emerge from material relationships,"[241] returning me to the cartography metaphor above.

Unlike new materialists in social research generally, legal geographers and legal materialists do not ordinarily refer to minoritized knowledge or themselves as carrying out minor inquiries. But critical legal theorist Shaun McVeigh describes such work—namely Andreas Philippopoulos-Mihalopoulos' contributions on spatial justice—as minor jurisprudence,[242] and Olivia Barr, whose scholarship on law and movement draws on legal geography and materiality, identifies with the practice as well.[243] On the surface the moniker may seem like a inane adornment—why refer to oneself as a minor jurisprudent or one's work as a minor jurisprudence if it retreads methods and methodologies of other approaches?—but I suppose what makes its invocation distinct and attractive is what accompanies it: the twinned notions of office and persona.[244] Office and persona have been backgrounded in my account of minor jurisprudence so far, but they function as methodological reminders to orient to, care for and live with law so as not to abandon it.[245] The office and persona that the jurisprudent assumes today are diffuse, at least relative to the formal offices of judge, attorneys-general, commissioner or bishop; but it is not without meaning.[246] As McVeigh states, the jurisprudent is at least partly oriented to clarifying the relation of conduct to Being and justice; abiding responsibilities to their communities as scholars, teachers and trainers "in a form of life."[247] The minor jurisprudent seeks specifically

[240] Ibid.
[241] Ibid.
[242] McVeigh (2017), *supra* note 185.
[243] Barr (2016), *supra* note 50.
[244] Shaun McVeigh, "Afterword: Office and the Conduct of the Minor Jurisprudent" (2015) 5 *UC Irvine Law Review* 499 [McVeigh (2015)]; also see Barr (2010), *supra* note 191.
[245] McVeigh (2015), *supra* note 244.
[246] Ibid.
[247] Ibid, 505.

'an expanded office,'[248] which plays with and exceeds its historical inheritances, to give different emphasis whilst taking seriously the jurisprudent's role as a steward of law.[249] I reflect on this emergent mode of social and juridical thought in the concluding chapter of this dissertation, where I consider how the three idioms of materiality under study—decomposition, cleavages and adulterations—may be rehabilitated by the minor jurisprudent; how the minor jurisprudent may step in tandem with these idioms and, in the resulting sequence, present an alternate staging for law and bodily matters; where office and persona sound rhythms that conduct social action.[250]

1.4. Structure of Dissertation

The dissertation starts with the stories common lawyers and jurists tell themselves. That necessarily draws on a 'doctrinal' method of legal research, which I understand as the qualified task of the jurist authoritatively identifying, describing and clarifying the common law's rules and reasoning as those take place in case law, where authority is measured by the conformity of a jurist's reasons with the norms and principles 'intrinsic' to the legal system.[251] That extends to the interpretation of legislative texts, whose provisions obtain special meaning for the jurist according to what they imagine the legal system—as enforced by courts, primarily—would require.[252] Chapter 2 initially presents those stories, especially as those arise within the common law of Canada, to benefit the reader unfamiliar with the topics of law that I cover, doubling as a reference to relevant contemporary and historical authorities as those are understood by jurists doctrinally. Those stories pertain to the laws

[248] Ibid, 504.
[249] Ibid.
[250] Elsewhere in Shaw (2020a), *supra* note 50, I played with the material metaphor of dance to describe, speculatively, the legal valence of movement. Sean Mulcahy takes dance literally as a method for the jurisprudent in Sean Mulcahy, "Dances with Laws: From Metaphor to Methodology" (2021) 15:1 *Law and Humanities* 106.
[251] Hutchinson and Duncan (2012), *supra* note 48; also see e.g., Falconer (2019), *supra* note 48.
[252] Hutchinson and Duncan (2012), *supra* note 48.

that affect the use and disposal of the human dead, and of bodily matters taken from dead and living humans, which are seldom discussed but, if one looks close enough, have a distinct legal history within the common law.[253] That includes laws that determine when, where and how the human dead are to be used or disposed, as well as those laws determining the interests, obligations and remedies relative to body parts. As I have already noted in this introduction, the stories jurists tell themselves generally differentiate between subjects capable of possessing legal personality, and the objects of property which cannot: a difference in status that tends to order the nature of the body's treatment from the perspective of law.[254] But Chapter 2 also begins to exceed those official stories by observing where their terms and premises are inadequate, suggesting what else may play a part, and perhaps a greater part, in authorizing ways of doing things with or under the auspices of law.[255] That requires me to attune to other practices present in a legal situation yet hidden by reference to legal doctrine.[256] The remainder of the dissertation then elaborates upon those 'unofficial' conditions that authorize the lawful use and disposal of the dead and body parts, which often subtend yet complicate the official renderings of jurists.

The 'unofficial' conditions of the lawful suggested in Chapter 2, and taken up in subsequent chapters, are the materiality of the human body, and of social conduct in response to that materiality. Those materialities are suggested in discrete legal situations:

[253] See e.g., with respect of the law and the dead, and law and bodily matter, Conway (2016), *supra* note 2; Falconer (2019), *supra* note 48; Marsh (2015), *supra* note 48.
[254] Davies and Naffine (2001), *supra* note 25; Mykitiuk (1994), *supra* note 24.
[255] Peter Fitzpatrick, "The Abstracts and Brief Chronicles of the Time: Supplementing Jurisprudence" in *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Durham: Duke University Press 1991), 1-33 [Fitzpatrick (1991)].
[256] Ibid.

the common law right to a dignified, final disposal by burial and cremation;[257] the power of physicians and surgeons to dissect the human body and produce and transit specimens;[258] and boundary cases where individuals contest the treatment of bodily viscera as medical waste (or, in some instances, contest the granting of a dignified disposal).[259] Doctrinally, each legal situation implicates varied formal laws sourced in judicial decisions and legislation that converge on the use and disposal of human remains or tissues. But as this dissertation shows, each situation also enlists at least one idiom of materiality in the genesis and maintenance of lawful conduct. These legal situations and idioms of materiality are described with use of a case-study method,[260] which 'in sociolegal research, […] allows the social researcher to qualitatively study several legal phenomena as those relate to each other in a

[257] In this situation, in terms of case law, I principally rely on *Gilbert v Buzzard and Boyer* (1820), SC 3 Phill 335 (London Consistory Court) (UK) [*Gilbert* (1820)]. But also see e.g., *Krauch v Degen Estate,* 2021 NSSC 108 [*Krauch* (2021)]; *Mason v Mason,* 2018 NBCA 20 [*Mason* (2018)]; *Miller v Miller,* 2018 ONSC 6625 [*Miller* (2018)]; *R v Stewart* (1840), 12 AD&E 773, 113 ER 1007 (Court of Queen's Bench) (UK) [*Stewart* (1840)]; *Saleh v Reichert* (1993), 104 DLR (4th) 384, 1993 CanLII 9394 (ONSC) [*Saleh* (1993)]; *Williams v Williams,* (1882) 20 Ch D 659, 30 WR 348 (Court of Chancery) (UK) [*Williams* (1882)].

[258] In this situation, I rely principally on *Report of Board of Inquiry Re Dr. Ramsay Smith* (22 September 1903) (South Australia) [records were produced from the archives of the City of Adelaide in Adelaide, Australia, and copies remain on my person] [*Ramsay Smith* (1903)]. But also see e.g., *Doodeward* (1908), *supra* note 3]; *Exelby v Handyside* (1749), 2 East PC 652 (Great Britain) [*Exelby* (1749)]; *Miner* (1910), *supra* note 3; *Phillips* (1908), *supra* note 3; *Price* (1884), *supra* note 9.

[259] In this situation, I rely principally on interviews that I completed with individuals between 2021 and 2022. But also see e.g., *Bastien et al. v Ottawa Hospital (General Campus),* 56 OR (3d) 397, [2001] OJ No. 3899 (ONSC) [*Bastien* (2001)]; *Browning v Norton Children's Hospital,* 504 SW 2d 713 (Ky Ct App 1974) (United States) [*Browning* (1974)]; *Dobson v Tyneside* [1996] EWCA Civ 1301, 4 All ER 474 (Court of Appeal) (UK) [*Dobson* (1996)]; *Doodeward* (1908), *supra* note 3; *Lam v University of British Columbia,* 2015 BCCA 2 [*Lam* (2015)]; *Piljak Estate v Abraham,* 2014 ONSC 2893 [*Piljak* (2014)]; *R v Kelly,* [1998] EWCA Crim 1578, [1999] 2 WLR 384 (Court of Appeal) (UK) [*Kelly* (1999)]; *Venner v State of Maryland*, 354 A 2d 483 (1976) (United States) [*Venner* (1976)]; *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, WLR (D) 34 (Court of Appeal) (UK) [*Yearworth* (2009)].

[260] Thomas A Schwandt and Emily F Gates, "Case Study Methodology" in Norman K Denzin & Yvonna S Lincoln, eds, *The SAGE Handbook of Qualitative Research* (London: Sage, 2018), 600-630.

real-world, social context.'[261] As sociolegal scholar Lisa Miller notes, '[c]ase studies can identify and draw together pieces of evidence that may not seem related at the macro level but, when decomposed under intensive scrutiny, add considerably to descriptions of a given legal phenomena.'[262] Case-studies are 'goal-oriented tools of social research, drawn to troubling the extant and mediating new understandings, in accordance with the social researcher's chosen and received methodologies,'[263] such as minor jurisprudence, and the atmospherics and materiality of law. The three case-studies—the law of burial and cremation, the power over human specimens, and claims to bodily viscera—are reported in that sequence.

Chapter 3 takes up the law of burial and cremation. As set out in Chapter 2, ecclesiastical and common laws established a 'Christian right' to the decent and final disposal of one's corpse, and the obligations of others to effect that right.[264] Doctrinally the right reflected the sanctity of the human body, and the principle of non-interference, which secured the dead's final repose (until, in Christian eschatology, the Last Judgment before

[261] Joshua David Michael Shaw, "Transcarceral Lawscapes Enacted in Moments of Aboriginalisation: A Case-study of an Indigenous Woman Released on Urban Parole" (2020) 16(4) *International Journal of Law in Context* 422 [Shaw (2020b)], 11; also see Lisa L Miller, "The Use of Case Studies in Law and Social Science Research" (2015) 14:1 *Annual Review of Law and Social Science* 381 [Miller (2015)]; Case studies are also commonly used in legal geography, see Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Abingdon: Routledge, 2015) [Keenan (2015)], 23-24. Given that case studies are encountered outside laboratory contexts, often in settings in which the phenomena under study are already occurring, case studies are rich in information that resist immediate systematization and call for probing analysis. This surfeit of information provides prime material for the social researcher's inductive processes, including 'construction and evaluation of theory, concepts and, potentially, causal mechanisms,' see Shaw (2020b), *supra* note 261 at 11.
[262] Miller (2015), *supra* note 261 at 384.
[263] Shaw (2020b), *supra* note 261 at 11; also see *ibid*.
[264] *Stewart* (1840), *supra* note 257; also see *Brown v Les Curé et Marguilliers de l'Œuvre et de la Fabrique de la Paroisse de Montréal,* [1874] UKPC 70, LR 6 PC 157 (Privy Council) [*Brown* (1874)]; *Ex Parte Wurtele* (1851) 2:5 Canadian Ecclesiastical Gazette 35 (Upper Canada) [*Wurtele* (1851)]; *R v Coleridge* (1819), 2 B&Ald 804, 161 Eng Rep 1343 (Court of King's Bench) (UK) [*Coleridge* (1819)]; *Gilbert* (1820), *supra* note 257; *Kemp v Wickes* (1809), 3 Phill Ecc 264 (Court of Arches) (UK) [*Kemp* (1809)]; *R v Newcomb* (1898), 2 CCC 255, 1898 CarswellNS 110 (Nova Scotia County Court) [*Newcomb* (1898)].

God.)[265] However, in Chapter 3, I draw attention to how, starting in the nineteenth century, the corpse's materiality—principally as an organic thing that decomposes—factored in judicial reasons and legislation despite narratives of legal doctrine, mediating expression of the right to a final and decent disposal. I first excavate the effects of materiality in the 1820-case *Gilbert v Buzzard*, where, for an ecclesiastical court in London, the corpse's decomposition mattered to the subsequent use of a burial spot, in that delays to decomposition (absent compensation) prejudiced interests in the land.[266] Secondly, I look to law reforms undertaken in England, Canada and Nova Scotia, among other places, with respect to the final disposal of the human dead in the nineteenth century. For example, parliaments enacted statutes that prohibited burial within towns and cities, and empowered certain officers to require the transfer of human remains from intra-mural churchyards to extra-mural cemeteries and burial grounds.[267] Such law reforms demonstrated anxieties over dead bodies and their decomposition, whose 'pestiferous influence' was thought to afflict those who breathed their noxious vapours, giving rise to moral turpitude, injury and, in the extreme, death.[268] The sacred status of the body contained in legal doctrine was challenged in this context; instead, gleaming through law's visage, the lawful disposal of the dead

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[265] Henry Spelman, *De Sepultura* (London: Robert Young, 1641); Robert Phillimore, *The Ecclesiastical Law of the Church of England* (London: Sweet and Maxwell, 1873), Chapter 10. Also see discussion in Sigrid Müller, "Concepts and Dimensions of Human Dignity in the Christian Tradition" (2020) 6 *Interdisciplinary Journal for Religion and Transformation in Contemporary Society* 22, 34 [Müller (2020)]; Caroline Walker Bynum, "Material Continuity, Personal Survival and the Resurrection of the Body: A Scholastic Discussion in its Medieval and Modern Contexts" in *Fragmentation and Redemption: Essays on Gender and the Human Body in Medieval Religion* (Brooklyn: Zone Books, 1992), 239-297 [Walker Bynum (1992); Caroline Walker Bynum, *The Resurrection of the Body in Western Christianity, 200-1336* (New York City: Columbia University Press 2017) [Walker Bynum (2017)].

[266] *Gilbert* (1820), *supra* note 257.

[267] See e.g., *Burial Act 1852*, 1852 c 85, s 1 (UK) [*Burial Act* (1852)]; *The Metropolitan Interments Act, 1850,* 13&14 Vic c52, s 6 (UK) [*Metropolitan Interments Act* (1850)].

[268] See e.g., Sir Edwin Chadwick, *Report on the Sanitary Condition of the Labouring Population of Great Britain: A Supplementary Report on the Results of a Spiecal [sic] Inquiry into the Practice of Interment in Towns at the Request of Her Majesty's Principal Secretary of State for the Home Department* (London: Her Majesty's Stational Office: 1843) [Chadwick (1843)] [located within the archives of Wellcome Foundation in London, UK].

appeared animated by images of the body's decomposition: slowly as effluvia in the earth, or quickly in the white-hot crematory. Following my account of decomposition in *Gilbert* (1820), I trace the influence of these decompositions on law reforms in this period, describing how decomposing materials can be a constitutive form to law. The decomposing body evinces a quality—often an annihilative quality—for which conventional legal discourse and theory cannot account.

Chapter 4 focuses on the powers of surgeons and physicians to dissect the human body or parts thereof, and to create and transit human specimens. Common law jurists generally avoid accounting for such powers, even though the common law has recognized, since the early mediaeval period, the privileges of some to come to and obtain custody over the human body, rending flesh into parts.[269] If such powers are discussed, they are ordinarily described by reference to modern statutes, regulating anatomy starting in the nineteenth century,[270] and the clinical use of human tissue starting in the mid-twentieth century,[271] where a person's consent—a fundamental principle of contemporary medical law—is generally thought to delimit access to tissue (although, as historian Ruth Richardson notes and as will be discussed in Chapter 2, this was not always the case with anatomy legislation.)[272] Alternatively, jurists rely on case law to recognize property in bodily material to provide some (e.g., physicians, hospitals, etc.) remedies against unwanted interference with their

[269] See e.g., Henry de Bracton, *De legibus et consuetudinibus Angliæ* ('On the Laws and Customs of England') principally written before 1235 AD. See Samuel E Thorne's English translation of Volume 2 (Harvard University Press 1968-1977), p. 334, online: https://amesfoundation.law.harvard.edu/Bracton/Unframed/English/v2/334.htm [Bracton (1235)]; *Treason Act 1351*, 25 Edw 3 St 5 c 2 (England) [*Treason Act 1351*]. Also see Arnold Blumberg, "The Law of Treason in Medieval England: Drawn and Quartered" (2015) 5:2 *Medieval Warfare* 49 [Blumberg (2015)].
[270] See e.g., *Anatomy Act 1832*, 2 & 3 Will IV c 75 (UK) [*Anatomy Act* (1832)]; *Act to regulate and facilitate the study of anatomy,* 1843, 7 Vict c 5 (United Canadas) [Canada's *Anatomy Act* (1843)].
[271] See e.g., *Human Tissue Act 2004,* 2004 c 30 (UK)*; Human Tissue Act 1961*, 1961 c 54 (UK) [UK's *Human Tissue Act* (1961)]; *Human Tissue Act* RSO 1970 c 214 [Ontario's *Human Tissue Act* (1962)].
[272] Regarding consent as part of medical law, see Emily Jackson, *Medical Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2022). Richardson (2001), *supra* note 10.

interests.[273] Whilst these authorities and statutes are canvassed in Chapter 2, Chapter 4 focusses on the violence and privilege that underlie their expression, exemplified by common law powers to dissect and make human specimens that belonged to those entitled to practise medical arts.[274] This is principally described relying on the story of Dr. William Ramsay Smith of early-twentieth century Adelaide, South Australia, who was the subject of an inquiry into his alleged offences as a coroner and hospital superintendent.[275] I also revisit the 1908-case *Doodeward v Spence,* where the High Court of Australia found a two-headed foetus could become property, and slavery cases including the *Case of the Hottentot Venus* from 1810.[276] Taken together, I show how (historically at least) the legal status of a human property relied, in part, on the materiality of its preparation: particularly its cleavage into fungible and exploitable parts differentiated from a body's whole. That involved 'making an object among objects,' which allowed for, and reinforced other instances of, de-humanization and racialization of human matter.[277] Having regard to its conceptual structure, attending to the process and history of dissecting the body, I argue that the body's cleavage by dissection functions analogously to 'blazoning'—a mediaeval rhetorical form that emerged in tandem with early anatomy—in the sense that it isolates and subordinates certain qualities of things

[273] *Dobson* (1996), *supra* note 259; *Doodeward* (1908), *supra* note 3; *Kelly* (1999), *supra* note 259. Within the US, see *Moore v Regents of the University of California,* 271 Cal Rptr 146 (Cal SC 1990) (United States) [*Moore* (1990)].
[274] To my knowledge, in my review of the contemporary literature, this is the first instance in which a common law power over human specimens has been given scholarly treatment (practical law books from the early-twentieth century however do acknowledge the possibility of such a power, but it escapes the attention of scholarly commentators). Debra Mortimer briefly acknowledges its assumption at common law in *Doodeward* (1908) but does not examine such a power further. See Debra Mortimer, "Proprietary Rights in Body Parts: The Relevance of *Moore's Case* in Australia" (1993) 19:2 *Monash University Law Review* 217 [Mortimer (1993)].
[275] *Ramsay Smith* (1903), *supra* note 258.
[276] *Doodeward* (1908), *supra* note 3; *The Case of the Hottentot Venus* (1810), 13 East 195, 104 ER 344 (Court of King's Bench) (UK) [*Hottentot Venus* (1810)].
[277] Frantz Fanon, *Black Skin White Masks* (Greenwich, NY: Grove Press 1967) [Fanon (1967)]; also see Katherine McKittrick, *Demonic Grounds: Black Women and the Cartographies of Struggle* (Minneapolis: University of Minnesota 2006) [McKittrick (2006)]; Alexander G Weheliye, *Racializing Assemblages, Biopolitics, and Black Feminist Theories of the Human* (Durham: Duke University Press 2014) [Weheliye (2014)].

as objects of knowledge and control.[278] The lawfulness of dissection thereby possesses a character not unlike what critical legal theorist Peter Goodrich identifies with the common law generally: a combative, aspersive style, oriented to the elimination of other notions and sources for law, and the consolidation of the common law's dominance by dint of 'natural' reason.[279]

Chapter 5 addresses the ambiguity of relation between an individual and a part removed from them, such as a limb or placenta, and the diverse interests that ambiguity can sustain. Unlike earlier chapters, the perspectives of those whose legal interests are directly affected by the disposal of tissue are analyzed, having regard to interviews I completed with twelve individuals (some of whom also completed creative works). As Chapter 2 outlines, legal doctrines supply answers for what is done with tissues removed during or with the assistance of medical procedures, including who can claim entitlements to bodily fragments and the content of those claims.[280] For example, environmental and public health legislation, like Ontario's *Environmental Protection Act* or the *Health Protection and Promotion Act*,[281] ordinarily treat such tissues as medical waste which must be securely and quickly disposed

[278] See Jonathan Sawday, *The Body Emblazoned: Dissection and the Human Body in Renaissance Culture* (London: Routledge, 1995) [Sawday (1995)]; Nancy Vickers, "Members Only: Marot's Anatomical Blazons" in David Hillman and Carla Mazzio, eds, *The Body in Parts: Fantasies of Corporeality in Early Modern Europe* (Abingdon: Routledge 1997), 3-22 [Vickers (1997)].
[279] Peter Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (Berkley: University of California Press, 1995) [Goodrich (1995)]. Indeed, Goodrich refers to the blazon at one point as an analogy to the common law's aspersive style generally, of which the common law power of dissection may be considered a part.
[280] *Browning* (1974), *supra* note 259; *Dobson* (1996), *supra* note 259; *Venner* (1976), *supra* note 259.
[281] *Environmental Protection Act*, RSO 1990, c E19; *Health Protection and Promotion Act*, RSO 1990 c H7. Section 6 of the *Environmental Protection Act*, for example, prohibits the discharge of a contaminant into the natural environment in excess of what the law allows, which, as set out in relevant regulations, includes contamination by hazardous waste. Section 13 of the *Health Protection and Promotion Act*, for example, empowers a medical officer of health or public health inspector to require a person to do or refrain from doing any action necessary to contain or eliminate a health hazard (including hazards to environmental health). A health hazard is defined by section 1 broadly as 'a condition of premises,' 'a substance, thing, plant or animal other than man [sic],' or 'a solid, liquid, gas or combination of any of them, that has or that is likely to have an adverse effect on the health of any person.'

so as not to pose a danger to others.[282] Accordingly, hospitals or facilities are likely to claim custody and control over bodily fragments.[283] Conventional jurisprudence reinforces that claim by adding that such tissues are abandoned by patients at common law, or alternatively that the disposal is performed by the hospital or facility on the patients' behalf.[284] But my interviews suggest how individuals from whom bodily fragments are taken contest law's ready-made categories, where fragments ordinarily treated as medical waste are otherwise claimed as one's own or as requiring some other use. That focus necessarily returns me to conventional doctrines and theories of property and personality in the body, and expelled or detached parts, in part to identify where those doctrines and theories appear to contribute to experience (by frustrating, enhancing, muddling, regulating, etc. the relations upon which experience depends) but also to demonstrate how they are overwhelmed. I then trace what is left for law by attending to the material processes that underlie individuals' complicated identifications. These materialities appear not only in the detachment of the part—in the opportunity for collapse of a singular identity and the possibility of multiplication—but also in the adulterations or mixtures that form. These multiplications, adulterations and mixtures disrupt the reliable boundary of person and property taken for granted in the common law, and rationalized in analytical jurisprudence. How individuals respond to these experiences is specific to each of them. Some ultimately articulate liberal claims of self-ownership despite the uncertainties posed by these adulterations, whilst others open themselves up to more radical, queer expressions that defy clear assortments. But each share in making sense of these adulterations as evincing experiences of belonging. That sense of belonging is

[282] See e.g., RRO 1990 Reg 347, s 1. Section 1 of RRO 1990 Reg 347 defines hazardous waste as including pathological waste, which encompasses medical waste in the sense of 'any part of the human body, including tissues and bodily fluids, but excluding fluids, extracted teeth, hair, nail clippings and the like, that are not infectious.' Relatedly, although not classified as pathological waste, we see concerns for contaminants arise with RRO 1990 Reg 557, ss. 7-11. Sections 7 to 11 of RRO 1990 Reg 557 impose conditions on the handling of corpses of those who have died from known communicable diseases identified in the regulation.
[283] *Browning* (1974), *supra* note 259; *Dobson* (1996), *supra* note 259; *Venner* (1976), *supra* note 259.
[284] *Browning* (1974), *supra* note 259; *Venner* (1976), *supra* note 259.

expressive of claims to or for justice in relations with bodily matters; a kind of justice where relations constitutive of legal meaning converge in what relations are held up in space and what are not through unwanted violence or as intentional projects of relating.[285]

Chapters 3, 4 and 5 involve deconstructive description,[286] enabling me to attune to the materialities of bodily matter and law.[287] As I noted earlier, deconstruction involves 'disturb[ing] [the received genres of law] by way of exploring what systematically drops through its grid and, by so disturbing it, to open it up'[288] and search for 'what is not present' and yet makes a difference in experience.[289] I do this by focusing on events of disposal, destruction and transformation which challenge the stories presented in Chapter 2. Each deconstructive description completes the movement of my minor jurisprudence, drawing out the minoritized effects of materiality in these case-studies: namely, the idioms of decomposition with burial and cremation, cleavages with the making of human specimens, and adulterations in claims to human tissue. These idioms of materiality exceed any singular, internally coherent story of law; instead, these materialities presage the polyphony of law, heteronomous through and through.[290] The collapse of law's autonomy in these chapters (understanding autonomy here as MacCormick does),[291] challenges the (already imperfect) narratives of property and personality upon which the doctrines of Chapter 2 variably depend, demanding an alternate theory for the law and bodily matter. Each deconstructive chapter offers that, bit by bit, unsettling the boundaries of legal theory to include the heteronomy of bodily matters and their social and political consequences.

[285] Keenan (2015), *supra* note 261; Philippopoulos-Mihalopoulos (2014), *supra* note 29.
[286] Jackson and Mazzei (2012), *supra* note 42.
[287] The case-studies were initially chosen because they illustrated the genesis, consequence and disturbance of the distinction between human remains and tissues as waste and non-waste.
[288] Caputo (1997), *supra* note 43 at 77.
[289] Jackson and Mazzei (2012), *supra* note 42 at 22.
[290] Fitzpatrick (1991), *supra* note 255; Motha (2022), *supra* note 30.
[291] MacCormick (1995), *supra* note 20.

In Chapter 6, the deconstructive bits accumulate an account felicitous for what is done with human remains and tissues, assembling the substantive insights of my dissertation for legal theory generally. I describe the arguments that compose a fleshy kind of jurisprudence, sensitive to the affections of bodies' materialities and their involvement in the constitution of social (including legal) forms, and how such a jurisprudence differs from conventional theories of law. Most importantly and distinctly, the materiality of that which is often referred to as 'nature'—including organic matter—must become legible to legal theory as an actant or agentic force;[292] legible as the atmospherics of law.[293] I advance these arguments whilst drawing on critical legal theory, the case-studies of my dissertation, and material corporeal feminism,[294] which permits me to add to the concept of heteronomy, and jurisprudential forays into law and matter. Drawing then on concepts of office and persona, as explored by some minor jurisprudents already,[295] I elaborate an account of justice which may make sense-able for law our relations with bodily matters.

Why Human Matter?

Law's relations to bodily matter may seem to be a queer choice for a dissertation, leaning into the titillating pastiche of gothic, horror or gore. But I see the human dead and tissues as relating to fundamental and specific questions that should be of interest to legal theory. Encounters with death and gore can expose the violence of law, in relation to the specific

[292] See e.g., M. Davies (2022), *supra* note 31; Grear (2017), *supra* note 34; Shaw and Mykitiuk (2023), *supra* note 39. Like with Indigenous legal traditions, earth jurisprudence, legal geography and legal materialism. See John Borrows (Kegedonce), *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 1998); M. Davies (2017), *supra* note 31; Philippopoulos-Mihalopoulos (2014), *supra* note 29; Elizabeth Povinelli, *Geontologies: A Requiem to Late Liberalism* (Durham: Duke University Press, 2016) [Povinelli (2016)]; Irene Watson, "Buried Alive" (2002) 13 *Law and Critique* 253 [Watson (2002)].
[293] I.R. Wall (2020), *supra* note 29.
[294] Alaimo (2010), *supra* note 35; Bennett (2010), *supra* note 61; Braidotti (2001), *supra* note 204; M. Davies (2022), *supra* note 31; Grear (2017), *supra* note 34; Grosz (2009), *supra* note 170; Grosz (2012), *supra* note 154; Grosz (2017), *supra* note 81; Shaw and Mykitiuk (2023), *supra* note 39.
[295] Barr (2016), *supra* note 95; Dorsett and McVeigh (2012), *supra* note 192.

mode by which law effects that violence and its consequences on others.[296] For example, law's violence is laid bare by the unmarked graves of Indigenous children who died at Canadian residential schools; the unmarked graves of women and children who died in Ireland's mother-and-baby homes; the unmarked and mass graves of Jewish peoples who died in the Holocaust; among other desecrations in contexts of war or genocide, where structures of power and violence in law and law-making are uniquely expressed in relation to the dead.[297] This violence carries through in the discovery of unmarked graves, in the attribution of responsibility and liability, and in the state's confrontation with the laws of the communities to whom those remains belong or otherwise matter.[298] Likewise, as Chapter 4 of this dissertation shows, there is a violence to law sorting between kinds of flesh, mutilating some and holding out others as sacred or special, which may not be legible outside attention to the use and disposal of bodily matters.

The dead body and body parts also are infrequently raised in jurisprudential and sociolegal inquiry, especially in critical registers, yet, as this dissertation and other scholars show,[299] both are formative to our experience of law and society (and in ways that exceed

[296] Robert M Cover, "Violence and the Word" (1985) 95 *Yale Law Journal* 1601 [Cover (1985)]; Austin Sarat, "Introduction: On Pain and Death as Facts of Legal Life" in *Pain, Death, and the Law* (Ann Arbor: University of Michigan Press 2001) [Sarat (2001)].
[297] See e.g., Ian Austen, "More Evidence of Children's Graves is Found at Former Indigenous School" *New York Times* (19 January 2023), https://www.nytimes.com/2023/01/19/graves-indigenous-school-canada.html; Eimear Flanagan, 'Tuam Babies: Excavation at Mass Grave Could Begin This Year' *BBC* (22 February 2022), https://www.bbc.com/news/world-europe-60464447; Sasha Ingber, 'More Than 1,000 Holocaust Victims are Buried in Belarus after Mass Grave Discovered' *NPR* (22 May 2019), https://www.npr.org/2019/05/22/725728990/more-than-1-000-holocaust-victims-are-buried-in-belarus-after-mass-grave-discove.
[298] See e.g., Sav Jonsa, "Remains of Indigenous Woman, Two Children Set to be Reburied in Medicine Hat" *APTN National News* (29 March 2023), https://www.aptnnews.ca/national-news/remains-of-indigenous-woman-two-children-set-to-be-reburied-in-medicine-hat/.
[299] Marc Trabsky, *Death: New Trajectories in Law* (Abingdon: Routledge 2023); Imogen Jones and Marc Trabsky, eds, *Routledge Handbook of Law and Death* (Abingdon, UK: Routledge, forthcoming); also see e.g., Desmond Manderson, ed, *Courting Death: The Law of Mortality* (London: Pluto, 1999); James R Martel, *Unburied Bodies: Subversive Corpses and the Authority of the Dead* (Amherst, MA: Amherst College Press, 2018).

concern for medical assistance in dying or capital punishment).[300] The relative silence may reflect a pervasive reluctance in society to face human demise, individually and collectively.[301] But other fields and disciplines—especially anthropology, literary studies, political theory and sociology—have developed specialties in death and body studies which defy this supposed anguish.[302] Thankfully critical legal scholars are following suit,[303] turning to death, the dead body and bodily tissues adding to the germinal interventions of critical legal scholars like Margaret Davies, Peter Fitzpatrick, Roxanne Mykitiuk and Ngaire Naffine.[304]

In so doing, it is vital for critical jurisprudents and sociolegal scholars to take seriously that the dead body and body parts do things that are different from the living body which ordinarily form the subject of law. Dead bodies and body parts decompose and fragment, engendering a multiplicity immanent to but rarely made explicit in living bodies; they become objects of memorialization and idolatry, forming integral parts of familial, religious and colonial projects. And, most importantly for this dissertation, in focussing on what happens

[300] Medical assistance in dying and capital punishment dominate analyses of law and death. See e.g., Jocelyn Downie, "From Prohibition to Permission: The Winding Road of Medical Assistance in Dying" (2022) 34 *HEC Forum* 321; Austin Sarat, ed, *Pain, Death and the Law* (Michigan: University of Michigan Press, 2001). Of course, I am not critical of these legitimate topics of study—I have written both in Joshua DM Shaw and Daniel Konikoff, "When Prisoners' 'Right to Die' Goes Online: A Case-Study of Legal and Penal Sensibilities" (2022) 37:3 *Canadian Journal of Law and Society* 451.
[301] Robert Cecil, *The Masks of Death: Changing Attitudes in the Nineteenth Century* (Harborough, UK: Book Guild, 1991).
[302] See e.g., The Collective for Radical Death Studies, https://www.radicaldeathstudies.com; The Australian Death Studies Society, https://www.deathstudies.org; Bryan Turner, *Body and Society: Explorations in Social Theory* (London: Sage, 2008).
[303] Barr (2016), *supra* note 95; Martel (2018), *supra* note 2018; Shaw and Mykitiuk (2023), *supra* note 39; Trabsky (2019), *supra* note 50; also see Carson Cole Arthur, "Make Believe: Police Accountability, Lying, Anti-Blackness in the Inquest of Sean Rigg" (2022) *Crime, Media, Culture*, https://doi.org/10.1177/17416590221131552.
[304] See e.g., Davies and Naffine (2001), *supra* note 25; Fitzpatrick (1999), *supra* note 33; Mykitiuk (1994), *supra* note 24.

with the body when it undergoes disposal, or some change or some transformation, it can challenge, and invite consideration of different bases for, law enriching it theorization.[305]

[305] There are personal reasons which brought me to the topic, too. When I was a child, my young mother returned to post-secondary education after my birth disrupted her first year of university. She enrolled in a college where she excelled in a practical nursing program. My mother was fascinated by the human body—and remains so today—and shared her love of learning with me. We huddled by a personal computer one evening and, with her then limited skills at computing, managed to access a website she presumably learned about at school. The website hosted many medical photographs of traumatic injuries and ailments, which I recall my mother excitedly explaining to me and my brother. This is when I heard my mother utter the phrase 'degloving' in relation to a particular kind of trauma caused by collisions at high speeds; she adroitly paired this medical lesson with a moral one: do not ride motorcycles. My mother's use of metaphor to describe the materiality of the body and the agentic capacities of skin colliding with asphalt, and her effortless citation of norms for behaviour, stick with me still. Here, in a dark basement, lit only with the pallid blue of a boxy computer monitor, my mother articulated the poetics of corporeal matter which incidentally formed the injunction that the body was a magical site, capable of doing wonderful things.

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Chapter 2 —Lawful Use and Disposal

Abstract

This chapter starts with the official, doctrinal stories of the common law, especially of although not limited to Canada, to benefit the reader unfamiliar with the topics of law covered in this dissertation. Those stories pertain to the laws that affect the use and disposal of the human dead, and of bodily matters taken from dead and living humans, which are seldom discussed but, if one looks close enough, have a distinct legal history within the common law. That includes laws that determine when, where and how the human dead are to be used or disposed, as well as those laws determining the interests, obligations and remedies relative to body parts. But the chapter also begins to exceed those official stories by observing where their terms and premises are inadequate, suggesting what else may play a part, and perhaps a greater part, in authorizing ways of doing things with or under the auspices of law. That requires the author to attune to other practices present in a legal situation yet hidden by reference to legal doctrine, upon which the remainder of the dissertation then elaborates. The 'unofficial' conditions of the lawful suggested in this chapter, and taken up in subsequent chapters, are the materiality of the human body, and of social conduct in response to that materiality. Those materialities are suggested in discrete legal situations: the common law right to a dignified, final disposal by burial and cremation; the power of physicians and surgeons to dissect the human body and produce and transit specimens; and boundary cases where individuals contest the treatment of bodily viscera as medical waste (or, in some instances, contest the granting of a dignified disposal).

The law of human remains was once described as "embrangled," attributed to the myriad statutes, court cases and other authorities that converged on the dead in the nineteenth century, shaping how they were to be handled and disposed of by the living.[1] Dissatisfied with this state to the law, jurists in the common law tradition wrote law books in the nineteenth and early-twentieth centuries to tame the embranglement, bringing clarity to the

[1] Alfred Fellows, *The Law of Burial and Generally of the Disposal of the Dead* (London: Hadden, Best & Co., 1940), preface & 196 [Fellows (1940)]. Fellows attributes his description of the law of the dead as 'embrangled' to Chief Justice Cockburn's statement to that effect in *R v Walcot Overseers*, (1862) 2 B & S 571, 10 W R 602 (UK). According to Fellows, Chief Justice Cockburn referred to the *Burial Acts*, which made up much of this area of law, as "this complicated, confused and embrangled legislation." At least as the case is reported in the Weekly Reporter, Chief Justice Cockburn does not use the word "embrangled." Instead, Cockburn reportedly says on page 603 of the Weekly Reporter, "this is a most complicated and confused piece of legislation, taking all the Acts together."

administrator, undertaker and member of the public, alike.[2] The array of legal sources has since been pruned, but the state of the law continues as a harried knot as further uses of the human body have become sanctioned in the twentieth and twenty-first centuries, made worse in Canada without the publication of scholarly manuals on the topic.[3] This deficit in Canada can be contrasted with contemporary law books authored by Heather Conway in the United Kingdom and Tanya Marsh in the United States,[4] or the writings of Kate Falconer in Australia,[5] through which the common and statutory laws of their respective jurisdictions have undergone juristic treatment in that the law, previously disparate, has become synthesized, taxonomized and evaluated in the model of law books.[6] Law books are understood here as Richard Abel once described them: "a work of legal doctrine," where "[t]he study identifies, defines, organizes, and criticizes the rules by means of criteria proper to the legal system—it

[2] See e.g., Thomas Baker, *The Laws Relating to Burials* (London: Maxwell, 1857) [Baker (1857)]; Hugh Y Bernard, *The Law of Death and Disposal of the Dead* (Dobbs Ferry, NY: Oceana Publications, 1966) [Bernard (1966)]; James Brooke Little, *The Law of Burial* (London: Shaw and Sons, 1894) [Brooke Little (1894)]; William Cunningham Glen, *Metropolitan Interments Act: 1850, with Introduction, Notes, and Appendix* (London: Shaw and Sons, 1850); M.R.R. Davies, *The Law of Burial, Cremation and Exhumation* (London: Shaw, 1956) [Davies (1956)]; Fellows (1940), *supra* note 1; William Cunningham Glen, *The Law Relating to the Burial of the Dead and the Burial of the Poor* (London: Shaw and Sons, 1881) [Glen (1881)]; E. Lewis Thomas, ed, *Baker's Law Relating to Burials* (London: Sweet and Maxwell, 1901) [Thomas (1901)].

[3] A solicitor in Ontario, Jason Ward, authored and self-published a summary of the law of human remains in that province, but the summary's scope is narrow and inexhaustive (e.g., Ward's focus is on interment disputes among family in Ontario), and provides no scholarly commentary. See Jason Ward, *Resolving Grave Disputes: The Law of Dead Bodies in Ontario* (Toronto: Wards Lawyers, 2018), online: <http://www.canlii.org/t/2bf4> [Ward (2018)]. Prior to that, Jill Watt published in 1974 a practical guide oriented to lawyers and self-represented individuals. See Jill Watt, *A Canadian Guide to Death and Dying* (Vancouver: International Self-Counsel Press, 1974).

[4] Heather Conway, *The Law and the Dead* (Abingdon: Routledge, 2016) [Conway (2016)]; Tanya Marsh, *Disposition of Human Remains: A Legal Research Guide* (Getzville, NY: William S Hein and Co., 2015) [Marsh (2015a)]; Tanya Marsh, *The Law of Human Remains* (Tucson, AZ: Lawyers and Judges Publishing Company Co., 2015) [Marsh (2015b)].

[5] Kate Falconer, "Dismantling *Doodeward*: Guided Discretion as the Superior Basis for Property Rights in Human Biological Material" (2019) 42:3 *UNSW Law Journal* 899 [Falconer (2019a)]; Kate Falconer, "An Illogical Distinction Continued: *Re Cresswell* and Property Rights in Human Biological Material" (2019) 1 *University of New South Wales Law Journal Forum* 1 [Falconer (2019b)]; also see Kate Falconer, "Bones of Contention: The Right to Possession of the Body under Australian Law as a Property Right". PhD Dissertation, Australian National University, 2020 [Falconer (2020)].

[6] Richard L. Abel, "Law Books and Books About Law" (1973) 26:1 *Stanford Law Review* 175 [Abel (1973)].

rationalizes them."[7] The law book can be thought of as "a response to the demands of a functioning legal system," unlike "a book about law" which relies on a broader "mode of *reflection* upon the legal system" (emphasis in original).[8] The principal task for the law writer then is to assemble in exposition the doctrinal content of law, notes on their formal sources, and limited comments on the history and practicalities of law in action.[9]

Without writings that identify, define, organize and criticize laws of bodily matters according to criteria proper to the Canadian legal system, it becomes necessary to first describe the law as a law book would. In other words, to describe the law as it is from the perspective internal to the Canadian legal system; to take seriously, at least for the moment, the narratives that the legal system authorizes and represents as law.[10] This chapter initially provides such description—identifying laws that facilitate the final disposal of the dead by burial and cremation, and then those laws that apply to bodies and derivative parts that enjoy some medial disposal—but in placing these laws together in the synthesis of legal doctrine, I also gesture to an internal contradiction or logical disjunction which appears to *matter*, in some constitutive way, in the experience of the lawful use and disposal of the human body and its parts.[11] Whilst the principles that rationalize the lawful use and disposal of bodily matters—namely, personality and property[12]—deny flesh the capacity to act for law, nevermind *as* law, the human body in relation to its environment actually contributes to the

[7] Ibid, 176.
[8] Ibid.
[9] Ibid.
[10] Falconer (2019a), *supra* note 5; Terry Hutchinson and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 17:1 *Deakin Law Review* 83 [Hutchinson and Duncan (2012)].
[11] John Caputo, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (New York City: Fordham University Press, 1997), 77 [Caputo (1997)].
[12] Roxanne Mykitiuk, "Fragmenting the Body" (1994) 2 *Australian Feminist Law Journal* 63 [Mykitiuk (1994)]; Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates about Property and Personality* (London: Ashgate, 2001) [Davies and Naffine (2001)]; Ngaire Naffine, "'But a Lump of Earth'? The Legal Status of the Corpse" in Desmond Manderson, ed, *Courting Death: The Law of Mortality* (London: Pluto, 1999), 95-110 [Naffine (1999)].

genesis of legal relations.[13] Such an aporia is inexplicable to law's extant narratives, and yet it appears that aporia is formative to how these narratives take expression and how the law operates.[14] This is, drawing on Jacques Derrida, a 'deconstructive'[15] movement that will enable the study 'about law' that occupies the remainder of the dissertation: a deconstruction that allows for further iterations of deconstruction which make up my minor jurisprudence. Through description I want to 'disturb [received genres for doing law] by way of exploring what systematically drops through its grid and, by so disturbing it, to open it up,'[16] in search of 'what is not present'[17] and yet makes a difference in what appears in experience including that of law.[18]

In addressing laws applicable to the final and medial disposal of human remains and bodily matter, this chapter does not provide a full account of the law of the dead or of human tissue in Canada. For example, I do not discuss in any extensive manner, if at all, those laws applicable to the administration of cemeteries or churchyards,[19] the discovery of human

[13] See discussion in Margaret Davies, *EcoLaw: Legality, Life and the Normativity of Nature* (Abingdon, UK: Routledge, 2022) [Davies (2022)]; Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Abingdon, UK: Routledge, 2017) [Davies (2017)].
[14] Peter Fitzpatrick, "The Abstracts and Brief Chronicles of the Time: Supplementing Jurisprudence" in *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Durham: Duke University Press 1991), 1-33 [Fitzpatrick (1991)].
[15] Alecia Y Jackson and Lisa A Mazzei, *Thinking with Theory in Qualitative Research: Viewing Data Across Multiple Perspectives* (Abingdon: Routledge, 2012), 22-23 [Jackson and Mazzei (2012)].
[16] Caputo (1997), *supra* note 11 at 77.
[17] Jackson and Mazzei (2012), *supra* note 15 at 22.
[18] Fitzpatrick (1991), *supra* note 14.
[19] See e.g., discussions in Thomas Cocke, *The Churchyards Handbook* (London: Church House Publishing, 2012); Marsh (2015b), *supra* note 4. Historically, in addition to those law books identified above at *supra* note 2, also see e.g., Richard Burn and Robert Phillimore, *The Ecclesiastical Law, Ninth Edition* (London: Sweet, Stevens and Norton, 1842); Sidney Perley, *Mortuary Law* (Boston: Reed, 1896) [Perley (1896)].

remains or ancient burial sites,[20] or the holding of inquests by coroners.[21] I do not discuss in any extensive manner laws applicable to organ and tissue donation and transplantation, or to the research or clinical use of tissue engineering.[22] Publication of a proper law book on the law in Canada will have to await another day. Instead, I deal narrowly with laws applicable to disposal of the human body and its derivative parts. Further, the deconstructive movement that begins in this chapter will not, itself, offer an alternative framework by which to identify, define, organize and criticize the law of bodily matters; although, in identifying that some remains appear to become something other than what received narratives provide, I am drawn to the materiality of the remains under disposal which is, in part, formative to the aporia noted above. That anticipates my description of the three idioms of materiality in the chapters to come.

The argument is structured accordingly: First, I set out the law of final and dignified disposal, through which I refer to the law's origins in ecclesiastical cognizance in the right (and attendant duties to perform) Christian burial,[23] the law's reliance on the no-property doctrine to limit interferences with duties to decently inter,[24] and the contribution of criminal law to enforcing standards of dignity.[25] Although some property interests are admitted (as a

[20] See e.g., discussions in Government of Canada, "Human Remains" (26 November 2022), https://parks.canada.ca/docs/r/pfa-fap/sec7/decouv_discov3.
[21] See e.g., discussions in Paul Matthews, *Jervis on Coroners* (London: Sweet and Maxwell, 2019); Sheila Nemet-Brown, *Halsbury's Laws of Canada: Inquests, Coroners and Medical Examiners* (Toronto: LexisNexis Canada, 2021). Historically, see for e.g., William Fuller Alves Boys, *A Practical Treatise on the Office and Duties of Coroners in Ontario and the Other Provinces and Territories of Canada, and in the Colony of Newfoundland: With Schedules of Fees and an Appendix of Forms* (Toronto: Carswell, 1905); Edmond McMahon, *A Practical Guide to the Coroner and his Duties at Inquests, Without and With a Jury, in Quebec, and Other Provinces of Canada* (Montreal: Wilson and Lafleur, 1907).
[22] See e.g., discussions in The Law Reform Commission, *Human Tissue Transplants* (Canberra: Australian Government Publishing Service, 1977); Manitoba Law Reform Commission, *Report on The Human Tissue Act* (Winnipeg: Manitoba Law Reform Commission, 1986). Also see Joshua DM Shaw and Roxanne Mykitiuk, "Jurisgenerative Tissues: Sociotechnical Imaginaries and the Legal Secretions of 3D Bioprinting" (2023) 34 *Law and Critique* 165 [Shaw and Mykitiuk (2023)]; Barbara von Tigerstrom, "How to Build (and Regulate) a Body Part: Regulating Tissue Engineered Products in Canada" (2011) 19 *Health Law Journal* 83.
[23] *Gilbert v Buzzard and Boyer* (1820), SC 3 Phill 335 (UK) [*Gilbert* (1820)].
[24] *Haynes's Case* (1614), 12 Co Rep 113, 77 ER 1389 (England) [*Haynes's Case* (1614)].
[25] *R v Lynn* (1788) 1 Leach 497, 168 ER 350 at 351 (Great Britain) [*Lynn* (1788)].

possibility, or actually) in Canadian law to assist the performance of duties to the dead, these are limited.[26] That description then enables me to reflect on some of the jurisprudential features of dignity—of the person, and of the dead's membership to a human species—which commonly rationalize the laws of burial and cremation, alongside concerns for public health and decency.[27] Second, I set out the law of alternative use and disposal, where other modes are authorized like dissection, use in industry and research and therapeutic applications. I start with a historical example of punishment—whether by being drawn-and-quartered or dissected as punishment, or obligations with *felo de se*—which originate in the King's royal prerogative over the bodies of his subjects.[28] Although closely entwined with final burial as its negation in circumstances of social and political transgression, it demonstrates that ecclesiastical cognizance was not alone in handling the dead.[29] It also shows the cognizance of law of the body in parts.[30] Then I consider the medical and scientific collection, use and disposal of the human body and its parts, which exists both at common law and statute.[31] That description allows a survey of the limited theoretical engagements with these alternative modes of use and disposal, which principally orient to the moral rights attributed in relation to

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[26] *Edmonds v Armstrong Funeral Home Ltd.* (1930), [1931] 1 DLR 676, 25 Alta LR 173 (ABCA) [*Edmonds* (1930)]; *Miner v C.P.R.* (1910), 18 WLR 476, 3 Alta LR 408 (Alberta Supreme Court) [*Miner* (1910)]; *Phillips v Montreal General Hospital* (1908), 33 Que SC 483, 1908 CarswellQue 8 (Quebec Superior Court) [*Phillips* (1908)].

[27] *Chaffey v Her Majesty the Queen in Right oof Newfoundland and Labrador*, 2020 NLSC 56; also see Heather Conway, *The Law and the Dead* (Abingdon: Routledge, 2016), 2 [Conway (2016)].

[28] William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769* (Chicago: University of Chicago Press, 1979), https://press-pubs.uchicago.edu/founders/documents/a3_3_1-2s8.html [Blackstone (1765)]; Henry de Bracton, *On the Laws and Customs of England* (Cambridge, MA: Harvard University Press 1968-1977), 334 https://amesfoundation.law.harvard.edu/Bracton/Unframed/English/v2/334.htm [Bracton (1235)].

[29] *Contra* William Blackstone, *Commentaries on the Laws of England, Volume 2* (London: JP Lippencott & Co, 1895), 235 [Blackstone (1895)]; William Blackstone, *Commentaries on the Laws of England, Volume 1* (London: JP Lippencott & Co, 1993), 429 [Blackstone (1993)].

[30] Exceptionally within ecclesiastical cognizance, the practice of producing, collecting and exhibiting human 'relics' existed within the established church in England. However, these practices (primarily done in the medieval era) do not appear to have borne on the common law's relationship to Christian burial. See discussion in Patrick J Geary, *Living with the Dead in the Middle Ages* (Ithica: Cornell University Press, 1994) [Geary (1994)].

[31] See discussion in *Doodeward v Spence* (1908), 6 CLR 406 (High Court of Australia) (Australia) [*Doodeward* (1908)]; *Phillips* (1908), *supra* note 26; *R v Price* (1884), 12 QBD 247 (Court of Queen's Bench) (UK) [*Price* (1884)].

such matters, and the suitability of property or personality as basis of regulation.[32] Third, albeit briefly, I consider claims that individuals increasingly make to their own bodily partings. Doctrinally, these are principally considered in contexts of reproductive care.[33] Their description invites reconsideration of some of the theoretical engagements proffered in the second segment of this chapter, now mediated by the added interests in forming (or not forming) kinship and family.[34] But they also suggest a model for other, non-reproductive tissues (like amputates, surgical waste, etc.) that people with postmodern sensibilities increasingly desire.

Each segment ends with a brief comment on an aporia prevalent throughout, the presence of which clots passage through law's received theories. Neither personality nor property—and the coherence of both in relation to each other—make total sense of what is done with the human body and its parts.[35] The laws are multiple, overlapping and conflicting, and there appear to be further distinctions or modes at work. Piecing them together as a single story for law requires force, creative leaps, and inattention to other processes that matter. Subsequent chapters of this dissertation then undertake the deconstructions indicated here having regard to burial, dissection and people's relationships to bodily partings, where the materiality of flesh as a heteronomous factor is foregrounded.

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[32] See e.g., Charles Foster, *Human Dignity in Bioethics and Law* (London: Hart, 2011) [Foster (2011)]; Jesse Wall, *Being and Owning: The Body, Bodily Material, and the Law* (Oxford: Oxford University Press, 2015) [Wall (2015)].

[33] In Canada, see e.g., *Lam v University of British Columbia,* 2015 BCCA 2 [*Lam* (2015)]. In the UK, see *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, WLR (D) 34 (Court of Appeal) (UK) [*Yearworth* (2009)]. However, also see examples in non-reproductive contexts, such as *Piljak Estate v Abraham,* 2014 ONSC 2893 [*Piljak* (2014)]; *Venner v State of Maryland*, 354 A 2d 483 (1976) (United States) [*Venner* (1976)].

[34] Marilyn Strathern, *Kinship, Law and the Unexpected: Relatives are Always a Surprise* (Cambridge: Cambridge University Press, 2005) [Strathern (2005)].

[35] Davies and Naffine (2001), *supra* note 12; Mykitiuk (1994), *supra* note 12.

3.1. **Final Disposal: The Dead Body for Sepulchre**

As opposed to other things capable of being objectified, the dead human body has long held a distinct legal status in the English law owing to its integrality to ecclesiastical doctrine.[36] Burying the dead was not only a temporal matter but also a spiritual one and so both aspects of burial were under the control of the established church in England.[37] Every parishioner had a right, of ecclesiastical cognizance, to sepulchre or 'Christian burial' in their parish churchyard, which required the church parson, when presented with the parishioner's body, to provide 'the interment […] with ecclesiastical rites in consecrated ground.'[38] With the established church, Christian burial 'entwined into municipal laws'[39] that rendered churchyards and their burial sites the exclusive domain for the dead,[40] with disputes heard by

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[36] Blackstone (1993), *supra* note 29; Edward Coke, *The Third Part of the Institutes of the Law of England: Concerning High Treason, and Order Pleas of the Crown, and Criminal Classes* (London: 1644), 203 [Coke (1644)].

[37] Blackstone (1993), *supra* note 29; Coke (1644), *supra* note 36. Also see discussion in Robert Phillimore, *Ecclesiastical Law of the Church of England* (London: Henry Sweet, 1873), chapter X [Phillimore (1873)]; *Kemp v Wickes* (1809), 3 Phill Ecc 264 (England) [*Kemp* (1809)]. Mark Singer provides an account of changing burial practices between the fifth and seventh centuries in England, when Christianization of English societies took place; see Mark Singer, "Reflecting on the Dead: Productive Relations and Changing Burial Practices in Early Medieval England" (2022) 23 *Enarratio* 1 [Singer (2022)].

[38] Herbert Thurston, "Burial" in Charles G Herbermann et al, eds, *The Catholic Encyclopedia: An International Work of Reference on the Constitution, Doctrine, Discipline and History of the Catholic Church* (New York: The Encyclopedia Press 1907), 71-78, 71 [Thurston (1907)]. Burial was one of those temporal matters governed by ecclesiastical jurisdiction, and expressed spiritually in the Apostles' Creed (the bodies of the dead would be reunited with the soul in everlasting life in the resurrection of Christ). Christian burials were conducted in accordance with the Book of Common Prayer and rubrics of the Church of England.

[39] R.S. Guernsey, "Law Relating to the Removal of Corpses After Burial" (1882) 10:114 *The Sanitarian* 519, 519.

[40] Edward Coke, *The Second Part of the Institutes of the Law of England: Containing the Exposition of Many Ancient and Other Statutes* (London: 1604), 489 [Coke (1604)]. Given that England had an established church, dissenters were viewed by many clergy as disentitled to Christian burial and were at times excluded from churchyards. See e.g., *Kemp* (1809), *supra* note 37. With respect of Protestant dissenters, the correctness of that view was partially challenged by ecclesiastical courts in the nineteenth century, with a consistory court in *Kemp* (1809) clarifying that the parish minister was not only under a "duty to the burial of persons of the Church of England" but also "all persons brought to the church" provided they are not "excommunicated persons," non-Christians and persons who had committed suicide—a conclusion the Court saw as reinforced by the enactment of the *Toleration Act 1688*. Likewise, the Privy Council noted in *Escott v Martin* (1842), IV Moore PC 104 at 129-131, 13 ER 241 (Privy Council) (UK) [Privy Council, *Escott* (1842)], that the refusal of Christian burial in cases of suicide, excommunication or persons unbaptized were added in a rubric from 1661 which did not abrogate the prior law that recognized baptisms conducted outside the Church of England. That entitled those who were baptized by dissenting Protestant denominations to Christian burial. Also see

ecclesiastical tribunals distinct from common law courts.[41] Accordingly, Sirs Edward Coke and William Blackstone—and generations of common law jurists since—described the dead body as *nullius in bonis*, an object for whom ideas of property had no bearing, and as being of ecclesiastical cognizance alone.[42]

Ecclesiastical cognizance, for a time, also extended to the British Canadas as the laws of England were carried by settlers to 'conquered' and 'ceded' territories.[43] With the introduction of ecclesiastical law, established churches formed part of the cultural sediment that governed settlers in the disposal of the dead.[44] Further, as shown in *Brown v Les Curé et Marguilliers de l'Œuvre et de la Fabrique de la Paroisse de Montréal* (1874), and *Ex Parte Wurtele* (1851): every parishioner was entitled to the right to Christian burial in their parish burial ground, and that right was secured by placing obligations on others at common law to arrange for that burial.[45] Ecclesiastical law and the parishioner's right to

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Mastin v Escott (1841), 2 Curteis 692 at 794-795, 163 ER 553 (Arches of Canterbury) (UK); *Titchmarsh v Chapman* (1844), 3 Curteis 840 at 849, 163 ER 920 (Arches of Canterbury) (UK). As Dr. Archibald John Stephens glossed in his ecclesiastical manual: 'Every person dying in this country, if not excluded by positive law, is entitled to Christian burial,' see Archibald John Stephens, *A Practical Treatise of the Laws Relating to the Clergy, Volume 1* (London: Benning and Co., 1848), 200.

[41] *Gilbert* (1820), *supra* note 23; also see *R v Coleridge* (1819), 2 B&ALD 804, 161 Eng Rep 1343 (Court of King's Bench) (UK) [*Coleridge* (1819)]. Whilst the no-property rule was expressed in relation to dead human bodies in *Haynes's Case* (1614), *supra* note 24, property in the living human bodies of African slaves was recognized by the common law in, for e.g., *Butts v Penny* (1677), 2 Lev 201, 3 Keble 785 (Court of King's Bench) (England) and by orders-in-council by King Charles II. See discussion in Holly Brewer, "Creating a Common Law of Slavery for England and its New World Empire" (2021) 39:4 *Law and History Review* 765 [Brewer (2021)]. I discuss human property in Chapter 4.

[42] Blackstone (1895), *supra* note 29 at 235; Blackstone (1993), *supra* note 29 at 429; Coke (1644), *supra* note 36 at 203. Also see Matthew Hale, *The History of the Pleas of the Crown: Volume 1* (London: T Payne, 1800), 515 [Hale (1736)]; *Haynes's Case* (1614), *supra* note 24; Davies and Naffine (2001), *supra* note 12.

[43] *Brown v Les Curé et Marguilliers de l'Œuvre et de la Fabrique de la Paroisse de Montréal,* [1874] UKPC 70, LR 6 PC 157 (Privy Council) (Canada) [*Brown* (1874)]; *Ex Parte Wurtele* (1851) 2:5 Canadian Ecclesiastical Gazette 35 (Superior Court of Upper Canada) (Upper Canada) [*Wurtele* (1851a)]. Also see M.H. Ogilvie, "What is Church by Law Established?" (1988) 28:1 *Osgoode Hall Law Journal* 179 [Ogilvie (1988)]; J.S. Moir, *Church and State in Canada, 1627-1867* (Toronto: McClelland and Stewart, 1967) [Moir (1967)].

[44] See e.g., *Brown* (1874), *supra* note 43; *Ex Parte Wurtele* (1851), *supra* note 43.

[45] *Brown* (1874), *supra* note 43; *Ex Parte Wurtele* (1851), *supra* note 43.

Christian burial have since receded from view for most Canadians,[46] but the envelope of duties that formed at common law around that right remain virtually unchanged: duties to respect the fundamental dignity of the person and the community to whom the dead's memory appeals by decently disposing their remains, and to refrain from disturbing their eternal repose.[47]

In the contemporary common law, duties are imposed on certain persons, like the trustee of an estate, which charge them with responsibility over the manner and place of the body's disposal.[48] The disposal must be 'dignified,'[49] 'decent,'[50] or 'befitting [the deceased's] station in life.'[51] What dignity, decency or station require cannot be known ahead of the circumstances, but if a practice is authorized or regulated by legislation, like burial and cremation, it will ordinarily be sufficient.[52] The duty is not exclusive; others may have the duty if they possess or undertake to dispose the body, or if the head of the house in which the

[46] Principles of ecclesiastical law were, however, referenced positively by the Supreme Court of Newfoundland and Labrador whilst discussing the law of burial and disinterment in *Chaffey* (2020), *supra* note 27.
[47] *Saleh v Reichert* (1993), 104 DLR (4th) 384, 1993 CanLII 9394 (ONSC) (estate administrator has authority to dispose as they see fit as long as decent, dignified and lawful) [*Saleh* (1993)]; also see *Krauch v Degen Estate,* 2021 NSSC 108 [*Krauch* (2021)].
[48] *Saleh* (1993), *supra* note 50; *Krauch* (2021), *supra* note 50; also see *Hunter v Hunter*, [1930] 4 DLR 255, 1930 CanLII 357 (ONSC) [*Hunter* (1930)]; *Mason v Mason*, 2018 NBCA 20 [*Mason* (2018)].
[49] *Buswa v Canzoneri,* 2010 ONSC 7137, paras 7 and 24 [*Buswa* (2010)].
[50] *Bastien et al. v Ottawa Hospital (General Campus),* 56 OR (3d) 397, [2001] OJ No. 3899 (ONSC) [*Bastien* (2001)]; *Edmonds* (1930), *supra* note 26; *McNeil v Forest Lawn Memorial Services Ltd.* (1976), 72 DLR (3d) 556, 1976 CanLII 1157 (BCSC) [*McNeil* (1976)]; *Miner* (1910), *supra* note 26; *Sopinka (Litigation guardian of) v Sopinka et al.* (2001), 55 OR (3d) 529, 2001 CanLII 27996 (ONSC) [*Sopinka* (2001)].
[51] *Schara Tzedeck v Royal Trust Co.,* [1953] 1 SCR 31 at 35, 1952 CanLII 199 [*Tzedeck* (1953)]. Also see *Mason* (2018), *supra* note 51 at para 32.
[52] *Abeziz v Harris Estate,* [1992] OJ No 1271, para 28 (ONCJ) (estate administrator has authority to dispose as they see fit as long as decent, dignified and lawful) [*Abeziz* (1992)]; *Saleh* (1993), *supra* note 50 at para 18.

body lies.[53] Even if one does not have a duty to dispose, everyone has a duty to not interfere with the dead's disposal; failing that duty is an indictable offence and interfering with the body can attract liability in tort if it causes the next of kin mental distress.[54] The duty to dispose may or may not be terminable depending on one's theory, but the body is undoubtedly expected to remain wherever it is placed.[55] There is a presumption of finality to the disposal generally preventing further use.[56]

Importantly, still to this day, human remains are not understood as being property in such a context, following the common law rule that there is no property in the human body or corpse—although other duties and rights exist for the purpose of facilitating their proper disposal.[57] Sir Edward Coke is perhaps the first jurist in the common law tradition to articulate the rule,[58] noting in 1644 that 'cadavers are *nullius in bonis*: the property of no

[53] *R v Stewart* (1840), 12 AD&E 773, 113 ER 1007 (Court of Queen's Bench) (UK) (duty to dispose falls on someone, in this case the head of household where death occurred) [*Stewart* (1840)]; also see *Bradshaw v Beard* (1862), 12 CB (NS) 344, 142 Eng Rep 1175 (Court of Common Pleas) (UK) (estranged husband liable to expenses incurred by another who buries wife even in absence of contract, owing to duties to dispose); *Davey v Rural Municipality of Cornwallis*, 1930 CanLII 642 (MBCA) (parallel duties to dispose fell on municipality and the coroner in absence of others claiming the body, and by statute coroner was entitled to compensation from the municipality for labour and expenses incurred) [*Davey* (1930)]; *Tugwell v Heyman* (1812) 3 Camp 299, 170 ER 1389 (Court of King's Bench) (UK) (duty to dispose may be performed by another, but executors of estate liable even in absence of contract for expenses incurred where estate has sufficient assets) [*Tugwell* (1812)]; *R v William Vann* (1851), 2 Den 325, 169 ER 523 (Court of Queen's Bench) (UK) (indigent father not required to incur debt because of duty to dispose infant—sufficient duty falls on another) [*Vann* (1851)].

[54] *Lynn* (1788), *supra* note 25; *R v Sharpe* (1857), Dears & Bell 162, 169 ER 959 (Court of Criminal Appeal) (UK) (offence to remove a corpse without lawful authority) [*Sharpe* (1857)].

[55] See e.g., *Dobson v Tyneside* [1996] EWCA Civ 1301, 4 All ER 474 (Court of Appeal) (UK) (duty to dispose was complete once human remains were decently disposed, and did not extend to parts retained by physician) [*Dobson* (1996)]; *O'Connor v City of Victoria* (1913), 11 DLR 577 (BCSC) (action lied in trespass to realty once corpse deposited, implying there was no longer a duty to dispose) [*O'Connor* (1913)].

[56] *Chaffey* (2020), *supra* note 27; *Mason* (2018), *supra* note 51.

[57] Blackstone (1895), *supra* note 29 at 235; *Haynes's Case* (1614), *supra* note 24. Also see *Hunter* (1930), *supra* note 51; *R v Polimac,* [2006] OTC 1232, 149 CRR (2d) 161 (SCC) (Canada); *Saleh* (1993), *supra* note 50; *Williams v Williams,* (1882) 20 Ch D 659, 30 WR 348 (Court of Chancery) (UK) [*Williams* (1882)]. *Contra,* there is case law that suggest the body can be property such as in situations of bailment or detinue, such as in *Doodeward* (1908), *supra* note 31; *Miner* (1910), *supra* note 26; *Waldman v Melville (City),* [1990] 65 DLR (4th) 154, 2 WWR 54 (SKQB) [*Waldman* (1990)].

[58] Alicja Puchta, "Book Review—Being and Owning: The Body, Bodily Material, and the Law, by Jesse Wall" (2016) 54:1 Osgoode Hall Law Journal 299.

one.'[59] Sir William Blackstone later described a similar rule, apparently drawing upon the circumstances of the 1614 decision of the *Haynes's Case*[60] to write:

> [S]tealing the corpse itself, which has no owner, though a matter of great indecency, is non felony, unless some of the gravecloths be stolen with it…[61]
>
> [The] heir has a property interest in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried.[62]

The rule, 'no person has any property in corpses,' was reportedly applied in *Exelby v Handyside* (1749) dismissing a civil suit brought against a physician who disinterred the remains of two infants.[63] But the first written decision invoking the rule in established form was in *Williams v Williams* (1882), involving a dispute over whether the decedent could, by means of their testamentary wishes, direct for the cremation of their remains.[64] As a result of such a rule, no 'person by will or other instrument [can] legally dispose of his [sic] body after death;'[65] instead, as the Superior Court of Ontario said in *Buswa v Canzoneri* (2010):

> The personal representative has the discretion as to how the remains of the deceased should be treated and disposed of and what observances should be followed. The fundamental obligation is that the body is to be dealt with appropriately, that is disposed of in a dignified fashion.[66]

Relatedly, in the 1996 case of *Dobson v Tyneside Health Authority*, the Court of Appeal of England and Wales applied the no-property rule to deny the next-of-kin's claims for conversion, wrongful interference and other claims pertaining to the brain of a deceased family member, which was lawfully removed from the decedent's body by a pathologist during

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[59] Coke (1644), *supra* note 36 at 203.
[60] *Haynes's Case* (1614), *supra* note 24.
[61] Blackstone (1895), *supra* note 29 at 235.
[62] Blackstone (1993), *supra* note 29 at 429.
[63] *Exelby v Handyside* (1749) 2 East PC 652 (Great Britain) [*Exelby* (1749)]. See Louise M Mimnagh, "The Disposition of Human Remains and Organ Donation: Increasing Testamentary Freedom While Upholding the No Property Rule" (2017) 7:1 *Western Journal of Legal Studies* 3, 5.
[64] *Williams* (1882), *supra* note 60 at 665.
[65] Brooke Little (1894), *supra* note 2 at 1.
[66] *Buswa* (2010), *supra* note 52 at para 7.

an autopsy required by the coroner and subsequently disposed.[67] The decedent's body less the brain was returned to the next-of-kin following the autopsy in December 1991 and buried not long after. In 1993, the next-of-kin wrote to the pathologist's department requesting a histological report relating to the tumours, wanting to assess whether the decedent's tumour was benign or malignant, proof of which would be important for a medical negligence suit contemplated by the next-of-kin. The department replied that no such tests were completed (as they were not required by the coroner) and the brain tissue was no longer in the department's possession. The next-of-kin brought a suit against the department and pathologist claiming the brain tissue was their property, since they were under a duty to dispose of the corpse. The Court of Appeal held against the next-of-kin. The Court held that they did not have a property right in the decedent's brain tissue and, consequently, were not entitled to plead conversion or wrongful interference, among the other pleadings; alternatively, if the next-of-kin did have such a right, it was limited to ensuring the proper disposal of the remains, which they perfected with the decedent's burial. The Court added that "[t]here was no practical possibility of, nor any sensible purpose in, the brain being reunited with the body for burial purposes."[68]

If not property, the place and manner of a final and dignified disposal are instead protected by proscribing interference with that duty as *contra bonos mores* or 'against the best customs or morals or a good way of life.'[69] For example, in *R v Lynn* (1788), the Court of King's Bench held that, despite ecclesiastical cognizance, interfering with a dead body was an 'offence […] cognizable in a criminal court at the common law.'[70] Such an offence could be found in the circumstances of Lynn, who 'entered a certain burying-ground, and taken

[67] *Dobson* (1996), *supra* note 58.
[68] Ibid, 6.
[69] *Lynn* (1788), *supra* note 25 at 351.
[70] Ibid.

from a coffin buried in the earth a dead body, for the purposes of dissection.'[71] Such interference was *contra bonos mores* and thus capable of constituting an indictable offence triable by a court of common law.[72] Likewise trespassing on a grave to disinter the dead, even for a laudable purpose, was an indictable offence;[73] casting the body into a river without rites was an indictable offence;[74] exposing the body naked where people were likely to be was an indictable offence;[75] and disposing the body in rubbish or keeping and mummifying it in a toilet were offences.[76] Whether intrinsic to the space the dead body occupies as a trace of a human life,[77] or sustained extrinsically in a community's sentiment,[78] dignity thereby creates a space of non-interference as well as requiring sanctioned interment which persons charged with the duty must perform.[79]

Particularly since the late nineteenth century, the obligation to dispose the human dead finally and decently, and to refrain from interfering with the performance of that duty, have also been cast in the sense of necessity.[80] That is apparent in *R v Newcomb* (1898),

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[71] Ibid.
[72] Ibid.
[73] *Sharpe* (1857), *supra* note 57 at 960.
[74] *Kanavan's Case*, 1 Greenl 226, 1 Me 226 (1821) (United States).
[75] *R v Clark* (1883), 15 Cox C.C. 171 (Durham Assizes) (UK) [*Clark* (1883)]; *R v Newcomb* (1898), 2 CCC 255, 1898 CarswellNS 110, para 1 (Nova Scotia County Court) [*Newcomb* (1898)].
[76] *R v Bernard,* 2021 ONCJ 78; *R v Taylor*, [2011] BCJ No 704. Also see *R v Giesbrecht*, 2019 MBCA 35.
[77] The dead body was significant, culturally and theologically, in England alongside the development of Christian burial from which dignified disposal originates. See discussion of bodily-practices and cultures with respect of the dead in Caroline Walker Bynum, "The Female Body and Religious Practice in the Later Middle Ages" in Michel Feher, Ramona Naddaff and Nadia Tazi, eds, *Fragments for a History of the Human Body: Part One* (Brooklyn: Zone, 1989), 160-219, 165 [Bynum (1989)]; Sigrid Müller, "Concepts and Dimensions of Human Dignity in the Christian Tradition" (2020) 6 *Interdisciplinary Journal for Religion and Transformation in Contemporary Society* 22, 34 [Müller (2020)]. See discussion of dignity in the living body in discussions of corrective justice in Richard A Epstein, "A Theory of Strict Liability" (1973) 2 *Journal of Legal Studies* 151 [Epstein (1973)]; Arthur Ripstein, "Corrective justice" in Hanoch Dagan and Benjamin C Zipursky, eds, *Research Handbook on Private Law Theory* (London: Elgar, 2020), 255-269, 263 [Ripstein (2020)]; NW Sage, "Original Acquisition and Unilateralism: Kant, Hegel, and Corrective Justice" (2012) 15:1 *Canadian Journal of Law and Jurisprudence* 119, 121 [Sage (2012)].
[78] See discussion in Joel Feinberg, *The Moral Limits of the Criminal Law*: *Harm to Others* (Oxford: Oxford University Press, 1984); Foster (2011), *supra* note 32; Wall (2015), *supra* note 32.
[79] *Stewart* (1840), *supra* note 56.
[80] Ibid.

where a Nova Scotia County Court referred to the obligation to bury the dead as 'an act of necessity,' which prevented one from 'cast[ing] [the body] out so to expose the body to violation, or to offend the feelings or endanger the health of the living.'[81] The Court also cited *R v Clark* (1883) for the rule that leaving 'a dead body exposed in a highway is an indictable nuisance.'[82] In this sense, the Court emphasizes not only the contravention of public decency by injuring the community's senses, but also the body's risk to public health.[83]

Interference with the duty to provide a decent and dignified disposal of human remains can be actionable under tort law, as evinced by disputes primarily arising in Canada in the age of the railroad and migratory labour, and advents in anatomical study. In these cases, legal interests akin to property are sometimes recognized, allowing for actions responding to direct and indirect interferences.[84] In the earliest of these decisions—namely *Edmonds v Armstrong Funeral Home Ltd.* (1930), *Miner v CPR* (1910), *Phillips v Montreal General Hospital* (1908)—Canadian courts cast doubt on both the veracity of the no-property rule and the suitability of deciding such disputes with regard for prior ecclesiastical cognizance.[85] These cases often look to American case law for descriptions of a qualified possessory right, seen as analytically necessary for the performance of obligations.[86] Contemporary legal

[81] Newcomb (1898), *supra* note 78 at para 4.
[82] Ibid, para 6. Also see *Clark* (1883), *supra* note 78.
[83] *Clark* (1883), *supra* note 78 at 173. The offending act was 'plac[ing] [the body] naked […] where many people were certain to pass and repass, and that the exposure was calculated to shock and disgust the passers-by and outrage public decency.' Also see discussion in *Slattery v Naylor,* [1888] UKPC 26, LR 13 App Cas 446 (Privy Council) (New South Wales) [*Slattery* (1888)]; *Ex Parte Flack* (1880), 1 NSWLR 27, 1 LR (NSW) 27 (NSW Supreme Court) [*Ex Parte Flack* (1880)].
[84] With respect of indirect interferences such as negligence, see *Miner* (1910), *supra* note 26; *Bastien* (2001), *supra* note 53; with respect of direct interferences see *Doodeward* (1908), *supra* note 31; *Edmonds* (1930), *supra* note 53; *Phillips* (1908), *supra* note 26.
[85] *Edmonds* (1930), *supra* note 53 at 178; *Miner* (1910), *supra* note 26 at 414; *Phillips* (1908), *supra* note 26 at para 13.
[86] See e.g., *Pettigrew v Pettigrew*, 207 Pa 313 (1904) (United States) [*Pettigrew* (1904)]; Henry Budd and Ardemus Stewart, *American and English Decisions in Equity, Volume 6* (Philadelphia: M. Murphy, 1900), 464; Thomas V Happer and Joseph P McNamara, "Law and Dead Bodies" (1928) 3:3 *Notre Dame Law Review* 141.

scholars tend to agree that principles of property better correspond to the incidents of disposing a corpse; Kate Falconer, for example, writes that the:

> Right to [a] particular "thing" can be considered a property right to the extent others have a duty to exclude themselves from that "thing," leaving […] a sphere of negative liberty within which to exclusively determine which, if any, use out of a sufficiently open-ended set of uses that "thing" will be put.'[87]

On that theory, interference with the duty to dispose a corpse or bodily material qualifies as a deprivation of some right incidental to that duty—a right to custody or possession of the corpse—which can be described as *injuria sine damnum* (a legal injury without physical damage).[88] Lately the appropriate theory for legal action is a complaint of indirect interference or negligence that causes the duty-bearer mental distress.[89]

3.1.2. *Dignity as Principle for Non-Interference*

Final disposal then is principally rationalized by conventional jurisprudents—when they consider it at all—having regard to the concept of dignity.[90] The notion of dignity—as that existed theologically within ecclesiastical cognizance—conceived of dead bodies as awaiting resurrection, and whose fundamental quality as corporeal extensions of 'man' formed in the image of God necessitated safe harbour and preservation.[91] But as the

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[87] Falconer (2020), *supra* note 5 at 207-208.
[88] *Edmonds* (1930), *supra* note 24 at 178-180.
[89] *AB v Leeds Teaching Hospital NHS Trust,* [2004] EWHC 644, [2004] 2 FLR 365 (Court of Queen's Bench) (UK) [*AB* (2004)]; *Bastien* (2001), *supra* note 53.
[90] See e.g., Margaret Brazier, "The Body in Time" (2015) 7:2 *Law, Innovation and Technology* 161; Kate Falconer, "Reconceptualising the Law of the Dead by Expanding the Interests of the Living" (2019) 45:3 *Monash University Law Review* 757 [Falconer (2019b)]; Sheelagh McGuinness and Margaret Brazier, "Respecting the Living Means Respecting the Dead too" (2008) 28:2 *Oxford Journal of Legal Studies* 297 [McGuiness and Brazier (2008)]; Wall (2015), *supra* note 32. Also see Foster (2011), *supra* note 32. Note that dignity is not always the term used, however it does appear to approximate the interests described in both individual and relational senses of bodily integrity and the importance placed on the subjectivity of the person deceased.
[91] Phillimore (1873), *supra* note 37; Henry Spelman, *De Sepultura* (London: Robert Young, 1641) [Spelman (1641)]; Thurston (1907), *supra* note 38. See generally Richard Hooker, *Of the laws of ecclesiastical polity (Books I to IV)* (London: Everyman's Library, 1907), 170 [Hooker (1593)]; Müller (2020), *supra* note 80 at 34. Also see Caroline Walker Bynum, *The Resurrection of the Body in Western Christianity, 200-1336* (New York: Columbia University Press 2017) [Bynum (2017)].

common law was increasingly asked to justify, and adjudicate disputes regarding, final disposal, dignity was given secular presentation independent of theology and in relation to both body and the community.[92] What dignity means to conventional jurisprudents is perhaps best shown with reference to tort law and the human body generally.[93] For example, Arthur Ripstein argues that "the idea of a system of reciprocal constraints on conduct, [entails] constraints that are consistent with the independence of each person from each of the others."[94] For Ripstein, tortious wrongs emerge from the interaction of separate, equal individuals where one, without the other's permission or a lawful excuse or right, intervenes on the other's independence. Independence has an intrinsic value owing to its connection with purposeful action. Ripstein continues:

> The relevant concept of *independence* can be articulated in terms of the contrasting idea of *dependence*: You are wrongfully subject to my choice if I get to determine the purposes that you will pursue. In the Kantian approach, tortious wrongs consist in one person subordinating another's capacity for choice. Your capacity to choose, in turn, is a matter of you, rather than others, deciding what purposes you will pursue, in the first instance with your body, but also with your property. The organizing thought is that one person interfering with another's body or property involves a kind of subordination of the latter to the former. This structure is easy to see in the case of an intentional battery, in which the batterer uses the other person's body for a purpose that the person being battered did not authorize. If I grab you by the wrist and do not let you move, I make your choice dependent on mine, and in so doing subordinate you. In so doing I wrong you, even if you actually were not planning to go anywhere anyway, because I forcibly decide for you, even if my decision is just the one you would have reached on your own. So, too, if I hit you to relieve or express my anger. Rather than characterizing the wrong in terms of the loss suffered by the victim, it is more fruitful to understand the occurrence in terms of how things stand between the parties, that is, that the batterer has subordinated the other person. It is not up to the batterer to decide what happens to the victim's body. This idea that certain things are 'not up to' others is morally familiar and compelling; it also explains why wrongs against bodies and property have a broadly parallel structure.[95]

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[92] See e.g., *Buswa* (2010), *supra* note 52; *Krauch* (2021), *supra* note 50; *Saleh* (1993), *supra* note 50. Also see arguments in Falconer (2019b), *supra* note 93; Foster (2011), *supra* note 32; McGuinness and Brazier (2008), *supra* note 93; Wall (2015), *supra* note 32; Jesse Wall and John Lidwell-Durnin, "Control, Over My Dead Body: Why Consent is Significant (and Why Property is Suspicious)" (2012) 12:4 *Otago Law Review* 757.

[93] Of course, tort law has not developed coherently as jurisprudents' normative theories might have assumed, desired or prescribed. Nonetheless it is instructive to see how these jurisprudents conceive of it. See discussion in John Murphy, "Contemporary Tort Theory and Tort Law's Evolution" (2019) 32:2 *Canadian Journal of Law and Jurisprudence* 413.

[94] Ripstein (2020), *supra* note 80 at 262.

[95] Ibid.

The independence of the human body, and its protection against 'wrongful transactions,' entails conducting oneself 'in a way that is consistent with the continued condition of [ther] body […] being up to [them], rather than subordinated to whatever would work best for [someone else].'[96] Others like Richard Epstein, also writing on torts, put it more explicitly as persons owning their bodies,[97] although it need not be viewed as ownership.[98] A common reference for such jurisprudents is the natural law of Immanuel Kant, for whom bodily integrity is the natural and innate condition of freedom:

> Kantian freedom entails an entitlement to bodily integrity. Your body is animated by your purposiveness—you act through it. So no other person can choose what you do with your body. Implicit in the right to bodily integrity is the right to occupy the space your body is taking up and also certain rights with respect to physical objects that your body is touching—for example, if you grasp an apple another person cannot pry it from your fingers.[99]

Such jurisprudents thereby understand tort law as mediating questions of responsibility with regard for the complexion of human behaviour that, in varying degrees, involves purposive interference with another's '[external] purposiveness in the world.'[100]

The challenge in recognizing dignity in the *dead body* is the requirement—under this theory—that purposive intentionality provides the ground and normative content for dignity. Without an intentional subject—who appropriates their body to the achievement of purposive tasks in their environment[101]—dignity cannot be intrinsic to it; it must depend on other moral considerations. These other moral considerations may attempt to recuperate dignity, by imagining the dead person as if they were alive—the antemortem person—and the possessor

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[96] Ibid, 263.
[97] Epstein (1973), *supra* note 80; also see Ripstein (2020), *supra* note 80.
[98] Wilkinson.
[99] Sage (2012), *supra* note 80 at 121.
[100] Ibid, 132.
[101] See e.g., John Locke, *Second Treatise of Government* (Indianapolis: Hackett Publishing, 1980), 8-9 [Locke (1690)]; Yechiel JM Leiter, *John Locke's Political Philosophy and the Hebrew Bible* (Cambridge: Cambridge University Press, 2018), 111.

of dignity.[102] But the violation of dignity in such cases would not be actually caused, but constructively so through the use of fictions:[103] like imagining the harm to the real person in the past, or injuring the memory of someone—what might be considered "Cambridge changes" in that the predicate was true of the object in one moment, but not another.[104] Alternatively, dignity relates not to the dead body in an intrinsic sense but exists relative to the special category of the human. Dignity then intercedes through membership to the human species, or a community, with whom those living identify.[105]

3.1.2. *Aporia I*

The conventional principles canvassed aver to the body's materiality. For example, invocations of intrinsic dignity are oriented to the space the body occupies, which implies the presence of the body.[106] Extrinsically, notions of communal sentiment or dignity as a species, whether actioned through theories of *contra bonos mores* or nuisance, assume a body that disgusts or affronts peoples' senses and morality. Likewise concerns for public health, and the necessity or utility of final and decent disposal, respond to the body's predilection to decompose. But these averments are fleeting and undertheorized. When the legality of using the dead body is considered, as exemplified in the moral jurisprudence of Charles Foster, the body actually becomes bodyless.[107] Jurisprudential concern scales up to concerns for the intentionality of the subject conserved in a community's memory, the purposiveness of the human being and moral valuations of humanity, which abstracts away from the body as a

[102] Feinberg (1984), *supra* note 81; Foster (2011), *supra* note 32.
[103] Wilkinson.
[104] Wilkinson; also see Peter T Geach, *God and the Soul* (London: Routledge, 1969).
[105] Foster (2011), *supra* note 32.
[106] Sage (2012), *supra* note 80 at 121.
[107] Foster (2011), *supra* note 32.

fleshy thing.[108] It is the kind of body familiar to natural law generally, which is never really about nature anyway, but the idealities invested in the human notion of nature.[109] The autonomy of law intrinsic to dignity is thus preserved, with heteronomous concerns like public health merely modifying conditions of its expression.

Yet the material body does contribute to the laws of burial and cremation. That is indicated in two ways: the ecclesiastical principle around which obligations at common law accreted;[110] and, once secularized, the stated concern for the necessity of burial owing to the 'nature' of the corpse, sentiment of the community and public health vulnerabilities.[111] The material body is absent from the language of "dignified," "decent' or even "Christian' disposal, and of the utility of securing public health against hazards, but distinctions in assumptions about the material body are relied on, subtending and mediating differences in the mode and place of lawful disposal.[112] Namely both draw on images of the body's decomposition—on it being given up to worms, forming part of the freehold,[113] becoming a physical threat as a vector of evil—which authorize different modes and places of disposal depending on the duration, extent and nature of the corpse's dissolution.[114] For example, in *R v Fox* (1841), a

[108] Chris Dietz, Mitchell Travis and Michael Thomson, "Nobody, Anybody, Somebody, Everybody: A Jurisprudence of the Body" in *A Jurisprudence of the Body* (London: Palgrave, 2020), 1-13 [Dietz et al. (2020)]. Also see Joshua Shaw, "Book Review: A Jurisprudence of the Body" (2022) 31:1 *Social and Legal Studies* 165.
[109] Margaret Davies, *EcoLaw: Legality, Life and the Normativity of Nature* (Abingdon: Routledge, 2022) [Davies (2022)]; Margaret Davies, "The Time, Nature and Place of Natural Law" (2019) 44 *Australasian Journal of Legal Philosophy* 106.
[110] Intercourse between ecclesiastical and common law over centuries accreted, at the limit between jurisdictions, as an envelope of obligations owed which sedimented with a certain permanence in the common law. Those included the duty to provide a decent interment, and duties of all to not interfere with the dead's permanent rest. Even where ecclesiastical law retreated or disappeared from public view, these obligations at common law reflected that prior intercourse, which was easily adaptable to the legal principle's secular presentation as dignity and decency. See Bernard (1966), *supra* note at 19.
[111] See e.g., *Gilbert* (1820), *supra* note 23; *Newcomb* (1898), *supra* note 78; *Slattery* (1888), *supra* note 86; *Stewart* (1840), *supra* note 56. Also see cases relating to sea burial where decomposition is especially pertinent, such as *Brambir v Cunard White Star Limited*, 37 F Supp 906 (SDNY 1940) (United States); *Finley v Atlantic Transport Co.,* 220 NY 249 (1917) (United States).
[112] See especially *Gilbert* (1820), *supra* note 23.
[113] *Gilbert* (1820), *supra* note 23; *O'Connor* (1913), *supra* note 58.
[114] See e.g., *Gilbert* (1820), *supra* note 23.

gaoler refused to provide the dead body of a prisoner to the executors of the prisoner's will for the purpose of burial unless certain debts were paid.[115] The gaoler threatened to inter the body within the grounds, even though, as the English Court of Queen's Bench noted, "there was no chapel or burying place" within its precincts.[116] Upon a motion of the Solicitor General, the Court granted mandamus, compelling the gaoler to give up the body to the executors so that their duty to dispose the body could be perfected—the absence of burial place threatened an indignity to the remains, and to public decency, causing them to decompose in an improper spot.[117] That is brought into relief when considering that, pursuant to the *Capital Punishment Amendment Act 1868* in England, convicts punished by hanging were not entitled to a decent interment in a churchyard or with Christian rites.[118] Superintendants were required to bury the deceased "within the precincts of the prison where the hanging [took] place" and 'the custom [was] to bury such bodies in quicklime" to make quick work of their material existence.[119] In a different sense, Lords of the Privy Council in *Slattery v Naylor* (1888) considered the importance of holding valid a municipal power to regulate—and effectively prohibit—burying the dead within a borough.[120] The notion of burial taking place at a suitable distance from a community, and the need to prohibit further burial in that same spot once the borough grew and closed in around a cemetery, assumed the

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[115] *R v Fox and Ors* (1841), 2 WB 246, 114 ER 95 (Court of Queen's Bench) (UK) [*Fox* (1841)].
[116] Ibid, 96.
[117] Ibid. The gaoler defied the order for which he was indicted at the York Spring Assizes in 1842: "[Fox] refused to [give up the body], though the executors, as such, were ready and willing to receive it for the purpose, &c., whereof defendant had notice; and that defendant unlawfully and in abuse of his office, without legal authority or excuse, and against the will of the executors, detained the body a long time in the gaol, to wit from, &c. until, &c., when defendant, unlawfully and indecently, &c, and against the will, &c, buried the body without any rite of Christian burial, or any funeral ceremony or observance, in a place not being a consecrated burial ground, or a customary or fit place for burial, to wit a yard of and within the precincts of the goal. […] The second count alleged a refusal to deliver up, &c. unless the executors would account with the defendant concerning certain claims of money which he pretended to have against Foster's estate, and pay defendant what should appear due; and that defendant wrongfully detained, &c., under pretext of such claims […] until, &c., when he buried, &c." See ibid, 97.
[118] *Capital Punishment Amendment Act 1868*, 31 & 32 Vic c 24.
[119] Fellows (1940), *supra* note 1 at 39-40.
[120] *Slattery* (1888), *supra* note 86.

hazards posed by the decomposing corpse.[121] Those hazards were likewise raised in *R v Stewart* (1840) as requiring the imposition of the duty to dispose on *someone*,[122] and in *R v Price* (1884) as delimiting what was possible in terms of disposing the dead.[123] In each of these cases the decomposition of the corpse appears to *matter* to the authority to dispose. The contribution of the decomposing corpse—as an absence present in the law[124]—forms the first aporia of concern in this dissertation, and is considered in Chapter 3.

3.1. **Alternative Disposal**

The common law of England is often understood to have exclusively obliged the final and dignified disposal of the human dead owing to the special cognizance claimed by ecclesiastical authorities,[125] with limited exceptions admitted by statute to facilitate, first, anatomy and, later, organ and tissue donation.[126] Owing to Canada's legal histories, the common law of Canada is also understood to reflect this presumption of final and dignified disposal subject to similarly narrow exceptions granted by statute for anatomical study, research or therapeutic use in transplantation.[127] For example, starting in 1843, with the enactment of *An Act to regulate and facility the study of Anatomy* in the Province of Canada, medical persons at licensed anatomy schools were authorized by statute to obtain dead bodies for the purposes of anatomy from poor houses and hospitals absent a claim from a

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[121] Ibid.
[122] *Stewart* (1840), *supra* note 56.
[123] *Price* (1884), *supra* note 31.
[124] Drew Leder, *The Absent Body* (Chicago: University of Chicago Press, 1990) [Leder (1990)].
[125] Blackstone (1895), *supra* note 29; Blackstone (1993), *supra* note 29; Coke (1644), *supra* note 36; *Exelby* (1749), *supra* note 66; Hale (1736), *supra* note 36; *Stewart* (1840), *supra* note 56.
[126] See e.g., *Anatomy Act 1832*, 2 & 3 Will IV c 75 (UK) [*Anatomy Act* (1832)]; *Human Tissue Act 1961*, 1961 c 54 (UK) [*Human Tissue Act* (1961)].
[127] *Hunter* (1930), *supra* note 51; *Krauch* (2021), *supra* note 50; *Mason* (2018), *supra* note 51. Also see e.g., the *Act to regulate and facilitate the study of anatomy,*1843, 7 Vict c 5 (United Canadas) [*Anatomy Act* (1843)]; *Human Tissue Act,* RSO 1970 c 214 [*Human Tissue Act* (1970)] which, when enacted in 1962, was the first Canadian jurisdiction to have a human tissue act following the enactment of the UK's *Human Tissue Act* (1961), *supra* note 131.

genuine friend or family.[128] Beginning in the 1962, in Ontario, one could expressly gift their body for anatomical research and education,[129] and donate their organs and tissues prior to or after death for medical uses.[130] However, that view is incomplete. Despite frequent absolutist claims by jurists, the common law in England and her colonies did authorize alternative modes of disposal and in ways that doctrinally stand apart from ecclesiastical providence.[131] There are at least two modes of disposal cognizant to the common law aside from decent and final burial: albeit historical, the King's royal prerogative exacted on the bodies of his subjects;[132] and, secondly, the powers asserted by physicians and surgeons over patients for the purposes of dissection.[133]

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[128] Canada's *Anatomy Act* (1843), *supra* note 132.
[129] Legislation in Canada did not authorize "donation" or "gifts" of one's own body for anatomical research or education until the 1960s. See the absence of provision in *Anatomy Act*, RSO 1914 c 162; *Anatomy Act*, RSO 1927 c 197; *Anatomy Act*, RSO 1937 c 226; *Anatomy Act*, RSO 1950 c 16; Anatomy *Act* (1843), *supra* note 68. Anatomy acts continued to not reference "donated" bodies until 1967 with the passage of an act that amended the *Anatomy Act* to include reference to"'donated bodies," "receive[d] […] for the purpose of anatomical dissection, other than [unclaimed bodies] under section 4." The provision required a medical school to notify the inspector of receipt of the body by means of donation, and to refrain from conducting any dissections until the inspector confirmed the completion of any required forms. However, unlike the *Anatomy Act* (1832)*, supra* note 131 at s 8, the Ontario act still did not explicitly authorise the donation of one's body, see *Anatomy Act*, RSO 1970 c 21, s 5(2). Explicit authorisation for donation came with the enactment of the *Human Tissue Act*, SO 1962-63 c 59, ss 1 & 2 [*Human Tissue Act* (1962)], which allowed a patient who was to die in a hospital to authorise, in writing or orally with witnesses, the donation of their body or specified parts thereof for a therapeutic purpose, or for the purpose of medical education or research. Alternatively, if one died outside a hospital or inside a hospital without requesting to donate their body, a hierarchy of people, from spouse to whomever had lawful possession of the body, could authorise the donation after the individual's death, see Ontario's *Human Tissue Act* (1970), *supra* note 132 at ss 3 & 4.
[130] *Human Tissue Act* (1962), *supra* note 134; *Human Tissue Act* (1970), *supra* note 132.
[131] See e.g., *Miner* (1910), *supra* note 26; *Phillips* (1908), *supra* note 26; *Price* (1884), *supra* note 31; also see Brooke Little (1894), *supra* note 2; Fellows (1940), *supra* note 1; Arthur Turnour Murray, *The Law of Hospitals, Infirmaries, Dispensaries, and Other Kindred Institutions Whether Voluntary or Rate-Supported* (London: J. Murray, 1908) [Murray (1908)].
[132] Blackstone (1765), *supra* note 28; Bracton (1235), *supra* note 28.
[133] Price (1884), *supra* note 31; Murray (1908), *supra* note 136; C.J. Polson, *Disposal of the Dead* (New York: Philosophical Library, 1953) [Polson (1953)].

3.1.2. *At the King's Disposal*

The first mode is well documented. Since as early as the thirteenth century at common law,[134] and fourteenth century with the enactment of the *Treason Act 1351*,[135] English law authorized the act of being drawn and quartered as punishment for those convicted of certain offences.[136] Sir William Blackstone described it as:

> very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk: though usually (by connivance, at length ripened by humanity into law) a sledge or hurdle is allowed, to preserve the offender from extreme torment of being dragged on the ground or pavement. 2. That he be hanged by the neck, and then cut down alive. 3. That his entrails be taken out and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal.[137]

To be killed by hanging was insufficient; the King had to further squelch the eschatological promise of the Last Judgment by mutilating the convict's body—a demonstration of His Majesty's strength and threat to those who dared challenge him, which exploited, and displayed the exploitation of, his subjects' corporeal vulnerability.[138] That mutilation would take on a different form as early as the sixteenth century, where those executed for an increasing number of offences were sent, pursuant to a royal charter, to surgeons and barbers for dissection.[139] That charter, made by King Henry VIII pursuant to his royal prerogative, granted to the United Company of Barbers and Surgeons:

> [T]he sayd maysters or govornours of the mistery and comminaltie of barbours and surgeons of Londō and their successours yerely for ever after their sad discrecions at their free liberte and pleasure shal and maie have and take without contradiction foure

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[134] Bracton (1235), *supra* note 28.
[135] *Treason Act 1351*, 25 Edw 3 St 5 c 2 [*Treason Act* (1351)].
[136] See Arnold Blumberg, 'The Law of Treason in Medieval England: Drawn and Quartered' (2015) 5:2 *Medieval Warfare* 49 [Blumberg (2015)].
[137] Blackstone (1765), *supra* note 28.
[138] Ibid; Blumberg (2015), *supra* note 141. Also see generally Michel Foucault, *Discipline and Punish: The Birth of the Prison* (London: Penguin, 1977) [Foucault (1977)].
[139] *An Act concerning Barbers and Surgeons to be of one company 1540*, 32 Hen St 8 c 42 (England) [*Barbers and Chirurgians Act* (1540)]; also depicted visually, see "King Henry VIII granting a Royal Charter to the Barber-Surgeons company" coloured engraving by WP. Sherlock, 1817, after H Holbein, 1542, https://wellcomecollection.org/works/a2whcqp3/items. See Neville M Goodman, "The Supply of Bodies for Dissection: A Historical Review" (1944) 2: 4381 *British Medical Journal* 807 [Goodman (1944)]; Stephen Lock, John M Last and George Dunea, eds, *The Oxford Companion to Medicine, Third Edition* (Oxford: Oxford University Press, 2001), <Barber-Surgeons, Company of>.

> persons condemned adjudged and put to deathe for feloni by the due order of the Kynges lawe of thys realme for anatomies.[140]

And in the eighteenth century, dissection as punishment was explicitly required under the *Murder Act 1751*.[141] Both forms of punishment shared a conceptual structure: the bodies of convicts, sentenced to execution and mutilation, were 'at the King's disposal.'[142] His Majesty held a divine right to the body which, when exercised, made that body eminently disposable like discard. It responded to aberrance through the deprivation of integrity. It was an effect of sovereign power.[143] Such punishments disappeared from English and Canadian law in the

[140] *Barbers and Chirurgians Act* (1540), *supra* note 144.
[141] *Murder Act 1751*, 25 Geo 2 c37 (Great Britain) [*Murder Act* (1751)]. *The Murder Act* (1751) required the bodies of murderers convicted and executed in the counties of Middlesex and London to be delivered to surgeons for the purposes of dissection and anatomy, and allowed courts in other counties 'or any other place in Great Britain'—including the British North American colonies having regard to *The Quebec Act 1774*, 14 Geo 3 c 83 (Great Britain)—to make such provision in the sentence of a convicted murderer. The bodies of murderers could also be hung in chains, if the court directed for this, but as a murderer, section 5 of the *Act* prohibited their subsequent burial unless their bodies were also anatomized (interestingly no provision is made for the further disposal of those bodies hung in chains).
[142] The *Murder Act* (1751), *supra* note 146, sought to connect dissection and punishment by requiring such a sentence to be made in open court, "in which sentence shall be expressed not only the usual judgment of death, but also the time appointed hereby for the execution thereof, and the marks of infamy hereby directed for such offenders, in order to impress a just horror in the mind of the offender, and on the, minds of such as shall be present, of the heinous crime of murder." If that punitive connection was not apparent from the substantive provisions of the statute itself, the preamble to the *Act* repeats legislative intent to exact 'further terror and peculiar mark of infamy' upon those executed: "WHEREAS horrid crime of murder has of late been more frequently perpetuated than formerly, and particularly in and near the metropolis of this kingdom, contrary to the known humanity and natural genius of the British nation; and whereas it is thereby become necessary, that some further terror and peculiar mark of infamy be added to the punishment of death, now by law inflicted on such as shall be guilty of the said heinous offence […]."
[143] See discussion in Peter Linebaugh, "The Tyburn Riot against Surgeons" in Douglas Hay et al., eds, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon Books, 1975), 65-118 [Linebaugh (1975)]. Also see generally the anatomo-politics of capital punishment in Foucault (1977).

nineteenth century,[144] but demonstrate how a dead body could undergo a fate divergent from the burial.

A related disposal practice—also derived from the Crown's royal prerogative over Crown subjects—was *felo de se*, where the remains of those who died by suicide were disposed of clandestinely by justices of the peace, coroners or others, being denied a Christian burial under ecclesiastical law.[145] *Felo de se* also empowered the forfeiture of the deceased's property, such as in the 1659 case of *R v Ward Executor of Wentworth*.[146] Law writer, C.J. Polson, described disposal following *felo de se* in his 1953 text, *Disposal of the Dead*: "the custom of burial of the *felo-de-se* [was] at the crossroads" of a public highway, and with "a stake driven through the body."[147] Law writer, Alfred Fellows, similarly described the "ancient law […] not peculiar to England" in his 1940 text: "suicides were buried at cross-

[144] Much of *The Murder Act* (1751), *supra* note 146, was repealed in England in 1828, with the proclamation of *Offences Against the Person Act 1828*, I Geo 4 c 31 (UK), but the practice of dissection as punishment was retained in the latter *Act*. With the *Anatomy Act* (1832), *supra* note 131, s 16, England abolished the practice of dissection as punishment and allowed for "such Prisoner either to be hung in chains, or to be buried within the Precincts of the Prison in which such Prisoner shall have been confined after Conviction." The Province of Canada, including both Upper and Lower Canadas, retained the practice for executed murderers with the enactment of *An Act to reduce the number of cases in which Capital Punishment may be inflicted; to provide other punishment for offences which shall no longer be Capital after the passing of this Act; to abolish the privilege called benefit of Clergy; and to make other alterations in certain Criminal Proceedings, before and after conviction, 1833,* 3 Will. IV c4, s 20 (Canada) [Canada's *Capital Punishment Act* (1833)]; this was the law of the Canadas late into the nineteenth century, well after England did away with it. The last document that I can find showing the operation of Canada's *Capital Punishment Act* (1833), was published in 1844, John Hillyard Cameron, *The Rules of Court, and Statutes relating to Practice and Pleading in the Queen's Bench* (Toronto: H&W Roswell, 1844). Also see William Renwick Riddell, "Criminal Law in Upper Canada a Century Ago" (1920) 10 *Journal of Criminal Law and Criminology* 516, 531 [Riddell (1920)]; Carolyn Strange, "The Lottery of Death: Capital Punishment, 1867-1976" (1995) 23 *Manitoba Law Journal* 595. It seems likely that with the proclamation of the *Constitution Act, 1867*, 30 & 31 Victoria c 3 (UK), and the assignment of criminal law to federal jurisdiction pursuant to s 91 of the *Act*, law reforms following confederation eliminated the lawful provision of executed bodies for dissection. See e.g., *An Act respecting Punishments, Pardons and the Commutation of Sentences*, RSC 1886, c 181, ss 5-6 (Canada) [*Revised Statutes of Canada 1886*], which only specify hanging. Also see Riddell (1920) where, at page 532, it is suggested that the evisceration of the body in the course of exacting punishment for high treason progressively became symbolic, minimally intervening on the body of the convict.

[145] Brooke Little (1894), *supra* note at 2 at 13. Brooke Little notes that the refusal of Christian burial required, under ecclesiastical law, more than the clergy's bare opinion: 'reasons for exclusion laid down in the canon and rubric [had to] be fully proved to justify a clergyman in refusing to bury the body of any person'.

[146] *R v Ward Executor of Wentworth,* (1659) 83 ER 270, 1 Levinz 8 (Court of King's Bench) (England).

[147] Polson (1953), *supra* note 138 at 156.

roads with a stake driven through the heart, to prevent vampirism."[148] In other cases, the stake was driven through the head. An unnamed writer in a 1905 edition of the *Canada Law Journal*, whilst summarizing the law against aiding or abetting suicide in Canada at the time, described the consequences of suicide generally at common law: "suicide was considered a crime against the laws of God and man, the lands and chattels of the criminal were forfeited to the King, *his body was interred in the highway with a stake driven through the head*, and he was deemed a murderer of himself, and a felon felo de se" (emphasis added).[149]

Legislative reforms in England during the nineteenth century progressively reformed the disposal of the remains of those who died by suicide, requiring a coroner to direct for a private interment in a churchyard or some other burial ground in the parish without a stake driven through the body.[150] But no such legislation appears to have existed in the Canadas. In 1864, law writer, William Puller Alves Boys, stated in his *A Practical Treatise on the Office and Duties of Coroners in Upper Canada* that "this statute is not in force in Canada, and we must consequently be governed by the more barbarous law previously existing, unless Coroners are willing to depart from their strict duty, and issue process for the remains to be buried according to the less severe provisions of the later English enactment."[151] Published within that same year, W.C. Keele's *The Provincial Justice, or Magistrate's Manual* similarly stated that such disposal was the law, although believing the "barbarous custom […] will of

[148] Fellows (1940), *supra* note 1 at 45.
[149] Anonymous, "The Criminal Liability of an Inciter or Abettor of Suicide" (1905) 41:23 *Canada Law Journal* 857, 857; Also see past tense used in the discussion of the common law requirements pertaining to the disposal of those dead by suicide in Anonymous, "Shakespeare as a Lawyer" (1885) 21:10 *Canada Law Journal* 189, 189-190.
[150] See *Burial of Suicide Act 1823*, 4 Geo IV c 52 (UK); *Interments (Felo de se) Act 1882,* 45 & 46 Vict c 19 (UK).
[151] William Puller Alves Boys, *A Practical Treatise on the Office and Duties of Coroners in Upper Canada* (Toronto: WC Chewett & Co., 1864), 45 [Boys (1864)].

course be dispensed with in this province" at some date in the future.[152] Boys' phrasing repeats in further editions of his book published in 1878, 1893 and 1905, although in the 1905 edition, Boys augments his prior, repeated call for legislative amendment to say "the law of Canada in this respect calls for direct and positive amendment," and adds:

> It has been supposed the burial of a *felo de se* relates to the criminal law and, not having been carried into the criminal code, is no longer in force in Canada. This, the writer has reason to believe, was the opinion of the late Attorney-General Mowat. As far as he is aware, there has been only one case reported in the newspapers in which the trustees of a cemetery in Ontario have refused interment of the body of a suicide on the ground that a *felo de se* was not entitled to burial in consecrated ground.[153]

The claim that disposal practices in relation to *felo de se* had fallen into disuse is supported by an unnamed writer in a 1908 edition of the *Canada Law Journal*, who described "modern sentiment [as] less severe," with a "merciful view […] taken by the church, and the crime […] practically condoned at the grave."[154]

Writers who were contemporary to these laws tended to emphasize the laws' punitive function, characterizing the evisceration of the body as the right of the King against his

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[152] W.C. Keele, *The Provincial Justice, or, Magistrate's Manual: Being a Complete Digest of the Criminal Law of Canada, and a Compendious and General View of the Provincial Law of Upper Canada with Practical Forms, for the Use of all Magistry* (Toronto: H. Roswell, 1864), 209. In the version published in 1858, Keele also described the disposal as a barbarous custom, but did not predict any future reform.

[153] Boys (1905), *supra* note 21 at 103. I note, however, that Henry Elzéar Taschereau's *The Criminal Code of the Dominion of Canada as Amended in 1893: With Commentary, Annotations, Precedents of Indictments, &c, &c* (Toronto: Carswell, 1893), includes the then newly added provision, s 965, which abolished a related concept of attainder. On p 975, Taschereau's describes the concept of attainder which was abolished: "By the common law, a man convicted of treason or felony stands *attaint*. By this attainder, he loses his civil rights and capacities, and becomes dead in law, *civiliter mortuus*: 1 Stephens' Comm 141. He forfeits to the King all his lands and tenements, as well as his personal estate, his blood is corrupted, so that nothing can pass by inheritance to, from or through him: 4 Blacks 380, 387. But the land or tenements are not vested in the Crown during the life of the offender, *without office or office-found* which is a finding by a jury of a fact which entitles the Crown to the possession of such lands or tenements: Wharton's Law Lexicon." In addition, offences at common law as a general part of Canadian law would not be abolished until the consolidation of the *Criminal Code* in 1953. See Alan W Mewitt, "The Criminal Law, 1867-1967" (1967) 45 *Canadian Bar Review* 726. Given the apparent need to abolish the concept of attainder at common law through legislative amendment, legislative silence on the disposal of the dead body of a *felo de se*, and belated abolition of common law offences, it does not seem, retrospectively at least, like Attorney General Mowat's opinion, as recorded by Boys, was defensible.

[154] Anonymous, 'The Crime of Suicide' (1908) 44:13/14 *Canada Law Journal* 473, 474.

subjects where order and justice required it.[155] Jeremy Bentham provides an illustrative study of corporeal punishment, which may be helpful to consider. Having regard to "afflictive punishment," Bentham described a complex species of punishment intended to cause permanent harm through "the alteration, the destruction or suspension of the properties of a part of the body," including "visible qualities […] and uses."[156] With living subjects, afflictive punishment caused pain and social disabilities but, especially when combined with death, "exemplarity" to others—and the object of leaving a "deep and lasting impression" upon others—was in "higher degree perhaps than any other species of punishment"[157] owing to "the effects it produce[d] *in terrrorum.*"[158] The question for Bentham, though, was whether such evils (as all punishments are evils in his philosophy) were properly effectual; were the coercive objects of law properly accomplished, or did it have other effects—in that sense then whilst Bentham describes, vividly, how such acts are punishment, his interest is in its utility. Otherwise, conventional jurisprudents since the abolition of these practices do not usually acknowledge them. When conventional jurisprudents write on punishment, they invariably adapt classic criminological theories which consider deterrence, retribution, utility or (less relevant here) reform as the justification for different forms of punishment.[159] The physical use of the body is averred; often assumed to be an inappropriate object for law in a system that aspires to respect the fundamental rights of each individual, even where possible in punishment.

[155] Blackstone (1765), *supra* note 28; Bracton (1235), *supra* note 28; Hale (1736), *supra* note 36.
[156] Jeremy Bentham, *The Rationale of Punishment* (London: R. Heward 1830), 86 [Bentham (1830)].
[157] Ibid, 178, 194.
[158] Ibid, 196.
[159] See generally, e.g., HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 2008), chapter 3.

3.1.2. *Authority to Use Tissues*

The second mode of alternate disposal is found in the practice of dissection, and later the therapeutic use of human tissues which, although commonly attributed to the introduction of statute,[160] appear to have at least begun as claims at common law.[161] This argument is given perhaps its most authoritative statement in *R v Price* (1884), where Justice Stephens of the Court of Queen's Bench wrote critically of the claim that burial was all the common law admitted:

> This way of looking at the subject seems to explain how the law came to be silent on exceptional ways of disposing of dead bodies. The question was, In [sic] what cases burial must be refused? As for the way of disposing of bodies to which it was refused, the matter escaped attention, being probably regarded as a matter which interested those only who were so unfortunate as to have charge of such bodies.
>
> The famous judgment of Lord Stowell in the case of iron coffins (*Gilbert v Buzzard*), which constitutes an elaborate treatise on burial, proceeds upon the same principles. The law presumes that every one will wish that the bodies of those in whom he was interested in their lifetime should have Christian burial. The possibility of man's entertaining and acting upon a different view is not considered.[162]

To the Court, the common law established duties on individuals to effect a decent burial (and later cremation), but that did not mean it occupied the field as the only option.[163] From the history of anatomy in England, and the language of the *Anatomy Act* (1832), the Court inferred "that Parliament regarded anatomy as a legal practice [when it introduced the *Act*],

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[160] See e.g., C.J. Polson, *The Disposal of the Dead (2nd Edition)* (London: English Universities Press 1962), 41-50 [Polson (1962)]. Here Polson, in describing the state of law prior to the *Human Tissue Act* (1961), *supra* note 131, strongly insisted on the illegality of practices conducted outside the anatomy legislation, referring to the post-mortem examination and retention of tissues practiced by physicians as lacking legal authority. However, with the *Human Tissue Act* (1961), *supra* note 131, these practices obtained clear authority and bore, remarkably, the very character that the common law was seen by some to provide; indeed, as Polson put it: "[s]ubject to the provisions of the new Act, all these practices are now lawful." This differs markedly from his account in the first edition of his book, where he admits its lawfulness is the view of some, see Polson (1953), *supra* note 138.

[161] As I have noted already, Debra Mortimer briefly acknowledges its assumption at common law in *Doodeward* (1908), *supra* note 31, but does not examine such a power further. See Debra Mortimer, "Proprietary Rights in Body Parts: The Relevance of *Moore's Case* in Australia" (1993) 19:2 *Monash University Law Review* 217 [Mortimer (1993)].

[162] *Price* (1884), *supra* note 31 at 250.

[163] Ibid.

and further, that it considered that there was such a thing as 'a legal supply of human bodies,' though that supply was insufficient for the purpose."[164] Having regard to this context, the Court concluded that anatomy was a lawful practice at common law;[165] if it was not, it would bar the lawful access to, and the trade of, "skeletons and anatomical preparations."[166] The exceptional or alternative use of the human body was subject only to requirements of criminal law (against indecency, for example), tort law (in an action for nuisance) or some other municipal law.[167]

The Court's comments were properly dicta—the complaint under adjudication pertained to the legality of cremation and not anatomy—but its analogies to anatomy are persuasive and law writers (at least until the mid-twentieth century) agreed.[168] Relatedly, an early Canadian case *Phillips v Montreal General Hospital* (1908) suggested the same,[169] that dissection (or some other use of the body) is lawful at common law even without explicit statutory authorization, but that courts must consider the circumstances under which the bodies are procured and whether the physician (or whomever effects the alternate use) has lawful possession of the bodies.[170] The Superior Court of Quebec wrote that "blind

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[164] Ibid, 251.
[165] Ibid, 252.
[166] Ibid.
[167] Ibid, 254-255.
[168] Brooke Little (1904), *supra* note 2 at 11; Murray (1908), *supra* note 136 at 45; Thomas (1901), *supra* note 2 at 36. E. Lewis Thomas, for example, stated that "[t]he custom of disposing of the dead in this country […] has from time immemorial been by burial, but it cannot now be doubted that disposal by other decent means is lawful." Arthur Turnour Murray wrote, "Dissection at Common Law.—'The practice of anatomy is lawful and useful, though it may involve an unusual means of disposing of dead bodies and thought it certainly shocks the feelings of many persons.'"
[169] *Phillips* (1908), *supra* note 26; also see *Doodeward* (1908), *supra* note 31; *Miner* (1910), *supra* note 26.
[170] *Phillips* (1908), *supra* note 26 at para 13. These arguments are distinct from the suggestion that physicians may be entitled to dissect a body owing to the authority conferred by the coroner's ancient powers at common law, see e.g., *Davidson v Garrett* (1899), 30 OR 353, 5 CCC 200 (Ont High Ct) [*Davidson* (1899)]. Ontario's High Court of Justice held that a parol order from the coroner authorized the dissection of a body by a surgeon in anticipating of holding an inquest. Such authority emanated from the ancient rights of the coroner at common law, namely the judicial discretion as a judge of a court of record to undertake dissections without a panel of witnesses. The surgeon entered the property and undertook the dissection in accordance with the coroner's order, in good faith, and without unnecessary violence or indignity.

acceptance of [the] doctrines [of no property] would lead to the conclusion, from every conceivable point of view, that a cadaver is, as the word implies, only flesh given to the worms and in regard to burial nullius in bonis;"[171] such a conclusion dissatisfied, in that it obstructed utilities for the living derived from the dead and their parts such as with "skeletons and anatomical preparations of parts of dead bodies"' and disregarded interests people form in relation to such matters.[172] Further, whilst the "non-development of English case law" on human remains and tissues "may be to some extent accounted for by the separate authority which English ecclesiastical courts exercise over the custody, burial and exhumation of the dead,"[173] the Court referred to the *Anatomy Act* (1832) as "giv[ing] emphasis to the belief that something more than a mere duty of sepulture exists in respect of a dead body."[174] Although only a decision on demurrer, holding that the circumstances disclosed a cause of action, the Court made plain that they saw the English common law as potentially allowing for more than final disposal to the extent the use was not otherwise unlawful or a criminal offence.[175]

The common law also recognizes property in bodies and bodily matters where an individual has applied work and skill to it, transforming it into a specimen of medical study or use.[176] The application of labour to flesh changes it from a "mere corpse awaiting burial," or a tissue awaiting some disposal, creating a property interest in the medical worker which is

[171] *Phillips* (1908), *supra* note 26 at para 12.
[172] Ibid, paras 8-12. The Court cites a statement of Sir J Fitz-James Stephen with apparent approval: 'I suppose […] that anatomical specimens and the like are personal property.' See James Fitz-James Stephen, *History of Criminal Law of England* (London: William S. Hein, 1883).
[173] *Phillips* (1908), *supra* note 26 at para 17.
[174] Ibid, para 16.
[175] Ibid, para 17. However, sources of civil law from France and Belgium were also canvassed in the decision, and favoured attributing rights to the deceased to direct for their disposition or, where that direction has not been provided, the deceased's next of kin. The Court expressed approval of these statements of law and found that they helped disclose a cause of action in the Province of Quebec, see para 26. The reliance on civil law sources, in a civil law jurisdiction like Quebec, limits the decision's precedential value in strictly common law jurisdictions but that does not interfere with my analysis here.
[176] *Doodeward* (1908), *supra* note 31; also see *Dobson* (1996), *supra* note 58.

enforceable and actionable at tort law,[177] and protected by criminal prohibition of theft.[178] Those interests can be transferred by others who assume ownership.[179] The status change to property applies to bodies and bodily matters which undergo dissection, preservation or some additional preparation; but those tissues simply removed and taken from the body, without more, do not properly become property.[180]

Tissues obtained by one's common law power appears to be disposed of as if any other object for which one is without the desire to hold onto: as waste to be abandoned.[181] Canadian law recognizes the possibility of abandoning chattels, which considers separation and the intention to extinguish title.[182] However, abandoning organic matters may give rise to concerns that hazardous contents or emissions will cause a nuisance,[183] create a risk of injury actionable in negligence,[184] or commit an indictable indecency.[185] Such laws appear to require, when abandoning specimens, some form of secure disposal, done quickly to avoid exposure and in a manner that properly concealed the act (unless the remains of a stillborn or deceased infant, in which case laws requiring certification, and final and decent disposal by burial or cremation, apply).[186] For example, legislation now establishes obligations with respect of the disposal of bodily objects but would exist parallel to obligations at common

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[177] *Doodeward* (1908), *supra* note 31.
[178] *R v Kelly,* [1998] EWCA Crim 1578, [1999] 2 WLR 384 (Court of Appeal) (UK) [*Kelly* (1999)].
[179] *Doodeward* (1908), *supra* note 31.
[180] *Dobson* (1996), *supra* note 58.
[181] See e.g., *Browning v Norton Children's Hospital,* 504 SW 2d 713 (Ky Ct App 1974) (United States) [*Browning* (1974)]; *Venner* (1976), *supra* note 33.
[182] *Stewart v Gustafson* (1998), 171 Sask R 27, [1999] 4 WWR 695 at paras 13-23 (SKQB) [*Stewart* (1998)]; *1083994 Ontario Inc. v Kotsopoulos*, 2010 ONSC 3582, para 23 [*Kotsopoulos* (2010)].
[183] See discussion in *Price* (1884), *supra* note 31; *Slattery* (1888), *supra* note 86; *Stewart* (1840), *supra* note 56.
[184] See, by analogy, *Jolly v Sutton London Borough Council*, [2000] 1 WLR 1082, 258 NR 182 (House of Lords (UK) (abandoned boat is *nullius bonis* which may allure children to risk of injury). It is conceivable to me that elements of negligence may be made out with respect of abandoned organic matter which, *nullius bonis*, may imperil those attracted to it.
[185] *Clark* (1883), *supra* note 78; *Newcomb* (1898), *supra* note 78; *Price* (1884), *supra* note 31.
[186] For stillbirths, see e.g., *The Vital Statistics Act*, *2009,* SS 2009, c V-7.21, Part VI (Saskatchewan). See discussion in *R v Giesbrecht*, 2019 MBCA 35 on differences between certification of, and other obligations relative to, stillbirths and offences under the *Criminal Code* for concealing the body of a child (including a stillbirth). Also see *R v Levkovic*, 2013 SCC 25, para 44.

law. Statutes and their subordinate legislation—generally classifying such materials as medical waste or biohazardous—require their destruction, usually by incineration.[187]

No legislation in Canadian provinces and territories until the mid-twentieth century authorized individuals to voluntarily donate their bodies to medical research and education.[188] Unlike the *Anatomy Act* (1832) in England,[189] in Ontario from 1843 until 1962, only "the body of any dead person found publicly exposed or sent to a public morgue […] or of any person who immediately before death was supported in and by any public institution" was eligible under statute for anatomical study at a designated school, unless claimed by a relative or *bona fide* friend.[190] Instead, at common law in Canada, this appears to have been something the prospective decedent could authorize whilst alive (although the authorization would not have been enforceable due to the no-property rule), or by direction of the next of kin (which

[187] See e.g., *Environmental Protection Act*, RSO 1990, c E19. Section 6 of the *Environmental Protection Act*, for example, prohibits the discharge of a contaminant into the natural environment in excess of what the law allows, which, as set out in relevant regulations, includes contamination by hazardous waste. Also see RRO 1990 Reg 347, s 1. Section 1 of RRO 1990 Reg 347 defines hazardous waste as including pathological waste, which encompasses medical waste in the sense of 'any part of the human body, including tissues and bodily fluids, but excluding fluids, extracted teeth, hair, nail clippings and the like, that are not infectious.'

[188] Legislation in Canada did not authorize "donation" or "gifts" of one's own body for anatomical research or education until the 1960s. See the absence of provision in *Anatomy Act* (1914), *supra* note 134; *Anatomy Act* (1927), *supra* note 134; *Anatomy Act* (1937), *supra* note 134; *Anatomy Act* (1950), *supra* note 134; Anatomy *Act* (1843), *supra* note 68.

[189] *Anatomy Act* (1832)*, supra* note 131 at s 8.

[190] See Anatomy *Act* (1843), *supra* note 68. Anatomy acts continued to not reference "donated" bodies until 1967 with the passage of an act that amended the *Anatomy Act* to include reference to "donated bodies," "receive[d] […] for the purpose of anatomical dissection, other than [unclaimed bodies] under section 4." The provision required a medical school to notify the inspector of receipt of the body by means of donation, and to refrain from conducting any dissections until the inspector confirmed the completion of any required forms. Explicit authorization for donation came with the enactment of the *Human Tissue Act* (1962), *supra* note 134, which allowed a patient who was to die in a hospital to authorise, in writing or orally with witnesses, the donation of their body or specified parts thereof for a therapeutic purpose, or for the purpose of medical education or research. Alternatively, if one died outside a hospital or inside a hospital without requesting to donate their body, a hierarchy of people, from spouse to whomever had lawful possession of the body, could authorise the donation after the individual's death, see Ontario's *Human Tissue Act* (1962), *supra* note 134, ss 3 & 4. The preponderance of use at common law is implied by the absence of legislation. Also note public hospitals would count as public institutions, but until the mid-twentieth century hospitals in Canada were primarily places for the "unemployed" and "indigent ill." See e.g., James M Wishart, "Class Difference and the Reformation of Ontario Public Hospitals, 1900-1935: 'Make Every Effort to Satisfy the Tastes of the Well-to-Do'" (2001) 48 *Labour / Le Travail* 27.

may not have been enforceable, but interference might attract tortious liability).[191] Explicit statutory authorization for donation came with the enactment of the *Human Tissue Act* in 1962 which allowed a patient who was to die in a hospital to authorise, in writing or orally with witnesses, the donation of their body or specified parts thereof for a therapeutic purpose, or for the purpose of medical education or research.[192] Alternatively, if one died outside a hospital or inside a hospital without requesting to donate their body, a hierarchy of people, from spouse to whomever had lawful possession of the body, could authorise the donation after the individual's death.[193] It appears that, since the mid-twentieth century, statute law is generally assumed to "occupy the field"[194] when it comes to the use and disposal of human tissues for medical research, education and therapeutic uses.[195] These statutes, with exception of Nova Scotia's *Human Organ and Tissue Donation Act 2019*, require the consent of the individual from whom the tissue will be taken or whose body will be donated, or the consent of the next of kin or some other properly authorised individual.[196] Nova Scotia's legislation introduced a 'deemed consent' scheme where one must opt out of—rather than affirmatively consenting to—organ and tissue donation.[197]

Where the 'gift' of one's body, organs or tissues under statute fails, in the sense that they are not used in medical research, education or therapeutic applications, these statutes generally require their disposal as if they had not been gifted.[198] That leaves open the possibility that some remains will be disposed of in a final and dignified manner, such as by burial or cremation, and others disposed of as medical waste. With anatomy, use of the body

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[191] *Phillips* (1908), *supra* note 26; *Edmonds* (1930), *supra* note 24.
[192] *Human Tissue Act* (1962), *supra* note 134 at ss 1 & 2; *Human Tissue Act* (1970), *supra* note 132.
[193] *Human Tissue Act* (1970), *supra* note 132 at ss 3 & 4.
[194] "Occupies the field" refers to the interaction between legislation and common law. Legislation occupies the field, and displaces the common law with respect of a situation, where there is "an intent to provide a complete and comprehensive statement of the law governing a matter." See *Koubi v Mazda Canada Inc.,* 2012 BCCA 310 at para 54. Although I am not sure I am convinced of this here.
[195] See discussion in Polson (1962), *supra* note 166.
[196] See e.g., *Gift of Life Act,* RSO 1990, c H20, ss 4, 5 [*Gift of Life Act* (1990)].
[197] *An Act Respecting Human Organ and Tissue Donation*, NS 2019 c 6, s 11.
[198] See e.g., *Gift of Life Act* (1990), *supra* note 204 at s 8.

does not—as with transplantation—disappear the donated part, so even with a successful gift there are provisions specifying the need for its further disposal. Duties are placed on heads of anatomy schools or designated recipients to provide dignified and final disposals of bodies that they dissect.[199] Anatomy schools usually hold ceremonies recognizing donors.

3.1.2. *Moral Rights of the Human*

Conventional jurisprudents and philosophers generally orient to the body's integrality to the human subject as the basis for moral rights, which can assist as a standard for the limits of authority for dissection, anatomy and therapeutic applications.[200] As discussed earlier with final and dignified disposal, the subject can be viewed as possessing an intrinsic quality, such as dignity, which relates fundamentally to the achievement of purposive action and self-formation.[201] That person's intrinsic quality establishes a core space of non-interference relating to themselves and binding on others.[202] It also confers authority on the subject—through the exercise of reason—to determine when others can appropriate or otherwise use objects (including the body of the subject) that fold into this space of non-interference.[203] That can extend to parts separated and taken from the living body, or even to the dead body which continues to exist for others like family and friends.[204] Since the subsequent use of separated body parts can, based on intention, form a "functional unity with the body" of the patient, their interests in self-ownership ought to correspond with and justify "their [continuing] rights of use and control."[205] Although weaker in the instance of a dead body, a

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[199] See e.g., *Anatomy Act,* RSO 1990, c A.21, s 7.
[200] See e.g., Foster (2011), *supra* note 32; T.M. Wilkinson, *Ethics and the Acquisition of Organs* (Oxford: Clarendon Press, 2011), chapter 2 [Wilkinson (2011)].
[201] Margaret Jane Radin, *Reinterpreting Property* (Chicago: University of Chicago Press 1993), 41 [Radin (1993)].
[202] Ibid, 38.
[203] Ibid, 35.
[204] Wall (2015), *supra* note 32 at 75-77; also see Stephen R Munzer, *A Theory of Property* (Cambridge University Press 1990), 57 [Munzer (1990)]; Wilkinson (2011), *supra* note 209 at chapter 3.
[205] Wall (2015), *supra* note 32 at 77.

deceased's prior, validly expressed wishes over the post-mortem use of their body can also form a functional unity with their body as it exists for others, placing injunctions on how others act as they confront indications of that prior subjectivity.[206] Claims of self-ownership are then weighed—variably among theorists—against competing social needs. Others, in favour of the public utility that comes with access to and use of bodily material, may minimize claims to ownership (such as with deemed consent to organ and tissue donation).[207]

Conventional jurisprudents also rely on theories of labour to clarify the conditions under which property relations are created. For example, jurisprudents often draw on the political theories of John Locke and Georg W.F. Hegel to explain how the body *becomes* property and *for whom* the body becomes property.[208] With Locke, the *stuff* of property was understood to result from the expenditure of labour, which brought a labourer's body into an intimate mixture with the matter of a thing.[209] Such admixture transformed the thing by 'remov[ing] [it] out of the state that nature hath provided,'[210] creating a different thing subject to the designs of the now-owner.[211] The transformative effect relied on the labourer having a prior property in their person—the latter of which Locke treated as extending from man as formed in the image of God—whose qualities were transmitted through the act of work.[212] The thing, now infused with a person's qualities, thus existed apart from nature in common with all other humans.[213] Likewise Hegel substantiated a labour thesis, but also argued the will took form from the appropriation of things external to the subject.[214] Hegel posited a

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[206] Ibid, 62-63. Also see Falconer (2019b), *supra* note 93.
[207] See discussion in Robert M Veatch, "Routine Inquiry about Organ Donation: An Alternative to Presumed Consent' (1991) 325 *The New England Journal of Medicine* 1246.
[208] Jeremy Waldron, "Two Worries about Mixing One's Labour" (1983) 33 *Philosophy Quarterly* 39 [Waldon (1983)]; Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) [Waldon (1988)]; Wall (2015), *supra* note 32. Also see G.W.F. Hegel, *Elements of the Philosophy of Right* (Cambridge: Cambridge University Press, 1991) [Hegel (1821)]; Locke (1689), *supra* note 175.
[209] Locke (1689), *supra* note 175.
[210] Ibid.
[211] Ibid.
[212] Ibid.
[213] Ibid.
[214] Hegel (1821), *supra* note 208.

necessary connection between subject and object, in that the object is vital to the expression of the subject.[215] Property then had a vital purpose in the constitution of the human subject.[216] Without it—without appropriation of that externality—the self could not exist.[217] Not only did the exercise of labour transform a thing into property, as with Locke, but property was necessary for the realisation of a human subject.[218] In the hands of jurisprudents, Hegel's thesis can explain claims of self-ownership over matters separated from the body owing to their necessary connection to the realization of the self.[219] A contingent connection between bodily matter and the person from whom bodily matter is taken would not countenance a superior claim, which might allow others to claim the tissue as theirs.[220]

3.1.2. *Aporia II*

Again, whether by recognizing the intrinsic capacity for dignity in the human body, or extoling the fundamental importance of property to the formation of a subject, the conventional theories used to orient to the dissected body, or the body used for therapeutic purposes, aver but never properly attend to the material body. The body is not seen as in itself productive of legal difference. Rather, jurisprudents focus on abstracted qualities or qualities capable of abstraction (e.g., dignity, autonomy, labour) in assessing the attribution, content and limits of rights to the body.[221] Likewise, in those few theoretical engagements with corpse-punishments it appears admitted that the evisceration of the body was the object and

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[215] Ibid.
[216] Ibid.
[217] Ibid.
[218] Ibid.
[219] See e.g., Falconer (2019a), *supra* note 5 at 901-902; Imogen Goold, Kate Greasley, Jonathan Herring and Loane Skene, "Introduction," in *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century?* (London: Bloomsbury, 2016), 1-8, 3; Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (London: Hart 2007), 141; J.W. Harris, "Who Owns My Body?" (1996) 16 *Oxford Journal of Legal Studies* 55 [Harris (1996)], 68; Muireann Quigley, "Property in Human Biomaterials: Separating Persons and Things?" (2012) 32:4 *Oxford Journal of Legal Studies* 659, 662; Wall (2015), *supra* note 32 at 5, 47.
[220] See especially in Wall (2015), *supra* note 32.
[221] See the argument generally in Dietz et al. (2020), *supra* note 112.

consequence of legal power, but its function as punishment and evaluation within jurisprudence is assessed with regard to utility or criticised according to the indignities it causes.

But both desecration as punishment, and medical authority to produce specimens and therapeutics, create distinctions in the lawful disposal of the body and parts that correspond to different images of the material body. With punishment, the body was treated profanely in its disposal, which followed the disentitlement (if not prohibition of) decent interment. The profane treatment was demonstrated through the abandon, display, concealment or evisceration of the body and parts thereof, perhaps most aptly put as the body being 'at the King's disposal.'[222] Generally, jurists and law writers explicating the law at this time justified this profanation as a response to a person's transgression of human laws and laws of nature (specifically, nature as designed by God); punishment was then exacted on the body as the King's or God's subject, destroying the path to resurrection and kindling terror in others that survive.[223] For example, the seventeenth-century jurist, Sir Matthew Hale, made this clear in his account of *felo de se*:

> No man hath the abſolute intereſt of himſelf, but 1. God almighty hath an intereſt and propriety in him, and therefore ſelf-murder is a ſin againſt God. 2. The king hath an intereſt in him, and therefore the inquiſition in caſe of ſelf-murder is *felonicè & voluntariè ſeipfum interfecit & murderavit contra pacem domini regis*.[224]

Distinctions in the status of specimens and therapeutic tissues, and their lawful use and disposal, also seem to rely on images of the mutilated body. Since their introduction in statutory law, anatomy legislation contemplated a final disposal of the dissected body, conducted in the manner of burial (and later cremation).[225] But such obligations appear to discriminate between the discrete body or those remains that can be said to countenance

[222] Blackstone (1765), *supra* note 28.
[223] Foucault (1977), *supra* note 148.
[224] Hale (1736), *supra* note 36 at 412.
[225] *Anatomy Act* (1832), *supra* note 131 at s 13; *Anatomy Act* (1843), *supra* note 68 at s 9.

that body, and tissues or specimen-parts that are extracted from the body proper. This appears to leave open the possibility that tissues or specimen-parts may be retained, even where one is obligated to provide a dignified disposal to the body proper. For example, under Manitoba's *The Anatomy Act*, the obligation on a physician or another proper custodian to perfect a final disposal seems to contemplate the body, and not "parts thereof," to which section 13 of the *Act* refers separately for the purposes of authorizing possession.[226] This would appear to allow for handling and disposal practices other than interment for those "parts thereof." Furthermore, if specimens were created at common law, there appears to be no obligation as to its disposal apart from liability for nuisance, negligence owing to the creation of danger, or risk of indictment for indecency.[227]

The distinction between tissues or specimen-parts, and bodies proper, is demonstrated historically by Dr. Frederick Luney, an eminent pathologist in Ontario in the

[226] *The Anatomy Act,* CCSM 1987, c A80, s 13. Relatedly, Saskatchewan's *The Human Tissue Gift Act, 2015,* SS 2015 c H-15.1, ss 7 & 9 [*Human Tissue Gift Act* (Saskatchewan), makes the distinction between part and whole explicit; in addition to referring separately to the body 'or the part of [their] body specified in the consent,' allowing for variable donations of bodies and parts thereof for the purposes of medical education and scientific research, *The Human Tissue Gift Regulations* enacted in 2018 under the *Act* specifies that tissues "obtained for the purposes of medical education must be [disposed] in accordance with the *Saskatchewan Biomedical Waste Management Guidelines*" (there are no such requirements for tissues obtained for research) Chapter H-15.1 Reg 1, s 7(2). Only if the gift specified in the consent fails, in the sense that for whatever reason it cannot be given effect, 'the tissue or part of the body and the body to which it belongs must be dealt with and disposed of as if no consent had been given,' but even this does not necessarily require interment for those parts that might be disposed of otherwise, see *Human Tissue Gift Act* (Saskatchewan), *supra* note 226 at s 14. Saskatchewan's *Cemeteries Act* would appear to only require 'a dead human body'—as opposed to any part thereof—to be disposed of in a cemetery, by cremation or in accordance with regulations enacted under the *The Cemeteries Act, 1999*, SS 1999, c C-4.01, ss. 1 & 61(1). No relevant provisions are found in the regulation enacted under this act. Saskatchewan's *Public Health Act, 1994,* SS 1994, c P-37.1, contemplates the responsible Minister enacting regulations 'governing the preparation, storage, transportation, interment, disinterment and disposal of dead bodies and parts of bodies other than for organ transplants,' but no such regulations exist.

[227] Regarding nuisance, see discussion in *Price* (1884), *supra* note 31; *Slattery* (1888), *supra* note 86; *Stewart* (1840), *supra* note 56. Regarding negligence, see *Jolly* (2000), *supra* note 192. Regarding indictable indecency, see *Clark* (1883), *supra* note 78; *Newcomb* (1898), *supra* note 78; *Price* (1884), *supra* note 31.

early- and mid-twentieth century.[228] Dr. Luney had a private museum of hundreds of gross (as in large) specimens, as well as microscopic preparations, taken from many physicians in Ontario (including his own gallbladder preserved by his attending physician from when Dr. Luney was young). This collection—including bone and soft tissue—was meticulously recorded, with specimens recorded as part of the museum between 1930 and 1960. Luney's private collection disappeared with his death, although hundreds of records remain documenting a collection made possible in law through the flesh's partition and preservation separate from the human body. Relatedly, until the introduction of new protocols in the twenty-first century, coroners in Ontario routinely held onto human tissues following post-mortem examinations.[229] The protocols—eventually codified in Regulation 180 of Ontario's *Coroners Act*[230]—established the need to clearly communicate with the next of kin, and to properly dispose of the tissues when retention was no longer necessary.[231] But prior to their

[228] See Dr. Luney's fonds, accessible at *The Congregation of the Sisters of St. Joseph in Canada Archives*, in London, Ontario, Canada. Dr. Luney was also involved in organizing "tissue seminars" at annual meetings of the Ontario Association of Pathologists, writing to various contacts in search of gross specimens relating to interesting cases (which, in some cases were 'inadvertently discarded', as one corresponding pathologist put it). But, even the body itself does not necessarily lead to final disposal, which suggests such distinctions are not merely caused by a division between part and whole. This may be demonstrated by the public dissection of Jeremy Bentham's body in 1832 and its subsequent display at University College London, see James Crimmins, "Introduction," in *Jeremy Bentham's Auto-Icon and Related Writings* (London: Thoemmes Press, 2002) [Crimmins (2002)]. Or by the permanent display of Charles Byrne's skeleton (who was anatomized in 1788) at the Hunterian Museum of the Royal College of Surgeons, see Mary Lowth, "Charles Byrne, Last Victim of the Bodysnatchers: The Legal Case for Burial" (2021) 29:2 *Medical Law Review* 252.
[229] See Chief Coroner for Ontario and Chief Forensic Pathologist for Ontario, *Memorandum 08-08* (8 December 2008) [Chief Coroner (2008)]. The memorandum was obtained via an access request that I made under Ontario's *Freedom of Information and Protection of Privacy Act,* RSO 1990, c F31.
[230] RRO 1990, Reg 180; *Coroners Act*, RSO 1990, c C.37.
[231] Chief Coroner (2008), *supra* note 239; Office of the Solicitor General, "Ontario inviting families to inquire about organ retention" (13 June 2012), https://news.ontario.ca/en/release/21300/ontario-inviting-families-to-inquire-about-organ-retention [Solicitor General (2012)]; Office of the Solicitor General, "Organ Retention in Ontario After Coroner-ordered Autopsies" (5 June 2013), https://news.ontario.ca/en/backgrounder/25882/organ-retention-in-ontario-after-coroner-ordered-autopsies.

introduction, tissues including whole organs were routinely kept, sometimes indefinitely, and disposed as waste without the knowledge of the deceased's next of kin.[232]

The cases canvassed are variable and undoubtedly differ, but all share in common an impression left by the severed, mutilated and preserved body or part. In this way, the materiality of the body in parts, or otherwise retained as a specimen, appears to *matter* to the authority to use and dispose of those tissues. Yet the materiality of severed, mutilated or preserved bodies and parts is not treated in conventional jurisprudence as contributing, in any meaningful way, to their lawful use and disposal; attention diverts to questions of dignity, property or punishment, which abstract away from the body despite relying on it. Cuts, slices and composites of flesh—as absences present in the law[233]—thereby form the second aporia of concern in this dissertation, and are considered in Chapter 4.

2.3. Claims of Self-Ownership in Law and Legal Theory

2.3.1. *Theories of the Person and Body Parts*

As noted above, the common law generally does not admit the possibility of property in the dead body; although that is not absolute. Nonetheless the no-property rule is often cited to deny decedents the power to direct for their own disposal, as the body cannot form part of their estate.[234] Likewise, the no-property rule is often thought to complicate claims among the living to custody or control of tissues or parts once removed or detached from their own bodies.[235]

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[232] Solicitor General (2012), *supra* note 241; "Ontario coroners have kept over 4,000 organs from autopsies" (13 June 2012) *National Post*, https://nationalpost.com/news/canada/ontario-coroners-have-kept-over-4000-organs-from-autopsies-now-theyre-asking-what-they-should-do-with-them. Similar types of practices were at issue in *AB* (2004), *supra* note 92.
[233] Leder (1990), *supra* note 129.
[234] *Williams* (1882), *supra* note 60; also *Hunter* (1930), *supra* note 51; *Saleh* (1993), *supra* note 50.
[235] See discussion in Remigius N Nwabueze, "Regulation of Bodily Parts: Understanding Bodily Parts as a Duplex" (2019) 15:4 *International Journal of Law in Context* 515 [Nwabueze (2019)].

Bodily fragments are complicatedly experienced, forming diverse embodiments that disturb the boundary between persons and properties and challenge the conventional doctrines and theories applied to the human body (see Chapter 5).[236] Some legal scholars answer by enlarging the putative limits of the legal person so that, provided the individual desires it, they may control what is done with the fragment (including its alienation) despite physical separation.[237] That is generally done according to the law of consent—such as in organ and tissue donation—although sometimes the enlargement of the person relies on claims of property advancing self-ownership.[238] That is, of course, until the fragment reaches some point at which it becomes just another object of property, disregarding the "humanness" of its origin, appearance and meaning, to support claims under the usual rules of property.[239] Others focus on the body's "humanness" as exemplary of communally held values—usually dignity—that prescribe (and proscribe) individual uses of its parts even after their separation from the body.[240] Each answer, albeit with different emphasis and effect, attempts to restore the boundary between persons and properties; but, as argued further below, the complex embodiments formed with bodily fragments expose the very boundary, and categories of person and property, as inadequate.[241] That inadequacy is felt particularly as biotechnologies and cultural practices with respect of the body proliferate.[242]

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[236] See discussion in Esmée Hanna, "Disposalscapes: 'Estranged' Limbs after Amputation" (2021) 27:1 *Body & Society* 27 [Hanna (2021)].
[237] Mortimer (1993), *supra* note 167; Wall (2015), *supra* note 32.
[238] Regarding self-ownership through doctrines of property, see e.g., Harris (1996), *supra* note 228; Graeme Laurie, *Genetic Privacy: A Challenge to Medico-Legal Norms* (Cambridge: Cambridge University Press, 2009); J.K. Mason and G.T. Laurie, "Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey" (2001) 64:5 *Modern Law Review* 710; Amitpal C Singh, "The Body as Me and Mine: The Case for Property Rights in Attached Body Parts" (2021) 66:3 *McGill Law Journal* 565 [Singh (2021)]; Jesse Wall, "The Legal Status of Body Parts: A Framework" (2011) 31:4 *Oxford Journal of Legal Studies* 783 [Wall (2011)].
[239] Bernard M Dickens, "Control of Living Body Materials" (1977) 27 *University of Toronto Law Journal* 142, 183 [Dickens (1977)]; Gerald Dworkin and Ian Kennedy, "Human Tissue: Rights in the Body and its Parts" (1993) 1 *Medical Law Review* 291.
[240] Foster (2011), *supra* note 32.
[241] Mykitiuk (1994), *supra* note 12.
[242] Ibid.

More than inadequate, insistence on the person-property boundary can cause (the experience of) injustice where authorities deny people's claims to separated fragments.[243] Doctrinally that has been achieved by preserving the no-property rule from *Haynes's Case* (1614) (namely their status as *res nullius* or *nullius in bonis*—the property of no one—upon death or, in the case of fragments, separation) and the work-and-skill exception from *Doodeward* (1908).[244] For both doctrines, the subject ends at the limits of the bounded, living body; the corpse or fragments separated from the whole (subject, person, etc.) become mere objects, incapable of the agency needed to have and realize rights.[245] Their status as objects is unchanged by the no-property doctrine.[246] These parts still fall away from the subject, given up to a passive, object-filled nature as *res nullius* (like "wild" fauna and flora). The work-and-skill doctrine then merely fulfills that subject-object division, and person-property boundary, by admitting that the labour of a subject can transform the character of an object—elevating it from nature—so to become property.[247] The corpse or fragments are reinforced as mere objects in their rendering as property: distinguished from the person in their subordination to the will and dominion of the owner-subject.

Both doctrines thereby fix in place the person-property boundary, which, as legal scholar Remigius Nwabueze describes, regulates the use and disposal of bodily matters by functioning as a "duplex": concurrently denying property claims of some, whilst paradoxically

[243] Hanna (2021), *supra* note 246.
[244] *Doodeward* (1908), *supra* note 31; *Haynes's Case* (1614), *supra* note 24.
[245] Nwabueze (2019), *supra* note 245.
[246] Ibid. The no-property doctrine denies the corpse or fragment is the property of the next of kin (in the case of the corpse), or the individual from whom the fragment was taken. Despite the doctrine's emergence within the common law in tandem with the superior claims of ecclesiastical law, the doctrine appears to work today as a purifying device, denuding the tissue of its subject- or person-like status.
[247] Davies and Naffine (2001), *supra* note 12. See discussion generally about subject-object division and property in Nicole Graham, *Lawscape: Property, Environment, Law* (Abingdon: Routledge, 2010) [Graham (2010)]. Also see Johanna Gibson, *Owned, an Ethological Jurisprudence of Property: From the Cave to the Commons* (Abingdon: Routledge, 2019) [Gibson (2019)].

enabling the claims of others.[248] The body's or fragment's transmutation as *res nullius* denies its human provenance as the foundation of legal rights, disabling claims from the most likely of sources: the individual from whom the matter was taken, their next of kin or other friends and family.[249] Doing so facilitates the ordinary or customary use of the body or fragment (disposal in the parish churchyard, municipal cemetery, etc. for the whole body; discard as medical waste for the fragment)—that was especially important when the dead were principally the concern of ecclesiastical authorities, but is also convenient for the administration of hospitals and mortuary practices. The duplex also permits the appropriation of the body or fragments by others. Historically, Nwabueze recounts, this was exemplified in mediaeval trade of *mummia*, where parts of the dead became commodities sold and consumed for therapeutic purposes;[250] likewise, there was once a burgeoning trade of relics (the preserved tissues of saints) among members of the established church in England (and elsewhere in "Christendom") that rendered some human matter property.[251] There was also, as noted above, the practice of dissection, and the collection and trade of human specimens, which, when contested, relied on the no-property rule to justify the taking of parts.[252]

That duplex character persisted with the work-and-skill doctrine, which augmented claims that the no-property rule already authorized. It did so by clarifying forms of action (torts of detinue, conversion) available when those claims were interfered with.[253] That is suggested in *Dobson* (1996), where the Court of Appeal of England and Wales applied the no-property rule to deny the next-of-kin's claims to the brain of a deceased family member

[248] Nwabueze (2019), *supra* note 245. By referencing 'duplex', Nwabueze, is drawing on the work of anthropologist Marilyn Strathern, see Strathern (2001), *supra* note 34.
[249] Nwabueze (2019), *supra* note 245.
[250] Nwabueze (2019), *supra* note 245.
[251] See e.g., Bynum (1989), *supra* note 80; Caroline Walker Bynum, *Fragmentation and Redemption: Essays on Gender and the Human Body in Medieval Religion* (Brooklyn: Zone Books, 1992); Geary (1994), *supra* note 30.
[252] See e.g., *Dobson* (1996), *supra* note 58; *Sharpe* (1857), *supra* note 57.
[253] Nwabueze (2019), *supra* note 245.

that was removed by a pathologist.[254] No work and skill had been applied to the tissues and so no exception to the no-property rule arose; but even if it had, the court suggested that would not legitimate a right in the next of kin.[255] The claimants would need to be the labourer, or have obtained an interest in the thing by sale or gift, to benefit from the work-and-skill doctrine.[256] There was also no "practical possibility" nor any "sensible purpose" in reuniting the brain with the body for final disposal, falling outside the remit of the next of kin's duty and any possessory interest in furtherance of that duty.[257] Instead, such tissues were waste that were to be, pursuant to public health and environmental legislation, and obligations under tort law, properly and safely disposed.

Both doctrines also arose in a cultural and political context where, unlike other things, the human body and its component parts were not considered alienable by the source individual (a consideration distinct from the body's importance to ecclesiastical law). That context—elaborated in moral philosophy and normative jurisprudence of the time—strongly repudiated self-ownership, as self-ownership encouraged someone to degrade themselves in direct contradiction with freedom.[258] Even if the part was removed during sanctioned surgery, following diagnosis of disease, disorder or injury, there were strong presumptions against treating it as the patient's chattel from which they could profit.[259] Moral philosopher Immanuel Kant for example wrote in his *Lectures on Ethics* (published between 1775 and 1780) that the "human being is not entitled to sell his [sic] limbs for money, even if he were offered ten thousand thalers for a single finger,"[260] which, as property theorist Stephen Munzer clarifies, forms "part of a broader position of Kant's according to which persons lack property rights in

[254] *Dobson* (1996), *supra* note 58.
[255] Ibid.
[256] See e.g., *Doodeward* (1908), *supra* note 31; *Kelly* (1999), *supra* note 186.
[257] *Dobson* (1996), *supra* note 58.
[258] See e.g., Immanuel Kant, *Lectures on Ethics* (Indianapolis: Hackett Press, 1963), 124 [Kant (1963)].
[259] See e.g., *Moore v Regents of the University of California,* 271 Cal Rptr 146 (Cal SC 1990) (United States) [*Moore* (1990)].
[260] Ibid, 124.

parts of their own bodies."[261] Kant's interdict extended from limb to tooth to prostitution, all of which Kant argued treated "his [sic] person [as] a thing," in that the body was no longer "part of the self," whose "togetherness with the self it constitutes the person."[262] As Munzer puts it, "*if* others *were* permitted to treat me as a dog, even if they do not do so or I obstruct them from doing so, I would still lose some freedom […] [f]or I would lose the justified ability to claim and require that they treat me with the respect appropriate to human beings." Variations of Kantian appeals to the dignity of human persons persist in contemporary discourse on commodification and sale of human tissues: to allow individuals to sell off parts treats them not as ends possessing the creative capacity of self-will, but as means that reduce them as things open to degradations by others.[263]

Self-alienation also disturbed standards of decency and deprived the sovereign of value in his subjects. For example, the law of mayhem, or maim, prohibited "violently depriving another of the use of such of his members, as may render his the less able in fighting, either to defend himself, or to annoy his adversary," such as by "cutting off, or disabling, or weakening of a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts, the loss of which in all animals abates their courage."[264] Interference with such parts was a breach of the King's peace, and "an offence tending to deprive [the King] of the aid and assistance of his subjects."[265] Mayhem has fallen to disuse but surgeons or others may still be prosecuted for causing grievous bodily harm where the removal of limbs or tissues is not medically indicated (such as in cases of elective

[261] Stephen R Munzer, "Kant and Property Rights in Body Parts" (1993) 6:2 *Canadian Journal of Law and Jurisprudence* 319, 319 [Munzer (1993)].
[262] Kant (1963), *supra* note 268 at 165-167.
[263] See e.g., Foster (2011), *supra* note 32.
[264] Blackstone (1765), *supra* note 28 at Chapter 15. Also see William Hawkins, *A Treatise of the Pleas of the Crown; or, a System of the Principal Matters Relating to that Subject, Digested under Proper Heads, Volume 1* (1824), 107.
[265] Blackstone (1765), *supra* note 28 at Chapter 15.

amputations or “extreme” body modification).[266] Although with focus on consequences rather than inherent dignity, such a paradigm is akin to the critique of self-ownership in that both reinforce the noncoincidence of person and thing, subject and object, and human and property.

3.1.2. *Theories of Property and Body Parts*

Conventional jurisprudents—when considering self-ownership—generally look to the indicia of property especially the exclusions involved in ownership, as well as the owner’s responsibilities.[267] In other words, the content of the law of property as distinguished from other categories of law. Irrespective of how the human body or parts thereof become property, once understood as such, the owner is thought to enjoy certain rights characterised by that legal status: particularly the right of exclusion.[268] The content of that right of exclusion depends on the theory of property.[269] For example, A.M. Honoré described property as comprised of “incidents of ownership”—"those legal rights, duties and other incidents which apply, in the ordinary case, to the person who has the greatest interest in a thing admitted by a mature legal system”[270]—which included:

> the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity […][271]

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[266] *R v BM,* [2018] EWCA Crim 560 (UK) [*BM* (2018)]. Also see Richard B. Gibson, “No Harm, No Foul? Body Integrity Identity Disorder and the Metaphysics of Grievous Bodily Harm” (2020) 20:1 *Medical Law International* 73. Also see *R v Brown (Anthony)*, [1994] 1 AC 212 (UK) [*Brown* (1994)] where the House of Lords held that consent could not excuse grievous bodily harm actually caused. *Brown* (1994) was relied on in *BM* (2018).
[267] See e.g., J.E. Penner, *The Idea of Property in Law* (Oxford: Clarendon Press, 1997) [Penner (1997)].
[268] Ibid.
[269] Ibid.
[270] A.M. Honoré, “Ownership” in A.G. Guest, ed, *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford: Oxford University Press, 1961), 107-147, 107 [Honoré (1961).
[271] Ibid, 113.

Each of these incidents, "concentrat[ed] in the same person" or owner,[272] circumscribe that individual's right to exclude others with respect to handling, using, selling, or otherwise intervening on a thing (land, chattel, incorporeals). Not all incidents of ownership needed to be present to countenance property according to Honoré's analysis (even if the "mature legal systems" of liberal societies tended to maximally express these standard incidents), so, for jurisprudents relying on Honoré's standard incidents, ownership of the human body or parts thereof need not include the right to income or capital, for example, which would necessitate them becoming commodities.[273]

With different emphasis from Honoré, James Penner focusses on the direction of claims to and of property*,* arguing that, of course, property rights are claims to exclude made against the entire world (*in rem*), but duties owed *also* are made *in rem* (to property owners as a class, that potentially anyone can join, of those who make up the world).[274] The impersonality of claims is a defining characteristic to the act-situation in which property is found, which claims *in personam* may succour or modify, but cannot corrupt.[275] Laws of property depend on this impersonality for if knowledge of an owner's identity was necessary for the performance of a duty, the machinery of the legal system would be brought to a halt: it would be impractically time-consuming for the duty-bearer to locate, and verify the identity of, the rights-bearer before every social transaction interfering on property.[276] Instead, duties *in rem*, namely those to refrain from interfering with a thing of property, are owed to every property owner irrespective of their identity.[277] It is within this impersonal matrix of rights and duties *in rem* that the distinctive quality of property claims is found, allowing the rights-bearer the freedoms to use, manage, alienate, destroy, etc., the property, unless enjoyment of those

[272] Ibid.
[273] Penner (1997), *supra* note 277.
[274] Ibid.
[275] Ibid.
[276] Ibid.
[277] Ibid.

freedoms were to interfere with others or were contrary to political or moral limits accreted in the form of law through legislation.[278] Following Penner, the human body or parts thereof could become property where peoples' claims to and of such matters were *in rem*, although for a complete picture of what could be done with such matters, the analysis would need to continue to assess whether other entitlements existed and whether (and what) limits were placed on the rights-bearer's freedoms.[279]

The notion of rights and duties *in rem* bears on the disposal of property—including of human bodies and parts—as a subset of legal relations found in the act-situation of property. Barring legislation responding to the specific mores of a community, the concept of property among common law jurisprudents supplies a right to rid oneself of their property by transfer of title to others (through contract or gift) or by its destruction.[280] The transfer of title may be facilitated by transactions made *in personam*, through the law of contract or the law of gift, for example, but such transactions do not alter the duties owed *in rem* which are owed to property owners as a class of those making up the world as opposed to particular persons—the title persists *in rem* irrespective of the transactions *in personam* underlying its transfer.[281] Likewise, the owner's destruction of the owned thing operates *in rem* by also extinguishing title in the thing.[282] The owner's destruction is distinct from the destruction caused by someone else since the latter owes duties of non-interference to property owners *in rem* and the property owner, by their very nature, does not relative to their property.[283] However, one's title cannot be transferred or destroyed through abandonment.[284] As Penner writes, the common law does not fully recognise abandonment as it would allow an object to retreat from

[278] Ibid.
[279] Ibid.
[280] Ibid.
[281] Ibid.
[282] Ibid.
[283] Ibid.
[284] Ibid.

law, and their prospective harms unattended.[285] Unlike that which exists outside the law from its genesis, by its nature, as 'wild', that which is property is touched by law and, as a result, the responsibility of whomever holds title.[286] Whilst the common law cognises harms attendant to the wild—for example, the law provides for its management and control through notions of property, or forestry inherited from prior jurisdictions—the law does not want things to revert to hinterlands; once held by law, the law wants to keep such things close in its hold.[287] But, as indicated above with reference to case law in Canada and as discussed in Chapter 5, objects *are* abandoned including bodies and bodily matters without consequence irrespective of what legal doctrine and conventional jurisprudence provide.

The other element jurisprudents orient to is separability. Both Honoré and Penner, like other jurisprudes of property,[288] briefly consider the human body and parts thereof in their work to illustrate separability.[289] In addition to incidents of ownership, or claims *in rem*, which define (and delimit) rights of exclusion, Honoré and Penner also argue that the thing that becomes property—the *res*—must at least exhibit the physical and social qualities of being separable from the individual who has interests in the *res* to countenance the proper expression of property relations[290]. For example, Honoré emphasised both the physical and social qualities of being separable when he wrote:

> A person is not, in most systems, regarded as owning his body, reputation, skill, honour or dignity. At most he has a simple right to these things, which are therefore not legally 'things'. By a 'simple right', I mean one which is protected by law but is not alienable or transmissible. Now it may be that the doctrine that one does not own one's body, etc. is influenced by the linguistic fact that such aspects of one's person do not fall within the prime class of things, external material objects. But a more likely explanation is simply that it has been thought undesirable that a person should alienate his body, skill or reputation, as this would be to interfere with human freedom. When human beings were regarded as alienable and ownable they were, of course, also regarded as being

[285] Ibid. *Contra*, see *Stewart* (1998), *supra* note 190.
[286] Penner (1997), *supra* note 277.
[287] Ibid.
[288] See e.g., Neil MacCormick, 'Rights' in *Laws of Scotland: Volume II* (Edinburgh: Stair Society, 1990), para 1100.
[289] Honoré (1961), *supra* note 280; Penner (1997), *supra* note 277.
[290] Honoré (1961), *supra* note 280; Penner (1997), *supra* note 277.

> legally things: and it is quite easy to conceive arrangements under which one could, for instance, lease one's reputation or one's skill for a term of years, so that the lessee could sue for infringements of the lessor's good name or for the fruits of his work. It may, indeed, be argued that contracts for the assignment of goodwill and contracts of service are examples of at least partial alienations of these interests.[291]

Whether or not something is separable is then set out in law institutionally: as Honoré further wrote, '[w]hen the legislature or courts think that an interest should be alienable and transmissible they will *rei*-fy it and say that it can be owned, that it is property.'[292] It also moves in the other direction, de-reifying the candidacy of a 'thing' as property, such as with the abolition of chattel slavery.

Differently, yet relatedly, Penner's separability thesis is expressed in this way:

> Only those 'things' in the world which are contingently associated with any particular owner may be objects of property; as a function of the nature of this contingency in theory nothing of normative consequence beyond the fact that the ownership has changed occurs when an object of property is alienated to another.[293]

He further clarifies the two propositions 'embodi[ed]' by the separability thesis:

> The first, that some idea of contingent association or 'separability' informs our understanding of what things can be property […] A necessary criterion of treating something as property […] is that it is only contingently ours; we must somehow show why it is ours because it might well not have been; nothing similar need be said about those things with 'necessary links with particular persons', like our talents, our personalities, our friendships or our eyesight.[294]
>
> [But] [w]hat distinguishes a property right is not just that they are only contingently ours, *but that they might just as well be someone else's.*
>
> This aspect of contingency is embodied in the second proposition of the separability thesis. The contingency of our connection to particular items of property is such that, in theory, there is nothing special about *my* ownership of a particular car—the relationship to the next owner will have to it is essentially identical.[295]

Accordingly, the object, thing or *res* of property relations must be contingently related to the subject who claims rights, and to whom duties are owed *in rem,* with respect to that property.

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[291] Honoré (1961), *supra* note 280 at 130.
[292] Ibid.
[293] Penner (1997), *supra* note 277 at 111.
[294] Ibid, 111-112.
[295] Ibid, 112.

The nature of the relationship between the owner and the *res* must be contingent in the sense that others could, in a system of equivalence, occupy the owner's position if title were transferred.[296] The human body, as a whole, does not ordinarily satisfy these propositions for Penner because "[w]e are stuck in, or to, but certainly with, them."[297] Similarly, the dead body is generally led by others as the last remains of a person's self, again entwining matter with personality.[298] But separation from or the loss of bodily matters may satisfy these propositions and thus constitute property.[299]

For example, Penner writes that the loss of limb or kidney may affect him, but it would not lead to a 'constitutive change in [his] character on the very occurrence of [the] event.'[300] The tissue does not form a fundamental part of his personality. In this sense, the first proposition of the separability thesis appears satisfied. Still the question remains as to whether others could stand in equivalent relation to the lost limb or kidney. To this, Penner notes that "until recently […] [w]e did not […] regard our connection to [the limb or kidney] as contingent: they could not just as well be someone else's body parts;" and yet in the past century technology and social convention have altered relations to bodily matters, which for Penner, render them at least candidates for property. The limb or kidney could countenance property to the extent that others could, through the aid of medical technology, experience their value, but not in the personal sense; rather an impersonal value that anyone, in theory, could enjoy. The penumbral threshold between personal and impersonal fascinates Penner, as he speculates as to when an essential organ, like the brain, might become property:

> The role of technology is obvious. To the extent that the removal of an organ causes death, such an organ cannot be regarded as property. Consider the idea of selling one's brain. If, however, science proves capable of disconnecting an organ so that one

[296] Ibid.
[297] Ibid, 121.
[298] Ibid, 122.
[299] Ibid, 114.
[300] Ibid, 114-115.

> remains essentially the same person, as is the case with a kidney, we can regard such an organ as a contingent material possession, and therefore one's property.[301]

Implicit in all of this is that there must be an owner, and a thing to be owned, and "these two cannot be the same thing."[302] To be owned would reduce one's humanity, which is incompatible with the theory of person upon which Penner and other jurisprudents rely. Penner draws on chattel slavery to illustrate the point:

> In true chattel slavery, the slave-owner owns the slave as he does a tame animal. The slave-owner extracts value from the body of the slave by acting on it, applying external stimuli of various kinds (stick or carrot, as appropriate, though as history illustrates mostly stick). What distinguishes this kind of slavery from status slavery is that the slave is not regarded as a responsible human agent with duties under the law. He has no duties—he just provides value more or less adequately, as does a cow, a car, or a vein of ore. On this view of slavery, the slave is harvested, usually for the energy of his labour, but also possibly for his material parts if need be [like render[ing] up parts of his body upon request, or tak[ing] his own life].[303]

If chattel slavery exemplifies property, as Penner suggests, then it would, to the extent that title continues and assuming the absence of legislated limits, allow virtually anything to be done with property including *res* sourced from a human (and that which is itself human in a non-legal sense). The maintenance of such a system depends upon opposing the human person to property, for which the separability thesis provides.[304] But the mere existence of this opposition is not sufficient to explain the full significance to the use and disposal of the human body and parts thereof. It is also important to analyse the conditions of separability argued or assumed in their accounts—where the line is drawn—as that shapes the precise form of the opposition in jurisprudential ideas of the body. For that reason it is important to consider how jurisprudents contest the threshold between person and property. Some like Wall extend the person to the dead body and bodily matters beyond physical separation, and, accordingly, extend necessity to respect the person's consents pertaining to the use and

[301] Ibid, 122.
[302] Ibid, 125.
[303] Ibid, 123.
[304] Ibid.

disposal of their dead body and bodily matters, such as in the whole body or organ and tissue donation.[305] For a time, at least, the dead body and bodily matters are ennobled with the qualities of personality.[306] Others, by contrast, evacuate the person from the dead body and bodily matters at their earliest convenience, freeing up the possibilities of what can be done with such materials in their jurisprudence.[307]

Bentham exemplified the latter position in his writings on the 'auto-icon' and by demonstration with the post-mortem treatment of his body.[308] Bentham's unpublished *Auto-Icon: Or, Farther Uses of the Dead to the Living,* written immediately prior to his death in 1832,[309] described multiple uses of the dead in place of sepulchre that fell under two categories: "1. A transitory [category], which I shall call anatomical, or dissectional : 2. A permanent [category],—say a conservative, or statuary."[310] Of the latter, permanent category of use, Bentham further described subcategories of "uses—by which addition is to be made to human happiness":

> 3. Moral, including 2. Political; 3. Honorific; 4. Dehonorific; 5. Economical, or money-saving; 6. Lucrative, or money-getting; 7. Commemorational, including 8. Genealogical; 9. Architectural; 10. Theatrical; and 11. Phrenological.[311]

What is remarkable is that Bentham situated the dead body comfortably within the law of property whose uses could, like other properties, be subject to evaluation according to measures of utility or maximum happiness. Governed by utility, the dead body and parts thereof needed not be treated as, or protected because of their connection to, human persons. Following the death of the legal subject, the body was property that merely

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[305] Wall (2015), *supra* note 32.
[306] Ibid.
[307] See e.g., Jeremy Bentham, "Auto-Icon: or, Farther Uses of the Dead to the Living" in James Crimmins, ed, *Jeremy Bentham's Auto-Icon and Related Writings* (London: Thoemmes Press, 2002) [Bentham (1842)]. The "Auto-Icon" was printed privately among some of his readers, potentially as late as 1842, although some doubt his authorship or that it was anything but satire.
[308] Ibid.
[309] Ibid.
[310] Ibid, 2.
[311] Ibid, 3.

resembled the living subject, whose simulacra of personality may lend to the utility of a particular use, but a utility that was always assessed externally from the vantage point of the legislator maximizing mirth. Presumably, Bentham would support the extension of that argument to bodily parts, as well.

3.1.2. *The Person-Property Boundary in Abandonment*

Even where the putative limits of the person expand through property, and self-ownership of fragments is admitted, the person-property boundary persists. The boundary is most evident in the operation of the doctrine of abandonment which accretes at the limit of the subject and a world of objects.[312] Abandonment (or some legal act that closely resembles it, like a gift or license to process and destroy) orders the change of relations between the self-owner and fragment, and the fragment and others, authorizing (or not authorizing if conditions do not satisfy) the transfer of authority to use or determine the use of the fragment.[313] The reconfigured boundary can appear to liberal theorists as an improvement in that expansions of the person through property permit claims (i.e. of control) relative to one's own flesh despite separation.[314] It is rationalized in normative jurisprudence, like the appropriation of any property, as supplying a material substrate that justly advances one's capacity to flourish.[315] But the persistence of the boundary at all, and the subject-object division the boundary still inaugurates, impair a fuller range of embodiments including those

[312] Penner (1997), *supra* note 277. Also see discussion in Dickens (1977), *supra* note 249; Imogen Goold, "Abandonment and Human Tissue" in Imogen Goold, Kate Greasley, Jonathan Herring and Loane Skene, eds, *Persons, Parts and Property: How Should we Regulate Human Tissue in the 21st Century?* (London: Hart, 2014), 125-155 [Goold (2014)]; Sophie Mills, "Owning My 'Self': A Reconciliation of Perspectives on the Body" (1999) 6 *UCL Jurisprudence Review* 191 [Mills (1999)]; Mark Pawlowski, "Property in Body Parts and the Products of the Human Body" (2009) 30 *Liverpool Law Journal* 35 [Pawlowski (2009)]; Loane Skene, "Ownership of Human Tissue and the Law" (2002) 3 *Nature Reviews: Genetics* 145 [Skene (2002)].
[313] Goold (2014), *supra* note 322.
[314] Mills (1999), *supra* note 322; Singh (2021), *supra* note 248.
[315] See e.g., Radin (1982), *supra* note 210.

fundamentally discordant with the paradigm of ownership and of individual autonomy—as will be discussed in the next section.

Abandonment, as property theorist James Penner writes, is "inherent" to property:[316] it necessarily follows from the "right to determine how a thing is to be used."[317] In the language of analytical jurisprudence, "abandonment is a permanent decision not to take advantage of the general duty *in rem* [against the world] prohibiting interference in respect of a particular thing abandoned."[318] Without requiring the performance of duties owed *in rem*, others can subsequently appropriate the abandoned object and, by their possession, potentially obtain 'a good root of title.'[319] The subject as rightsholder is thereby a rational agent who possesses free will, in contrast to the thing—a passive, unthinking object—that 'has nothing to say about the relationships it has.'[320] The subject is assumed to choose to appropriate properties, and to rid oneself of them in the exercise of rights. Other subjects, too, are assumed to make deliberate choices in avoiding the contravention of duties owed to the rightsholder.[321]

Further, abandonment assumes—like property generally—that the object of property is contingently related to the owner-subject, allowing anyone to occupy the formal position of owner provided title is lawfully transferred.[322] That requires the object of property to be separable, if not already separate from the subject, enabling its alienation to others.[323] It also requires that the alienation of the part not involve a "constitutive change in the [previous owner's] character on [the] very occurrence" of its alienation (although the consequences of

[316] Penner (1997), *supra* note 277 at 80.
[317] Ibid, 79.
[318] Ibid.
[319] Ibid.
[320] Ibid, 81.
[321] Ibid.
[322] Ibid, 79.
[323] Ibid. Also see Singh (2021), *supra* note 248. Singh argues the owner of property, and the object of property, can coincide in one body provided the attached body part is potentially separable. This would, from Singh's perspective, better align forms of action relative to certain body parts with the actual nature of the interference.

the loss may, as Penner admits, affect them socially).[324] As Penner writes, "[one] would be the same person if [they] lost one of [their] limbs" since "losing [one's] limbs […] is no different from losing a wristwatch or selling [one's] house."[325] By contrast, Penner says, "that is not the case with our bodies" since "[w]e are stuck in, or to, but certainly with, them."[326] The subject-object division, and person-property boundary, thereby continue to map onto a certain embodiment for the law: the whole body and the whole person, of which tissues form a part of the whole, *contra* the eliminable or extraneous.[327] Those finite parts integral to personality, as the substrate or surface upon which personality is staged, are ontologically stuck to the whole.[328] By contrast that in excess to or extricable from personality, especially although not necessarily where it is renewable (sperm, hair, etc.), is eliminable from the whole (or never formed a proper part of it). Personality itself does not require peripherals of the body. Advances in surgery and biotechnology increasingly (and more acceptably) render fragments alienable from the body, making possible property claims in them. That involves, for Penner, altering the social conventions that mediate which parts are seen as separable and, accordingly, peripheral to the body.[329]

There is a small number of cases that address abandonment relative to the human body. For example, with parts taken from the living, American courts held in *Browning v Norton Children's Hospital* (1974) that consent to the medical procedure implied "[acceptance of] 'all the rules, regulations, and the modus operandi of that hospital' as to disposal of surgically removed tissue;"[330] and in *Venner v State of Maryland* (1976) that "by force of social custom, we hold that when a person does nothing and says nothing to indicate an

[324] Penner (1997), *supra* note 277 at 114.
[325] Ibid, 114-115.
[326] Ibid, 121.
[327] Ibid.
[328] Ibid.
[329] Ibid, 121.
[330] *Browning* (1974), *supra* note 189 at 714. Also see Dickens (1977), *supra* note 249 at 184.

intent to assert his [sic] right of ownership, possession, or control over [excrement, fluid waste, secretions, hair, fingernails, toenails, blood, and organs or other parts of the body], the only rational inference is that he [sic] intends to abandon the material."[331] In *Browning* (1974), the Court of Appeal of Kentucky thus decided against the plaintiff who, after obtaining an amputation, was distraught to belatedly discover that his amputated leg was incinerated;[332] and in *Venner* (1976), the police could lawfully take and investigate samples of urine left behind by a patient at hospital.[333] With tissues preserved for assisted reproduction (like ova, sperm and embryos), courts emphasize the intention of those from whom the tissue was taken or generated to recognize property claims (particularly the intention to personally benefit from their use in procreation at a later date),[334] which works conversely to abandonment.[335]

In each of these cases, an intentional subject with rights to bodily matter as a chattel is constructed, for whom the decision to alienate rights and obligations to the chattel is a deliberate act—either inferred as having taken place in *Browning* (1974) and *Venner* (1976), or not in *Yearworth* (2009).[336] The owner-subject is set apart from the fragment in which they claim ownership. The fragment's association with the person through property does not elevate the fragment from its status as an object—it remains an appropriated thing to which one has title, controlled and used within limits set by public law, and alienated by transfer or abandonment. Others can (and do) occupy equivalent positions relative to the fragment as a result of abandonment, affirming the contingency of attachment. And like any other object of property, the fragment in each case is passive having "nothing to say about the relationships

[331] *Venner* (1976), *supra* note 33 at 499; also see Dickens (1977), *supra* note 249 at 185.
[332] *Browning* (1974), *supra* note 189.
[333] *Venner* (1976), *supra* note 33.
[334] See e.g., *Yearworth* (2009), *supra* note 33.
[335] Falconer (2019a), *supra* note 5.
[336] Regarding abandonment of property generally in Canadian common law, see *Stewart* (1998), *supra* note 190 at para 16.

it has."[337] The doctrine of abandonment, then, orders the transition of parts from their status as belonging to the body, to belonging to no one, at which point their appropriation by the medical practitioner transforms them into property or otherwise insulates them from claims from whom the parts originate.[338]

3.1.2. *Guided Discretion Approach*

Recent case law in Canada, following the example of *Yearworth* (2009), has drawn attention away from the work-and-skill exception and suggested an alternative framework for property in bodily materials: guided discretion.[339] Notably, under a guided discretion approach, the parties' intention to generate bodily material—and the converse situation of abandonment—supplies principles for legal action. For example, both the Supreme Court of British Columbia in *KLW v Genesis Fertility Centre* (2016), and the province's Court of Appeal in *Lam v University of British Columbia* (2015), held that property could exist in reproductive material, and that the work-and-skill doctrine in *Doodeward* (1908) may not be the proper basis for that interest.[340]

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[337] Penner (1997), *supra* note 277 at 81.

[338] Randy W Marusyk and Margaret S Swain, 'A Question of Property Rights in the Human Body' (1989) 21:2 *Ottawa Law Review* 351. Although critical of the implications that medical personnel or hospitals could obtain a right of ownership in such matters, Canadian practitioners Marusyk and Swain agreed that the separation of parts from the body rendered them *res nullius*. At pp. 381-382, Marusyk and Swain argued that legislation was needed to deny the possibility of their subsequent ownership so to prevent misuse (such as in markets of human tissues and substances), allowing the parameters of consent (aided with devices of trusts) to direct and guard their proper use. That framework did not, however, deny the possibility of substances derived from human body becoming patented to ensure their availability as *res communes omnium* (the common property of all). With surgical waste, Malowski suggests it is more appropriate to suggest abandonment occurs through relinquishing the matter to the legal custody of physician (or hospital) rather than *res nullius*, having regard to observations in *Haynes's Case* (1614), *supra* note 24: "A man [sic] cannot relinquish the property he hath to his goods unless they be vested in another." However, the common law in Canada—unlike England, as discussed in Penner (1997), *supra* note 277—has been far less afraid of the notion of abandonment.

[339] Regarding the term "guided discretion," see Falconer (2019a), *supra* note 5. Canadian case law includes *CC v AW,* 2005 ABQB 219 [*CC* (2005)]; *KLW v Genesis Fertility Centre,* 2016 BCSC 1621 [*KLW* (2016)]; *Lam* (2015), *supra* note 33; *LT v DT Estate (Re)*, 2019 BCSC 2130 [*LT* (2019)] (*contra* 2020 BCCA 328); *SH v DH*, 2018 ONSC 4506 [*SH* (2018)] (*contra* 2019 ONCA 454).

[340] *KLW* (2016), *supra* note 349 at paras 67-76, 89 & 93-96; *Lam* (2015), *supra* note 33 at para 53.

The courts in *KLW* (2016) and *Lam* (2015) cite favourably the reasoning of the Court of Appeal of England and Wales in *Yearworth* (2009), where it was stated that developments in medicine and science "now require a re-analysis of the common law's treatment of and approach to the issue of ownership of parts or products of a living human body, whether for present purposes (viz. an action for negligence) or otherwise."[341] The exception from *Doodeward* (1908) was a limiting foundation given the court constructed it limitedly in relation to the corpse, and would always favour the physician involved in the tissue's removal.[342] Instead, the courts looked to the circumstances of the case to assess—as Kate Falconer has characterized it[343]—whether indicia of property existed, whether property relations were intended, and whether it was appropriate to recognize property in the bodily materials:[344]

> The donors had ejaculated the sperm; contracted to store the sperm for their own future use; paid a fee for storage; and could consent to the sperm being tested. Further, they could terminate the storage agreement; could consent to the release of the sperm to their physician to be used by their spouse; and could exclude all others from using the sperm. Although legislation or the storage agreement precluded the donors from disposing of the sperm by leaving it to someone in their will or from selling the sperm, they nonetheless had sufficient rights in relation to their own sperm for it to be defined as property.[345]

The case of *KLW* (2016) has been criticized by subsequent courts for not "giv[ing] effect to the clear and unambiguous wording of a criminal prohibition" of posthumous use of reproductive materials without consent from the donor; however, these courts leave open the possibility that their interpretations of property in reproductive material are correct.[346] Further, *Lam* (2015) was careful to note they were not pronouncing all bodily materials, or even all reproductive tissues, as property in all contexts. Nor were they specifying the incidents of property to be found in the sperm in every possible case.[347] But legal scholar Kate Falconer

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[341] *Yearworth* (2009), *supra* note 33 at para 45.
[342] *KLW* (2016), *supra* note 349 at paras 67-76, 89 & 93-96; *Lam* (2015), *supra* note 33 at para 53.
[343] Falconer (2019a), *supra* note 5.
[344] See e.g., *Lam* (2015), *supra* note 33 at paras 115-118.
[345] *KLW* (2016), *supra* note 349 at para 76.
[346] *LT* (2020), *supra* note 339 at paras 40-42, 44.
[347] *Lam* (2015), *supra* note 33 at paras 110-113.

has suggested these cases in Canada, England, and Australia demonstrate what she calls a guided discretionary approach where:

> [J]udges are presented with the discretion to choose between two equally valid courses of action—to make a finding of property rights on the one hand, and to decline to make such a finding on the other. […] At its core is the notion of detachment—that is, does the human biological material at issue have a real, separate physical existence from the source individual. Guided discretion then allows judges to consider factors external to the material at issue itself: the factual and legal context of the case, and the practical reasons for finding property rights.[348]

Another case, not involving reproductive tissues, also supports the idea that some bodily materials may be recognized as property, with which the person from it was taken may have interests. In *Piljak Estate v Abraham* (2014), Master Dash of Ontario's Superior Court of Justice held—in the context of a medical malpractice claim brought by an estate against a defendant-physician—that the decedent's "excised tissue [which was removed for diagnostic purposes]" was property.[349] In the circumstances of this case, the excised tissue was the property of the hospital who retained it "as a component of the medical record" as they were required to do under Ontario's *Public Hospitals Act.*[350] But the deceased—through their estate—had at least a right of access given the medical context.[351] Given that the tissue was property, and given the deceased (via his estate) had a right of access, the Court ordered for its inspection to assist with 'the property determination of an issue in a proceeding'.[352] An earlier decision, *Marchand v Public General Hospital Society of Chatham* (1993), also held that the patient had 'an undeniable right to inspect, examine, and analyze' tissue slides and blocks retained by the hospital.[353] There, the Ontario Court of Justice did not phrase it as a matter of property outright; instead, the Court treated the materials as information, shared in

[348] Falconer (2019a), *supra* note 5 at 903.
[349] *Piljak* (2014), *supra* note 169 at para 27.
[350] Ibid, para 26. Also see RRO 1990, Reg 965.
[351] *Piljak* (2014), *supra* note 169 at para 26-27
[352] Ibid. Also see RRO 1990, Reg 194, Rule 32.01(1).
[353] *Marchand v Public General Hospital Society of Chatham*, [1993] OJ No 561, 1993 CarswellOnt 455 (ONCJ), para 11.

confidence with the physician in the context of the physical-patient relationship.[354] Both *Piljak* (2014) and *Marchand* (1993) may satisfy the discretionary approach: separation of the tissues from the source individual; practicality of recognizing the tissue as property; and with regard for the legal and social context of the claims.[355]

If property, on this approach, self-ownership could be advanced through tort law or claims of bailment, for example, potentially advancing claims to their amputates, surgical tissues or other materials which people increasingly, and for variable reasons, desire custody or control of.[356] For example, where tissue has been wrongfully taken, one might bring actions of detinue demanding the return of the bodily material.[357] The defendant might argue the plaintiff abandoned the tissue; abandonment of personal property in Canada requires intention and an act by which the owner relinquishes title, which can be inferred from the following factors: (a) the passage of time, (b) the nature of the transaction, (c) the owner's conduct, and (d) the nature of the property.[358] There must be "evidence pointing to 'a giving up, a total desertion, and absolute relinquishment.'"[359]

Alternatively, such matters are abandoned (or were never property in the first place) and they become medical waste. As I noted above, in Ontario, such matters are "likely [to be] classified as 'waste' under [Ontario's] *Environmental Protection Act* (EPA) and its Regulations, and is therefore subject to the EPA's strict regulatory regime with respect to

[354] Ibid, paras 8-9.
[355] Falconer (2019a), *supra* note 5.
[356] See e.g., of these arguments in the Smith Shield Moot 2022-2023 at Schulich School of Law, Dalhousie University. The moot problem—*Studley v Cape Prudence Catholic Hospital*—was designed by me whilst a faculty member there. Juris Doctor students Emma Vossen, Nicole Arski, Jacket Bennett and Leandra Bouman performed in the moot. See "Smith Shield Moot 2022-2023" (11 October 2022) *YouTube* (*Schulich Law*), https://www.youtube.com/watch?v=jX34NBX9HQ0.
[357] See generally *Taheri v Buhr,* 2021 SKCA 9 at para 61; John W. Salmond, *Law of Torts* (London: Sweet and Maxwell, 1973), 113.
[358] *Stewart* (1998), *supra* note 190 at paras 13-23; *Kotsopoulos* (2010), *supra* note 190 at para 23.
[359] *Chaisson v Kennedy*, 2014 NSSM 64, para 17.

waste disposal."[360] For example, section 5.1 of the Ministry of Environment's guidelines specify how biomedical waste—including "human tissues, organs or other body parts, other than teeth, hair or nails"—should be stored, transported and disposed.[361]

3.1.2. *Aporia III*

Claims of self-ownership over one's body and parts attempt to control use and disposal of biological matter, where the no-property rule would deny such authority.[362] In this way self-ownership attempts to legitimate relations with the human body that the common law has classically obscured in favour of ecclesiastical doctrine.[363] But with claims to self-ownership, laws pertaining to bodily fragments are dominated by discourses on property. In their formalism, such discourses disappear the body, speaking instead of the correlative relations of rights, duties, powers and disabilities between subjects.[364] In so doing the body appears limitedly, if at all, as the *res* to which others can or cannot form an equal relation, depending

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[360] Daphne G Jarvis, "The Disposition of Human Remains/Tissues—A Short Guide for Hospitals" (2019) BLG's Insights, online: <https://www.blg.com/en/insights/2019/02/the-disposition-of-human-remains-tissues-a-short-guide-for-hospitals> [Jarvis (2019)].

[361] Ministry of Environment, "C-4: The Management of Biomedical Waste in Ontario" (2019), online: <https://www.ontario.ca/page/c-4-management-biomedical-waste-ontario>; Also see RRO 1990, Reg 347.

[362] See e.g., *Phillips* (1908), *supra* note 26. Also, consider the example of Dr. John Scott, who was appointed as the superintendent of the Provincial Lunatic Asylum in Toronto, Upper Canada, from 1850 until his resignation in 1853. Early in his tenure at the Asylum, it was discovered that he had removed 'an arm, a leg, and the head' of an Asylum patient who died in his care. The parts were missing from the coffin, which was discovered by the sexton and two others at Potter's Field just prior to the sexton burying the body. Editors of the *Upper Canada Journal of Medical, Surgical and Physical Science* were critical of the sexton's interference, and offered a defence of Scott which not only pressed on the importance of dissection but also claimed such a practice was authorized by law. Editors of the *Upper Canada Journal* further noted "there is no such thing as *property* in a body from which life has departed" and that "no statute is violated" by dissection itself. Editors, "The Provincial Lunatic Asylum" (1851) *The Upper Canada Journal of Medical, Surgical and Physical Science* 378, 379; Editors, "The British American Journal's Lecture on Medical Ethics" (1852) *The Upper Canada Journal of Medical, Surgical and Physical Science* 419, 421.

[363] Nwabueze (2019), *supra* note 245.

[364] See discussion generally in Dietz et al. (2020), *supra* note 112; Graham (2011), *supra* note 257. See e.g., Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26:8 *Yale Law Journal* 710.

on the circumstances.[365] Namely the determination depends on the part's separation from the subject, as subject and object cannot be coincident.[366] Otherwise property law de-physicalizes the body as an object to which legal relations refer.[367] Legal analysis then shifts to the nature of legal relations—whether they are *in personam* or *in rem*—and their regulation of conduct between owner and others.[368] Property exists in the abstract relation between *person*-subjects, even as it refers to and controls the thing-object.[369] And whilst adaptations of the property paradigm via Hegel can assist with justifying claims to self-ownership—looking to the integrality of the part to the formation of self[370]—such accounts remain cleaved to a liberal theory of property that similarly disappears the body in the focus on the purposive subject.[371]

Yet as cases involving reproductive tissues suggest, other relations (such as those of kinship) matter significantly to experience of and expectations around use and disposal of the body and parts which can be unintelligible to property.[372] Self-ownership is thus a partial advancement which leaves many meanings of and relations with the body out of frame, seemingly incapable of accommodating them. Critical legal scholar Alain Pottage writes that one must "get away from the divisions that shape modern [legal] thinking—persons and things, persons and place, propositions and things—and to think instead in terms of relations

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[365] Penner (1997), *supra* note 277. Penner stands apart from many conventional theorists of property in that he admits the object's physicality as occasionally relevant. For example, he argues that a duty of non-interference takes form in the presence of objects that, according to convention, tend to be property (such as a car), but would not take form where such objects are absent or where the objects present are not conventionally experienced as property (Penner gives the example of pigeons). Without such conventions rights *in rem* and duties *in rem* would be inoperable. But aside from allusions to social perception and convention, Penner otherwise leaves the physicality of the body—and its connection to a broader place—uninterrogated, putatively irrelevant to legal analysis. His commitment to the paradigm of property nonetheless de-physicalises the body, rendering it placeless.
[366] Ibid.
[367] Ibid.
[368] Ibid.
[369] Graham (2011), *supra* note 257.
[370] Wall (2015), *supra* note 32; also Singh (2021), *supra* note 248.
[371] Radin (1982), *supra* note 210.
[372] See e.g., Strathern (2001), *supra* note 34.

of hybridization, or connections whose terms are not persons and things but agents that 'exchange competences.'"[373] With similar effect, Nicole Graham argues one must reach past received paradigms of property and trace the surfeit of relations the order experience of the physical world. The materiality of the body, the relations that compose parts from the body, may be those agents that exchange competences, making a difference in how norms take form relative to bodily matter. The multiplications of the body in parts—as absences present in the law[374]—thereby form the third aporia of concern in this dissertation, and are considered in Chapter 5.

3.1. **Something Seeps Outside**

The dead body inhabits, as Ngaire Naffine argues, 'a sort of legal limbo, neither person nor property.'[375] Quoting from *Haynes* (1614), the dead body has been treated as 'but a lump of earth [which] hath no capacity;' it is not a person capable of owning property.[376] The dead do not possess a mind, the apparent source of a 'rational disembodied will'[377] that, within the common law's received mind-body dualist ontology, underlies animacy and thus capacity for legal personality. In the alternative, if not a person, some have considered it possible that human remains can become property, so that 'death […] marks the moment at which the human form becomes explicitly objectified in law—when the human non-being becomes something to be possessed and disposed of: "but a lump of earth."'[378] Such a view has been reinforced by radical developments in biotechnology which allow for increasing instrumentations of the body and materials derived from it, which, as Roxanne Mykitiuk puts

[373] Alain Pottage, "Forward" in Nicole Graham, *Lawscape: Property, Environment, Law* (Abingdon, UK: Routledge, 2010), xi-xii.
[374] Leder (1990), *supra* note 129.
[375] Ngaire Naffine, "'But a Lump of Earth'? The Legal Status of the Corpse" in Desmond Manderson, ed, *Courting Death: The Law of Mortality* (London: Pluto Press, 1999), 95-110, 96 [Naffine (1999)].
[376] Ibid, 97.
[377] Ibid, 105.
[378] Ibid, 102.

it, still suffers '[a] basic problem with existing legal concepts is that they provide only two conceptual categories within which to examine body fragments: either as persons or property.'[379] Neither personality nor property are ultimately that helpful for explaining how bodily matters are understood within law, at least not completely, leading to an impossible distinction that itself leads to slippages and ambiguity.[380]

For Naffine, attention to the materiality of the body may enable common lawyers to break through the distinction of animate and inanimate, personality and property, allowing law to better respond to the complexities through which bodily matters are encountered.[381] I share this commitment to the materiality of the human body and the materiality of law over the uncritical reception of extant legal concepts, which, in their abstraction, conceal how law affects and is experienced by communities. By following the materiality of bodily matters, especially as that materiality shapes their differential treatment or disposal under law, I may better appreciate law's relations to the body. In place of any determinate conceptual structure, social and physical conditions, enacted in processes that countenance life, appear to mediate legal doctrine.

Here those social and physical conditions—those processes by which law finds expression despite official narratives—suggest bodily matters obtain their legal status according to their materiality and the milieus, or surrounding environments,[382] those matters form part of: anatomized, eviscerated or emulsified parts, irrespective of the reasons for their material transformation, tend to become discard as they assume shapes other than the human, and irrespective of their treatment as property or not. These remains are not often the explicit subject of the common law; instead, courts, jurists and law writers except such tissues from the common law. Meanwhile those remains that form whole bodies, namely

[379] Mykitiuk (1994), *supra* note 12 at 74.
[380] Naffine (1999), *supra* note 427.
[381] Ibid, 105.
[382] See generally Davies (2022), *supra* note 113.

whole bodies in the image of God (or, increasingly in secular society, in the image of the "person"), attract rites of final disposal. Relatedly, processes of decomposition, such as in *Gilbert* (1820),[383] can affect the relation of those remains to land, in terms of the place at which those remains are understood to lie and the duration they countenance a subject respected by law.[384] Quicklime can quicken the process of decomposition, enabling the law to forget one's existence, vacating the place at which that body once stood to allow others to take its place.[385]

The materiality of these matters, and their significance to the expression of law, appears to be an absent and yet present force in the ongoing articulation of the common law. The common law may not name or acknowledge the effect of their materiality, but bodily matters are nonetheless embrangled in the constitution of law and, through their existence, make their absence/presence felt. In this way, unlike what was reportedly said in *Haynes's* (1614), the dead are not "but a lump of earth [which] hath no capacity;"[386] indeed the dead body and body parts thereof act as participants—through the processes by which those matters take form, and affect or are affected by others and their environment—in the making of law. What precisely this relation between materiality and law means requires further analysis, deconstructing the conditions under which the law of human remains takes form, and their effect on the disposal of the body. But in synthesizing doctrine together as done above, certain contradictions have appeared and, in their tension, certain features hitherto ignored have obtained focus.

[383] *Gilbert* (1820), *supra* note 23.
[384] See Chapter 3.
[385] Fellows (1940), *supra* note 1.
[386] *Haynes's Case* (1614), *supra* note 23.

Chapter 3 — Humic Lawscapes

Abstract

Robert Pogue Harrison claims that relations with decaying matters are constitutive of social and cultural forms. He refers to these relations as the humic foundations of the life-world. By extending the concept of humic foundations from cultural studies to the analysis of law, the jurisprudent may re-encounter the decomposing dead as constitutive of law's forms. In this chapter, I revisit *Gilbert v Buzzard and Boyer*, a case from 1820 dealing with a citation of burial law; burial law reforms in nineteenth-century England and colonies; and, briefly, the custom of burial at sea. In *Gilbert* (1820), a court of ecclesiastical law indexed the decomposed corpse to the faltered claim to burial. Once fully decomposed, the grave was no longer occupied, extinguishing any surviving claims to exclusive use of that plot, and reverting the land to the parish. With nineteenth-century burial law reforms, parliaments enacted statutes that prohibited burial within towns and cities, and empowered certain officers to require the transfer of human remains from intramural churchyards to extramural cemeteries and burial grounds. Ecclesiastical jurisdiction over the disposal of the dead—practiced since at least the early mediaeval period—was generally replaced, again by statute, with secular corporations or municipalities responsible for burial. And with sea-burials under admiralty and maritime law, the body is hastily and deliberately cast overboard with cannon balls, or some other weight, fastened to its legs. By tracing the influence of decompositions in these examples, describing how decomposing materials can be a constitutive form to law, I suggest that the decomposing body evinces a quality—an "ontogenetic" and "jurisgenerative" quality—for which conventional legal discourse and theory cannot account. The constitutive form is in the fluidity of decompositions, which defies containment, stillness and stable identities, as it leaks, expands and spreads. Human remains become excrement, as opposed to dignified and ordered, which stages a spacing of "non-law" consequential to the formation of law and legal ideas. Likewise, the absence that follows decomposition are also heteronomous, factoring in law's formation.

In 1614, in the *Haynes's Case*,[1] the "dead body" was reportedly described by justices at the Serjeant's Inn as "being *but a lump of earth [it] hath no capacity*."[2] The absence of capacity meant that title to a shroud did not vest in the individual wrapped in it, but remained with whom placed the property there.[3] To that, English jurists—Sir Edward Coke, Matthew Hale, William Blackstone—added that the case also stood for another rule: no property in a

[1] *Haynes's Case* (1614), 12 Co Rep 113, 77 ER 1389, 1389. [*Hayne's Case* (1614)].
[2] Ibid.
[3] Ibid.

corpse.[4] For these jurists, the dead body lacked capacity of a different kind, too. Not only did the dead body fail as a subject of rights at common law; it was also not an object suitable as property. Rather, the dead body was of ecclesiastical cognizance alone.[5] But despite what was said at Sergeant's Inn, or how the decision has been interpreted, there *is* capacity; dead bodies have affections that animate lawful relations; have capacity to secrete social effects in the folds, distention and perforation of decomposing flesh, which impress on the world and congeal as law.

Robert Pogue Harrison claims that our relations with decaying matters, and processes of decay, are constitutive of social and cultural forms.[6] He refers to these relations as the humic foundations of the life-world (the "humic", in the sense of relating to "humus" or decomposed materials sediment in the earth).[7] By extending the concept of humic foundations from cultural studies to the analysis of law, the jurisprudent may re-encounter the decomposing dead as constitutive of law's forms just as the humic is constitutive of other social or cultural forms. The jurisprudent may notice the law secreted by flesh as it folds, as flesh distends, as it is perforated.[8] Order is framed by movement, composition, destruction of the body.[9] Flesh contorts, joins with touch and pulls apart, forming a frame incidental to the body's movement which enables from chaos an expression that obtains a certain

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[4] Edward Coke, *The Third Part of the Institutes of the Law of England: Concerning High Treason, and Order Pleas of the Crown, and Criminal Classes* (London: 1644), 203 [Coke (1644)]; Matthew Hale, *The History of the Pleas of the Crown: Volume 1* (London: T Payne 1800), 515 [Hale (1800)]; William Blackstone, *Commentaries on the Laws of England, Volume 2* (London: JP Lippencott & Co, 1895), 235 [Blackstone (1895)].
[5] Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property and Personality* (London: Ashgate, 2001) [Davies and Naffine (2001)].
[6] Robert Pogue Harrison, *The Dominion of the Dead* (Chicago: University of Chicago Press, 2003), x-xi [Harrison (2003)].
[7] Ibid.
[8] See discussion in Joshua David Michael Shaw, "Confronting Jurisdiction with Antinomian Bodies" (2020) *Law, Culture and the Humanities,* online: https://doi.org/10.1177/1743872120942770 [Shaw (2020a)].
[9] Ibid; also see Margaret Davies, *EcoLaw: Legality, Life and the Normativity of Nature* (Abingdon: Routledge, 2022) [Davies (2022)].

sensibility,[10] a sense of the lawful, in that order, authority and meaning are jointly fastened on the earth as the body grazes, walks, dances, plays, or is hawked or dragged.[11] In this space of encounter, abutting bodies, abutting the earth, where limbs, flesh, carbon mingle, is the place where laws form, where habits individuate from this flux of matter and obtain a certain solidity that becomes hard to bend—becomes a path that must be followed.[12] This "vibrant" body,[13] shedding law with each movement,[14] with each affection,[15] forming grooves in the earth and cortical tissues,[16] have been the subject of study by legal scholars before, especially where that body exists in some recognizably living form (like the embodiment of a woman, of an intersex or racialized person, in cases of disability, pregnancy, among other embodiments),[17] but the jurisprudent can be drawn to another kind of body: that of the dead.[18] Because there *is* movement to the dead, even if we often do not think of it.[19]

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[10] Elizabeth Grosz, *Chaos, Territory, Art: Deleuze and the Framing of the Earth* (New York City: Columbia University Press, 2008) [Grosz (2008)].
[11] See e.g., Olivia Barr, *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place* (Abingdon: Routledge, 2016) [Barr (2016)]; Shaw (2020a), *supra* note 8; Marc Trabsky, *Law and the Dead: Technologies, Relations, Institutions* (Abingdon: Routledge, 2019) [Trabsky (2019)]. With respect of play, see Joshua DM Shaw, "A Minor Jurisprudence of Play: Becoming Jurisprudents through Play in the *Majora's Mask*" in Dale Mitchell, Ashley Pearson and Timothy Peters, eds, *Law, Video Games, Virtual Realities: Playing Law* (Abingdon, UK: Routledge, 2023) [Shaw (2023)].
[12] Davies (2022), *supra* note 9.
[13] Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Durham: Duke University Press, 2010).
[14] Shaw (2020a), *supra* note 8.
[15] Anna Grear, "Foregrounding Vulnerability: Materiality's Porous Affectability as a Methodological Platform" in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks, eds, *Research Methods in Environmental Law* (London: Elgar, 2017), 3-28 [Grear (2017)]; Andreas Philippopoulos-Mihalopoulos, "Atmospheres of Law: Senses, Affects, Lawscapes" (2013) 7 *Emotion, Space and Society* 35 [Philippopoulos-Mihalopoulos (2013)]; Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (Abingdon: Routledge 2014) [Philippopoulos-Mihalopoulos (2014)].
[16] Davies (2022), *supra* note 9; Grosz (2008), *supra* note 10; also see Margaret Davies, *Law Unlimited: Materialism, Pluralism and Legal Theory* (Abingdon: Routledge, 2017) [Davies (2017)].
[17] See e.g., Sara Ahmed, "Deconstruction and Law's Other: Towards a Feminist Theory of Embodied Legal Rights" (1995) 4:1 *Social and Legal Studies* 55; Ruth Fletcher, Marie Fox and Julie McCandless, "Legal Embodiment: Analysing the Body of Healthcare Law" (2008) 16:3 *Medical Law Review* 321; Fae Garland and Mitchell Travis, *Intersex Embodiment: Legal Frameworks beyond Identity and Disorder* (Bristol: Bristol University Press, 2023); Roxanne Mykitiuk, "Fragmenting the Body" (1994) 2:1 *Australian Feminist Law Journal* 63 [Mykitiuk (1994)].
[18] A variation of the thesis is advanced by Ngaire Naffine, in "'But a Lump of Earth'? The Legal Status of the Corpse" in Desmond Manderson, ed, *Courting Death: The Law of Mortality* (London: Pluto, 1999), 95-110 [Naffine (1999)]. However, Naffine does not develop the thesis with respect of the legal theories with which I am engaging here.
[19] See e.g., Barr (2016), *supra* note 11; Shaw (2020a), *supra* note 8; Trabsky (2019), *supra* note 11.

The constitutive effect of the humic is demonstrated in how the dead haunt the laws of England and her colonies—common, statutory and ecclesiastical. I trace such hauntings in two case-studies: *Gilbert v Buzzard and Boyer*,[20] a case from 1820 dealing with a citation of burial law; and statutory reforms to burial laws undertaken in England and the British colonies in the nineteenth century.[21] With *Gilbert* (1820), the Consistory Court of London—a court of ecclesiastical law—indexed the decomposed corpse to the faltered claim to burial. Once fully decomposed, the grave was no longer occupied, extinguishing any surviving claims to exclusive use of that plot, and reverting the land to the parish. With the law reforms, legislatures—in Westminster and the colonies—enacted statutes that prohibited burial within towns and cities, and empowered certain officers to require the transfer of human remains from intra-mural churchyards to extra-mural cemeteries and burial grounds. Legislatures were concerned with the "pestiferous influence" of the decomposing dead, thought to afflict those who breathed their noxious vapours, giving rise to moral turpitude, injury and, in the extreme, death.[22] By tracing the influence of decompositions in these case-studies, describing how decomposing materials can be a constitutive form to law, I suggest that the decomposing body evinces a quality—an "ontogenetic" and "jurisgenerative" quality[23]—for which conventional legal discourse and theory cannot account. The constitutive form is in the fluidity of decompositions, which defies containment, stillness and stable identities, as it

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[20] *Gilbert v Buzzard and Boyer* (1820), 3 Phill 335, 161 ER 1342 [*Gilbert* (1820)]. The case was previously heard in a court of common law and reported as *R v Coleridge* (1819), 2 B & ALD 806, 106 Eng Rep 559. There, the Crown sought, on behalf of Mr. Gilbert, mandamus which would require 'the rector, officiating curate, churchwardens and sexton of the parish of Saint Andrew' to effect the burial in an iron casket (560). Five justices unanimously held against the Crown, each stating that the method of burial was of ecclesiastical cognizance alone.

[21] See e.g., *The Metropolitan Interments Act, 1850,* 13&14 Vic c52, s 6 (UK) [*Metropolitan Interments Act* (1850)].

[22] See e.g., Sir Edwin Chadwick, "A Supplementary Report on the Results of a Spiecal [sic] Inquiry into the Practice of Interment in Towns" (London: W. Clows and Sons, 1843) [Chadwick (1843)].

[23] See Joshua DM Shaw and Roxanne Mykitiuk, "Jurisgenerative Tissues: Sociotechnical Imaginaries and the Legal Secretions of 3D Bioprinting" (2023) 34 *Law and Critique* 105 [Shaw and Mykitiuk (2023)]. Also see Margaret Davies' discussion of biogenesis and jurisgenesis in Davies (2022), *supra* note 9.

leaks, expands and spreads.[24] Human remains become excrement, noxious and undesired, as opposed to dignified and ordered by sepulchre.[25] Likewise, the absence that follow decomposition also factors in the formation of law.

Before I end the chapter, I contemplate the lawful disposal of the seafaring dead under admiralty and maritime law.[26] Those involved in sea-burials were cognizant of the itinerant, haunting and decomposing dead in ways the laws of England and her colonies need not have been until the nineteenth century. Customary modes of disposal—namely, the fastening of chains or cannonballs to the dead body quickening its watery descent—demonstrated this cognizance in the sense of coming to terms—however provisionally—with the dead's affections. But I conclude that the jurisgenerativity of the corpse does not correspond exactly with that observed in nineteenth-century law reforms. Unlike the earth in its apparent solidity, the sea was inhuman in the extremis, so that the constant flux of movements, and unknowable depths, defied settlement or control: two means by which humans orient to place.[27] The lawful disposal of the seafaring dead necessarily responded to the fluidity of oceanic space, distinctly refracting the jurisgenerativity of the decomposing

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[24] See discussion of "leaky bodies" in Elizabeth Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (Bloomington: Indiana University Press, 1994) [Grosz (1994)]; Robyn Longhurst, *Bodies: Exploring Fluid Boundaries* (Abingdon: Routledge, 2001) [Longhurst (2001)]; Margrit Shildrick, *Leaky Bodies and Boundaries: Feminism, Postmodernism and (Bio)Ethics* (Abingdon: Routledge, 1997) [Shildrick (1997)].

[25] See e.g., Nick Land, *The Thirst for Annihilation: Georges Bataille and Virulent Nihilism (an Essay in Atheistic Religion)* (Abingdon: Routledge 1992) [Land (1992)]; Jean-Luc Nancy, *Corpus* (New York City: Fordham University Press, 2008) [Nancy (2008)]; Margrit Shildrick, *Embodying the Monster: Encounters with the Vulnerable Self* (London: Sage, 2002) [Shildrick (2002)]; Shildrick (1997), *supra* note 24.

[26] To see accounts of the custom of "committing [the body] to the deep" by way of burial at sea, see Clark Bell, "Burials at Sea" (1908) 26 *The Medico-Legal Journal* 246 [Bell (1908)]; J.E., "Burial at Sea" (1873) 45-46 *The Sailors' Magazine and Seamen's Friend* 107 [J.E. (1873)]; Thomas Faughnan, *Stirring Incidents in the Life of a British Soldier* (Toronto: Hunter, Rose & Company, 1879), 136-137 [Faughnan (1879)]; W.P. Marshall, *Three Years Life at Sea* (Zanesville, OH: Sullivan and Parsons, 1876), 53-54 [Marshall (1876)]; W.M.H. Palmer, *A Seaman's Log* (Victoria, BC: Munroe Miller, 1891), 26 [Palmer (1891)]. Also see David J Stewart, "Burial at Sea: Separating and Placing the Dead During the Age of Sail" (2005) 10:4 *Mortality* 276 [Stewart (2005)].

[27] Harrison (2003), *supra* note 6 at 11-15; anxieties over the ontology of the sea is given jurisprudential treatment in Carl Schmitt, see Alain Pottage, "Holocene Jurisprudence" (2019) 10:2 *Journal of Human Rights and the Environment* 153 [Pottage (2019)]; Shaw (2020a), *supra* note 8.

dead in a maritime context, and shoring up different legalities as a result. Drawing together the legal imaginaries in *Gilbert*, nineteenth-century burial law reforms and the customs of sea-burial opens me to the active work of the human dead in the making of law.

Such a thesis demands a materialist theory of law. Within contemporary jurisprudence, there are varied accounts of how physical matter relates to law, and *vice versa*, drawing disparately from Marxist, new materialist and actor-network theories, among other strands. But, like critical legal theorists Hyo Yoon Kang and Sara Kendall, my interest in materiality (the stuff, things, objects, etc. that make up the world) attunes to "the legal meaning or quality of the elements that fabricate law."[28] Such an attunement requires me to: "observ[e] how certain elements mobilize and condition legal meaning by simultaneously serving as law's material conditions and as the embodiments of legal matters themselves," and "investigat[e] the properties of those legal materials," as "a mode of understanding law's composition and relationality."[29] Relatedly, Alain Pottage describes materialist enquiry into law as, "instead of presuming 'law', beginning":

> […] with a set of raw elements: texts, institutions, statements, gestures, architectural and material forms, formalized roles and competences, and self-descriptions (people often characterize themselves as practitioners or participants in "law"). And, instead of abstracting to a field, medium, code or rationality in which these elements cohere into "law", one would explore the ways in which elements are assembled into *dispositifs* [whose networked relations, in duration and place, conduce effects experienced as, or later recognized as, "law"].[30]

As I explain below, I develop a materialist theory of law with the assistance of concepts—principally, Andreas Philippopoulos-Mihalopoulos' "lawscape"—which enlarge and draw focus to the contribution of spatiality, temporality, corporeality and affect to the genesis of law and

[28] Hyo Yoon Kang and Sara Kendall, "Legal Materiality" in Simon Stern, Maksymillian Del Mar and Bernadette Meyler, eds, *The Oxford Handbook of Law and Humanities* (Oxford: Oxford University Press, 2019), 20-37, 34 [Kang and Kendall (2019)].
[29] Ibid.
[30] Alain Pottage, "The Materiality of What?" (2012) 39:1 *Journal of Law and Society* 167, 181 [Pottage (2012)].

legal meaning.[31] In doing so a materialist theory of law can re-animate, and trace, the relations that comprise the human dead for law.

3.1. A Right to be Deposited in Our Parental Earth

English doctors of ecclesiastical law claimed all God's creations, upon death and by natural right, were deposited in their "parental earth."[32] Ecclesiastical law facilitated that right within the English parish and improved it by associating the right with the churchyard where the dead could lie proximate to prayerful communities interested in their absolution.[33] Burial was a spiritual matter, in that it expressed a fundamental relation with God, and ecclesiastical law reflected this in its formulation of the right to Christian burial (see Chapter 2).[34] But as laid bare in *Gilbert* (1820)*,* the right so claimed could also assume a material form: it referred to the placement of the body in terms of location and mode, and evoked the process of decomposition in how it related the body to the earth and other matter. *Gilbert* (1820) thereby shows how the office of Christian burial factored the process of decomposition, which in turn begins to illustrate my claim that bodily decompositions can matter to law and theory. Principally, *Gilbert* (1820) demonstrates that the decomposing body can mediate the transition between legal statuses, and the relations that comprise those statuses, owing to its jurisgenerative ontology.

In *Gilbert* (1820)*,* the Consistory Court of London was asked whether churchwardens could refuse to bury a parishioner in an iron casket and insist on the use of wooden one instead. Alternatively, if the churchwardens could not refuse, could a parishioner be charged

[31] Philippopoulos-Mihalopoulos (2013), *supra* note 15; Philippopoulos-Mihalopoulos (2014), *supra* note 15.
[32] Robert Phillimore, *Ecclesiastical Law of the Church of England* (London: Henry Sweet, 1873), Chapter 10; also see generally about the ecclesiastical legal history of burial in England in Heather Conway, *Law and the Dead* (Abingdon: Routledge, 2016) [Conway (2016)].
[33] Conway (2016), *supra* note 35.
[34] Ibid.

more for the burial? Key to the parishioner's argument was that "the ground once given to the interment of a body [was] appropriated for ever to that body."[35] A parishioner's right to Christian burial was forever, and so it did no matter whether the casket's material prevented or delayed the body's decomposition (although the parishioner also maintained that iron "goes to rapid decay" and "would decay as soon as wood").[36] To admit authority to decline materials was to erode the parishioner's right to burial:

> If the imperishable nature of the article is admitted as a ground of objection, where is the objection to stop? It may next be made to the interment in lead. There can be no legal right to reject the material: the churchyard and burial grounds belong to the parish, for the interment of the parishioners; they are vested by law in the incumbent and the parishioners. Every parishioner has generally a right to a place in the churchyard; he has no right to any particular spot; but when death and interment have taken place, then there is a severance of the common property, the general right has become a particular right, there is a legal appropriation of a legal right. Inviolability of sepulture is one of the dearest and most ancient rights of mankind; it is most deeply impressed on all our minds, and embodied in our common forms of speech. In the grave a man expects to be undisturbed; it is his last home; and this, *ut requiescat in pace, usque ad resurrectionem* [that he may rest in peace, until the resurrection] (2 Inst. 489), is considered by Lord Coke as a ground of the parishioners' duty of repair.[37] (translation is my own)

The churchwardens replied that "[c]ast-iron would certainly be imperishable," and that its common use would interfere with the rights of parishioners to Christian burial:

> if the mode of burying in iron coffins were resorted to, it would be impossible for all the parishioners to be buried in the church-yard, and they would be driven at considerable expense to purchase additional grounds out of the parish. The right of burial is like other rights; it is not to be so used as to injure others.[38]

Further, the allotment of land for a parishioner's burial was not forever. Rather, churchwardens were only required to ensure 'that the body be kept unmolested until it decays.'[39]

Dr. William Scott of the Consistory Court held that a parishioner's right to Christian burial could not be denied outside the canons. The canons generally required the body to be

[35] *Gilbert* (1820), *supra* note 20, 1344-1345, 1350.
[36] Ibid, 1344.
[37] Ibid, 1344-1345.
[38] Ibid, 1345.
[39] Ibid.

laid to rest and buried in consecrated soil, consistent with those portions of theology concerned with death, God's Last Judgment and the resurrection (otherwise known as "eschatology").[40] Once committed, the burial ground could not be put to any other use as the land and the dead were inviolable, for as long as both were identifiably present; limited exceptions provided by the canons were exercised somberly and with hesitation. Sir Henry Spelman—an English scholar of antiquaries cited by Dr. Scott—said in his seventeenth-century tract that "the very burial of [the] body […]" "assigned [a place] to some office of Religion" or *Locus Religiosus*, because:

> the nature of the soil has changed from secular, and, in reverence of this new function, counted to be religious, and now therefore by the Canons nothing may be taken for any more graves there.[41]

To be buried was to finally return the body to the earth and emplace one's soul amongst the safekeeping of the soil to await resurrection.[42] By such a process the land was "severed from human property" and returned to God. Since at least *AD* 750, such a spot was generally the yard surrounding the parish church, when a constitution was imported by Archbishop Cuthbert from the Holy See of Rome that required it.[43] Deviations threatened

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[40] The right to a Christian burial was enjoyed by all who belonged to the Christian community; namely, as parishioners to the parish churchyard. Exceptions could be granted to those travelling or itinerant. Those dissenting from the Church were by the nineteenth century increasingly admitted, by statute, their own burying grounds. I have described features of Christian burial in greater detail in Chapter 2. Also see generally Conway (2016), *supra* note 35.

[41] Henry Spelman, *De Sepultura* (London: Robert Young, 1641), 12 [Spelman (1641)]. *De Sepultura* concerns clergy exhorting monies in consideration for burial, which was contrary to the canons. The tract reproduces and comments upon canons pertaining to burial.

[42] Such eschatology was not universally shared across time or denominations. To suggest the soul could be emplaced in the soil was to suggest it had, or could have, a materiality, which was inconsistent with the theories of some. The eschatology to which I refer was that relied on, albeit variably, in medieval and early modern ecclesiastics in England who countenanced the ecclesiastical law applicable to the English parish. See discussion in Caroline Walker Bynum, "Material Continuity, Personal Survival and the Resurrection of the Body: A Scholastic Discussion in its Medieval and Modern Contexts" in *Fragmentation and Redemption: Essays on Gender and the Human Body in Medieval Religion* (Brooklyn: Zone Books, 1992), 239-297; Caroline Walker Bynum, *The Resurrection of the Body in Western Christianity, 200-1336* (New York City: Columbia University Press, 2017).

[43] *Gilbert* (1820), *supra* note 20 at 1347.

excommunication, such as Pope Boniface VIII's promulgation in *AD* 1300 which prohibited the disembowelment of human remains, and their boiling to separate flesh from bones.[44]

The sacred status of the burial spot and the body emplaced in it prohibited clergy from exhorting monies in consideration for the service of burial, as it profaned what properly belonged to God (as *Locus Sacratus*). Selling land for burial also constituted "a reaping of commodity out of carcasses of the dead,"[45] which presented an impossible commodity in God since the human body was His as *imago Dei*.[46] The ecclesiastical "office of burial" was devoted to furthering "the Law of Nature and divine Law [of] bury[ing] the dead,"[47] which required clergy to selflessly deposit the human dead in their parental earth and to ensure they remained deposited. Whilst "no positive rule of law or of religion […] prescribe[d]" the "way the mortal remains [were] to be conveyed to their last abode"[48]—such matters instead arose from sentiment and use—the law did provide for a right to burial.

But with respect to the parishioner's claim, Dr. Scott complained that the parishioner misconstrued the right to burial, giving it a content unfamiliar to the "original abstract right" and without due regard for what was "necessarily involved in it":[49]

> That right, strictly taken, is to be returned to his parent earth for dissolution, and to be carried there for that purpose in a decent and inoffensive manner.[50]

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[44] William Devlin, "Cremation" in Charles Herbermann et al., eds, *The Catholic Encyclopedia: An International Work of Reference on the Constitution, Doctrine, Discipline, and History of the Catholic Church (Volume 4)* (New York City: The Encyclopedia Press, 1908), 481-483.
[45] Spelman (1641), *supra* note 44 at 11.
[46] In early mediaeval England, Christian eschatology permitted different bodily cultures where the dead bodies of saints, and parts thereof, were commodified and exchanged, *because* of saints' proximity to God. There were periods where significant trade was undertaken with respect of relics. However, relics were not practised under the Church of England. See Caroline Walker Bynum, "The Female Body and Religious Practice in the Later Middle Ages" in Michel Feher, Ramona Naddaff and Nadia Tazi, eds, *Fragments for a History of the Human Body: Part 1* (Brooklyn: Zone Books, 1989), 160-219 [Bynum (1989)]; Patrick J Geary, *Living with the Dead in the Middle Ages* (Cornell University Press 1994).
[47] Spelman (1641), *supra* note 33 at 3.
[48] *Gilbert* (1820), *supra* note 20 at 1347.
[49] Ibid, 1348.
[50] Ibid.

To demand an iron casket may develop out of "natural feelings" toward the dead, specifically the want to have those remains treated with care, but the right narrowly pertained to being deposited in and returned to the earth (although ecclesiastical law did not prohibit it).[51] Further, the parishioner's argument that "the ground once given to the interment of a body is appropriated forever to that body" failed.[52]

> [I]t seems to be assumed that the tenant [of the grave] himself is imperishable; for surely there cannot be an inextinguishable title, a perpetuity of possession belonging to a perishable thing: but obstructed in a portion of it by public authority, the fact is, that 'man' and 'for ever' are terms quite incompatible in any state of his existence, dead or alive, in this world. The time must come when his posthumous remains must mingle with and compose a part of the soil in which they have been deposited. Precious embalmments [sic] and splendid monuments may preserve for centuries the remains of those who have filled the more commanding stations of human life: but the common lot of mankind furnishes them with no such means of conservation. With reference to men, the *domus aeterna* is a mere flourish of rhetoric. The process of nature will resolve them into an intimate mixture with their kindred earth, and will furnish a place of repose for other occupants of the grave in succession.[53]

Accordingly, an iron casket could be requested, but was not guaranteed. If iron was allowed, churchwardens were entitled to charge more to maintain the grounds, since iron was likely to slow the process of decay and thereby delay the plot's reversion to common use of the parish.[54]

3.1.1. *Jurisgenerativity of the Corpse*

At least in my reading, the Consistory Court incorporated the process of decay into legal reasoning. The dead body "mingle[d] with and compose[d] a part of the soil," which, for Dr. Scott, aligned title to a grave with the temporality of the dead body. Title thereby extinguished once the body fully churned and dissembled, and "[t]he process of nature […] resolve[d] [the

[51] Ibid, 1350.
[52] Ibid, 1350.
[53] Ibid, 1349-1350.
[54] Ibid, 1354.

body] into an intimate mixture with their kindred earth."[55] At this juncture clerical duties to burial were fulfilled, in that no meaningful trace of the person remained, lying vulnerable to disturbance or defilement where it was deposited. The soul was preserved amongst that spot of soil, to await resurrection, as the physical body was taken in by worms, becoming, once again, one with the earth: dust to dust, just as God sentenced.[56] For clergy, upon the extinguishment of title the land became amenable to subsequent use which, in the context of a consecrated churchyard, was restricted to further burials as the land reverted to common use of the parish. If not a churchyard, it would have reverted to a natural state awaiting appropriation for any lawful use.[57] In *Gilbert*, with consequence to the parish, the iron casket prolonged 'the process of nature' to which title was indexed; however, the body would still decompose and so the title, like the body, was perishable and so could not be prohibited. But delayed decomposition, arising from a parishioner's choice of material, entitled the churchwarden to charge more to ensure the churchyard's upkeep over a longer period.

The physical matter of the decomposing corpse—its materiality—functions here as an intermediary between legal statuses where one status, and the relations that comprise it, become another once decomposition is complete. The material presence of the decomposing dead, and its eventual absence, orders how others—churchwardens, undertakers, parishioners—lawfully relate to each other and the burial place. The ordering is spatial, in that *Locus Sacratus* excludes others and prohibits conduct at that spot where the corpse is placed. It is also temporal, in that bit by bit the corpse vacates that spot, becoming indistinguishable from the soil, which conditions upon completion further iterations of use.

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[55] Ibid, 1350.
[56] Worms consuming the corpse is a motif common among discourses on sepulchre in the eighteenth and nineteenth centuries.
[57] Prue Vines, "Bodily Remains in the Cemetery and the Burial Ground: A Comparative Anthropology of Law and Death *or* How Long can I Stay?" in Desmond Manderson, ed, *Courting Death: The Law of Mortality* (London: Pluto, 1999), 111-127, 122 [Vines (1999)]. The High Court of Australia affirmed this assumption in *Doodeward v Spence* (1908) 6 CLR 406 [*Doodeward* (1908)]; as did the Supreme Court of British Columbia in *O'Connor v City of Victoria* (1913), 11 DLR 577.

Elsewhere, Marty Slaughter describes that which "lies outside law," as "chaos, fragmentation, hybridisation, and decomposition" in contrast to "law belong[ing] to and creat[ing] an order of things" that connects, unifies *and* "survives the individual parts."[58] Slaughter looks to the cutting up, decomposition and admixture of bodies and bodily materials as evincing this point of "non-Law." Likewise, the decomposing corpse may be said to perform a duration of non-law between two points of law separated in chronological time: the grave site as *Locus Sacratus* exists as an order of things that encases and preserves the dead's repose; and once decomposed that place assumes another order, becoming property again or at least available for such lawful uses. The duration between creates a space of non-law, of chaos, needed to bring about another law where the prior law perished.

That duration also participates in creating the order that follows. Borrowing from Robert Cover, the duration may be described as "jurisgenerative" in that immanent to its expression, is the genesis of normative worlds which supply a sensory and narrative repertoire for law. Cover was writing on diverging constitutional interpretations, far afield from dead bodies, but I think his comments on the formation of an interpretive community, namely through the exertion of an "insular autonomy"[59] or a "principle of separateness [as] constitutive and jurisgenerative,"[60] can be extended by analogy to the physical matter of decomposition. Cover described the jurisgenerative as akin to "juridical mitosis," where:

> New law is constantly created through the sectarian separation of communities. The 'Torah' becomes two, three, many Toroth as surely as there are teachers to teach or students to study. The radical instability of the paideic *nomos* forces intentional communities—communities whose members believe themselves to have common meanings for the normative dimensions of their common lives—to maintain their coherence as paideic entities by expulsion and exile of the potent flowers of normative meaning.[61]

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[58] M.M. Slaughter, "Sacred Kingship and Antinomianism: Antirrhesis and the Order of Things" (1992) 4 *Law and Literature* 227, 228 [Slaughter (1992)].
[59] Robert M Cover, "*Nomos* and Narrative" (1983) 97 *Harvard Law Review* 4, 26 [Cover (1983)].
[60] Ibid, 29.
[61] Ibid, 15-16.

Different cultural and institutional configurations thereby proliferate *nomoi* by conditioning peoples' separation from a prior community—allowing another to intentionally form in contradistinction[62]—or maintain nomoi through apparatuses of enforcement that preempt separation.[63] Those worlds suppress the possibility of others in the fact of their unity, as an enforcement of that which is already present or as inspiration toward what is imagined to be.[64] Returning to *Gilbert*, we might see a similar movement at play where a prior unity in *Locus Sacralas*, analogous to Cover's Torah, was disemboweled by the appearance of difference divined through the body's decomposition. The integrity of the prior unity channeled through the body in repose was dissolved as the body decayed, setting the occasion for another unity to take place. The movement was repeated with each burial, with each process of decomposition, which nested the space of non-law within a pattern or choreography that formed a superior unity or structure. The difference produced by the jurisgenerative functioned *for* that structure as opposed to against it, enabling a change in state necessary for its performance. Here, that structure was created through narratives of Christian eschatology, of which the parish and the parishioners formed part. An iron casket portended the narrative's destabilization by protracting the decompositions upon which it relied. The Consistory Court attempted to re-incorporate the jurisgenerative within the higher unity supplied by the eschatological narrative by admitting iron if churchwardens could still maintain the grounds for their holy purpose.

3.1.2. *Antinomian Bodies*

Elsewhere, I have characterized bodily processes as jurisgenerative in that flesh and other viscera necessarily exceeds the grids law imposes on the human, creating space in their

[62] Ibid, 12-13.
[63] Ibid, 13.
[64] Robert M Cover, "Violence and the Word" (1985) 95 *Yale Law Journal* 1601 [Cover (1985)].

transgression for different legalities to emerge.[65] I have located these "leaky bodies" in contests of the medico-legal prescription of death,[66] in speculations of the jurisdictional effects of post-mortem organ and tissue donation,[67] and, with Roxanne Mykitiuk, in appraising the imaginaries that could arise from 3D bioprinting.[68] In these cases, I (or, in the last instance, we) have taken Mykitiuk's argument about "recalcitrant" bodies and bodily fragments further;[69] the body and bodily parts are not only a corporeal remainder to law's discourses, but also formative spacings for law.[70] Law can be made through the physical processes of bodies—processes which are "antinomian" in that such bodies test the nomoi they form part of—with new orders forming as nomoi stretch, perforate and heal over.[71] And like many scars, a trace of that wound indelibly brands the flesh as the new nomos settles. Antinomian bodies, as I have called them, can mediate both law's dissolution and formation, as sinews connecting normative possibilities.[72] The human dead functions similarly: as the integrity of the body falters, the nomos carried by the body does too, transforming, taking on a new figure, with each decomposition. Although, unlike my prior investigations of the jurisgenerative, the antinomian body disappears—it becomes absent or other—which is suggestive of a different form to law.[73]

Marty Slaughter makes a similar observation when counterposing the genealogy of law—the sacred body that is the King's common law—to the "antinomianism" of decompositions, fragments, adulterations, among other agents of chaos.[74] Law is the binding

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[65] Joshua David Michael Shaw, "The Spatio-Legal Production of Bodies Through the Legal Fiction of Death" (2021) 32:1 *Law and Critique* 69 [Shaw (2021)]. Also see Grosz (1994), *supra* note 24; Longhurst (2001), *supra* note 24; Shildrick (1997), *supra* note 24.
[66] Shaw (2021), *supra* note 68.
[67] Shaw (2020), *supra* note 8.
[68] Shaw and Mykitiuk (2023), *supra* note 23.
[69] Mykitiuk (1994), *supra* note 17.
[70] Shaw and Mykitiuk (2023), *supra* note 23.
[71] Ibid.
[72] Ibid.
[73] Regarding the importance of absence to embodiment generally see Drew Leder, *The Absent Body* (Chicago: University of Chicago Press, 1990).
[74] Slaughter (1992), *supra* note 61.

of "an individual to a name and gather[ing] [of] dispersed isolated things under a sign," of a filial unity, which "relates the individual to an order that survives the individual parts."[75] Slaughter relates metaphors of physical, bodily processes to the law of "Antinomians," the seventeenth-century movement of protestants that rejected the King's Law, claiming instead that the "law [lying] within" the individual would, through the achievement of "inner perfection," allow the King's "[L]aw [to] wither away."[76] The antinomian position is one of "an outcast individual without language and syntax, with only a private language, babbling to himself with words that in their detached state are pieces of copper rather than pennies, that have no social meaning and make no contact—that decompose and vanish like the body."[77] Antinomianism potentiates the fulfillment of chaos, the fulfillment of disorder, through the individual's withdrawal and separateness. But whilst Slaughter's reference to decompositions is metaphorical, I see it as real, materialized in the flesh. The decomposing corpse—as conduit of a space of non-law—works analogously to Slaughter's "Antinomians," withdrawing from the nomos of the body, creating the possibility of a new nomos as tissues separate, bones disintegrate, and residues mix with the earth.

My claim relates to, but is different from Prue Vines' comments on *Gilbert* (1820)*,* who straightforwardly argues that "once the body […] decompose[s] it […] *disappear[s],* and the land is no longer a burial ground—it […] [loses] that character."[78] Vines continues by saying:

> The body is defined as separate from the soil in which it is buried, and after decomposition seems to have legally and culturally "disappeared." The site of burial is then available to be used again.[79]

She contrasts *Gilbert* (1820) with practices among Indigenous peoples in Australia, for whom "the body when [it] decompose[s] would seem not to […] 'disappear[…]' or 'evaporat[e]' but

[75] Ibid, 228.
[76] Ibid, 233.
[77] Ibid, 234.
[78] Vines (1999), *supra* note 60 at 122.
[79] Ibid, 123.

[…] merge[…] with the land."[80] With that comparison, Vines concludes the ecclesiastical legal system, and the common law which has inherited its principles, "can only conceive of death as personal silence or absence."[81] But the corpse does not merely evince an absence nor does it merely separate the body from land; there is a productive quality to the dead, expressed through its relations with others, which Vines leaves undertheorized, in that its process of decomposition bears on, and constitutes a form for, law. There is an architectonics to the corpse, in the sense of a spacing and movement to the corporeal form which grafts onto and creates physical and social space including the law and normativities of such space.[82]

Those architectonics are also elided by political theorist James Martel in his recent analysis of the dead.[83] Martel and I share in arguing that the corpse, especially as it decomposes, is subversive to the "Law" and that, through that subversion, participate in authorizing another law.[84] However, we appear to differ in how we conceive this subversion taking place. Martel describes the corpse as "exert[ing] a kind of counteragency," because the corpse—like any object—"inherently resist[s] projection" of the Law's phantasms.[85] In doing so he draws on Walter Benjamin to argue that the dead may lack language (at least as humans know it by speech and sound) but nonetheless "emit 'the magic of matter' among themselves" forming a "material community" of affects which "rebel[s] against the false names and fetishistic projects—and especially commodity fetishism—to which [humans] subject them."[86] The corpse as object evinces a limit to law through its unmaking of

[80] Ibid, 122.
[81] Ibid.
[82] Henri Lefebvre, *The Production of Space* (London: Blackwell, 1991); also see Shaw (2021), *supra* note 68.
[83] James R Martel, "Interrupted by Death: The Legal Personhood and Non-Personhood of Corpses" (2022) 87A *Studies in Law, Politics and Society* 103 [Martel (2022)].
[84] Martel, "Interrupted by Death."
[85] James R Martel, *Bodies Unburied: Subversive Corpses and the Authority of the Dead* (Amherst, MA: Amherst College Press, 2018), 137 [Martel (2018)].
[86] Ibid, 139.

language—of law's mythic violence—which gives room for other forms of law (or the Law's rearticulation).[87] On the surface, our accounts resemble each other, but there are differences. I see Martel as having a negative account of the corpse (as lack, silence, object, etc.), counterposed to law as belonging only to a symbolic domain, whose relation is achieved principally through a dialectic of opposing forces. By contrast I attempt a non-dialectical materialism where certain distinctions (absence/presence, subject/object) are not fundamentally opposed to one another, but are generated together on an immanent plane of "differential elements and relations."[88] As literary theorist Erin Edwards put it, the "'live human' and 'corpse human' part ways, not according to a more traditional divide between vitalism and mortalism but according to different modes of *doing*."[89] It is through the latter I think the jurisprudent can better sense how the dead have capacities for law without reinscribing the familiar problematics of conventional legal theory.

3.1.3. *Toward a Materialist Theory of Law and the Dead*

The legal status of the human dead has constantly challenged scholars. But I try to overcome the challenge by following Ngaire Naffine and Margaret Davies, who called on jurisprudents to look beyond conventional theories of personality and property.[90] Instead, the jurisprudent should analyze the socio-material conditions through which human bodies, living or dead, take form, inhabit, and obtain meaning[91]—it is in our attention to "the historical and discursive processes which shape our socio-legal environment,"[92] including our relations with the physical and social world,[93] where the legal status and function of the human dead may be

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[87] Ibid 140-141; also see Martel (2022), *supra* note 86.
[88] Pheng Cheah, "Non-Dialectical Materialism" in *New Materialisms: Ontology, Agency, and Politics*, edited by Diana Coole and Samantha Frost (Durham: Duke University Press, 2010), 70-91, 85.
[89] Erin E Edwards, *The Modernist Corpse: Posthumanism and the Posthumous* (Minneapolis: University of Minnesota Press, 2018), 6 [Edwards (2018)].
[90] Davies and Naffine (2001), *supra* note 5; Naffine (1999), *supra* note 18.
[91] Naffine (1999), *supra* note 18.
[92] Davies and Naffine (2001), *supra* note 5 at 184.
[93] Ibid.

understood (or at least understood with different effect). Whilst personality and property are not irrelevant to the common law, they are mere fragments of a social process, "[n]either […] possesses a unitary, stable meaning"[94] and fail to account for all factual elements like those in *Gilbert* (2020). It is that thesis on which my reading of *Gilbert* (1820) necessarily depends. It is also the thesis my reading potentially confirms and elaborates, albeit with a materialist theory of law. By materialist theory of law, I mean to describe law as the effect of a socially imbedded, embodied and ecologically mediated practice of action that *matters* in experience and existence including that of the non-human.[95] A materialist theory of law that makes sense of the atmospherics that exceed yet potentiate law's forms.[96]

A useful concept for a materialist theory of law is the "lawscape," which critical legal theorist Andreas Philippopoulos-Mihalopoulos defines as "the tautology between law and space/matter [that] unfolds as difference" in physical and social existence.[97] The lawscape "is co-determined with the space between bodies […]; the space that is produced and is occupied by bodies; the movement of bodies; the desire of bodies; and the withdrawal of bodies for another law."[98] Bodies which compose the lawscape can be human, non-human, material and immaterial.[99] The lawscape can be thought of as being "held up" in social

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[94] Ibid, 181.
[95] See e.g., Grear (2017), *supra* note 15; Alain Pottage, "Introduction: The Fabrication of Persons and Things" in Alain Pottage and Martha Mundy, eds, *Law, Anthropology, and the Constitution of the Social: Making Persons and Things* (Cambridge: Cambridge University Press 2004), 1-39.
[96] Daniel Matthews and Illan rua Wall, "Legal *Aesthesis*: Affect, Space and Encounter" (2022) *Law, Culture and the Humanities*, https://doi.org/10.1177/17438721211056512 [Matthews and Wall (2022)]; Philippopoulos-Mihalopoulos (2013), *supra* note 15; Philippopoulos-Mihalopoulos (2014), *supra* note 15.
[97] Andreas Philippopoulos-Mihalopoulos, "Lawscape" (2020) *International Lexicon of Aesthetics*, online: http://doi.org/10.7413/18258630100 [Philippopoulos-Mihalopoulos (2020)]. Critical legal theorists Nicole Graham and Andreas Philippopoulos-Mihalopoulos separately named and developed the concept of the lawscape, but both speak to the material-discursive flux in which law participates. Graham defines lawscape as 'the relationship between the abstractness of […] law and the physical materiality of place.' See Nicole Graham, *Lawscape: Property, Environment, Law* (Abingdon: Routledge, 2010), xiii.
[98] Philippopoulos-Mihalopoulos (2020), *supra* note 100.
[99] See Gilles Deleuze, *Foucault* (Minneapolis: University of Minnesota Press, 1988); also see Andreas Philippopoulos-Mihalopoulos, "Law, Space, Bodies: The Emergence of Spatial Justice" in Laurent de Sutter and Kyle McGee, eds, *Deleuze and Law* (Edinburgh: Edinburgh University Press, 2012), 90-110.

practice, in that physical and social spaces extend from witting and unwitting acts of bodies that converge in place, figuring whom and what belongs in a place and that which is excluded.[100] The lawscape also enfolds time, sustaining durations, flows and rhythms between and within the practices of bodies.[101] The resulting spatio-temporalities of living flesh thereby exude law, as the lawscape, as they form patterns (and thus normativities) for physical and social action.[102]

With the dead, however, the space between, produced and occupied by bodies (the cadaver itself, its constituent parts and that which the corporeal becomes) tends to subtraction in the loss of corporeal integrity and identity, eventually leaving little to no trace—an absence that appears totalizing.[103] Here, the body does not so much hold up the law; rather by decomposing the body appears to *drop* the law as flesh *wastes* away, *withdrawing* from extant unities of life/law/order.[104] From this vantage, decomposition appears thoroughly anarchic in the total absence of law that it portends—an annihilative spacetime of non-Law.[105] The flesh is atomized, sublimated as autonomous particles that refuse communication with (or at least comprehension by) others, given up entropically to disorder against the unity promised by Law.[106] But in flux, the space between, produced and occupied by bodies also tends to accretion, creating excess matters and substrates for other things. Those excretions enable new relations as different forms are assumed, and in this way hold

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[100] Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Abingdon: Routledge, 2015) [Keenan (2015)]; also see Joshua David Michael Shaw, "Transcarceral Lawscapes Enacted in Moments of Aboriginalisation: A Case-study of an Indigenous Woman Released on Urban Parole" (2020) 16:4 *International Journal of Law in Context* 422 [Shaw (2020b)].
[101] Sameena Mulla, "Topological Time, Law and Subjectivity: A Description in Five Folds" in Sian Beynon-Jones and Emily Graham, eds, *Law and Time* (Abingdon: Routledge, 2020), 259-270. Also see Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Abingdon: Routledge, 2015).
[102] Shaw (2020a), *supra* note 8; Shaw (2021), *supra* note 68; Shaw and Mykitiuk (2023), *supra* note 23; also see the discussion of biogenesis and jurisgenesis in Davies (2022), *supra* note 9.
[103] Nancy (2008), *supra* note 25 at 105.
[104] Ibid.
[105] Ibid.
[106] Slaughter (1992), *supra* note 61.

up further iterations of lawscapes: as humic foundations for whatever law is to come. Despite Harrison, these humic foundations need not be cultivated as relations of memory, debt or inheritance (such as in traditions of burial).[107] Rather relations of the dead are potently multiple, which a materialist theory of law may attune to and shape.[108]

Whilst Philippopoulos-Mihalopoulos' concept of lawscape is abundant with relation—bringing seemingly disparate bodies together on a singular ontological plane to trace the complex entanglements generative of difference in the physical and social world—he emphasizes that the lawscape is conditioned by withdrawal: there is an ontological need of all bodies to "succum[b] to […] ruptures,"[109] retreating from the lawscape and turning inward. In turning inward, withdrawal instantiates a duration of non-relation, of a retreat to the law of the individual. The need to withdraw allows for difference, the emergence of striations and separateness, which are fundamental to a lively law that frames, creates and orders meaningful action.[110] The conditions of withdrawal then shape the desire and attainment of one's return to a lawscape to become part of its atmosphere,[111] where atmosphere is "the excess of affect that keeps bodies together; and what emerges when bodies are held together by, [through] and against each other."[112] Decomposition appears to not only imitate the ontological condition of withdrawal, but actually realizes it in the flesh, ever widening the reach of annihilation until the remains are physically overtaken and gone. In so doing decomposition appears to take the thesis of withdrawal to its extreme: the law of the

[107] Harrison (2003), *supra* note 6. Certainly, memory, debt and inheritance are familiar modes of relating to the dead, and often central to the juridification of the earth within common law traditions. See Barr (2016), *supra* note 11.
[108] See e.g., Shaw (2020a), *supra* note 8.
[109] Andreas Philippopoulos-Mihalopoulos, "Withdrawing from Atmosphere: An Ontology of Air Partitioning and Affective Engineering" (2016) 34:1 *Society and Space* 150, 154 [Philippopoulos-Mihalopoulos (2016)].
[110] Philippopoulos-Mihalopoulos (2014), *supra* note 15; also see Grosz (2008), *supra* note 10.
[111] Philippopoulos-Mihalopoulos (2016), *supra* note 91.
[112] Ibid, 158.

individual (autonomy or "the capacity to give oneself one's own law by one's own means")[113] otherwise enabled by withdrawal is evacuated upon the destruction of the physical body, which may be uniquely felt by those for whom that individual's life/law/order was meaningfully affective (for whom awareness of, and care for, the finitude of relation—relative to the place of. Law—can inaugurate a feeling of loss).[114]

Withdrawal by decomposition may occasion the end of the individual body—at least relative to that lawscape—but it is not the end of law. As critical legal theorist Stewart Motha stresses: law is not only autonomy (of the individual), law is also heteronomy in the sense of the "presence of an external or different law: of myth, extraneous forces, drives, legal institutions and history."[115] The law of the other. Even with the destruction of the individual (archive, actor, corpse, etc.), in its wake there seeps a heteronomous carriage whose retrieval from the pits of what is no longer there supplies meaning for new forms. Most clearly, as bodies decompose, excrements "throw" their presence open, exceeding the body/law of the individual, defying the signs of order and intelligibility incarnate in the human form, enabling the possibility of new worldings, or lawscapes, in the resulting tangle of worms, mycelia and soil-kinds, among other bodies.[116] But absence too throws itself, felt knowingly or unknowingly on others, whose traces supply "heteronomous determinants"[117] for future lawscapes.

Harrison writes that as "humans dwell, the dead, as it were, indwell—and very often in the same space."[118] The humic foundations result from this "indwelling" of the dead among and in the living, forming part of, and structuring from within, institutions of social and cultural

[113] Stewart Motha, "My Story, Whose Memory: Notes on the Autonomy and Heteronomy of Law" (2022) 87B *Studies in Law, Politics and Society* 1, 15 [Motha (2022)].
[114] Harrison (2003), *supra* note 6.
[115] Ibid.
[116] Nancy (2008), *supra* note 25.
[117] Motha (2022), *supra* note 117 at 12.
[118] Harrison (2003), *supra* note 6 at ix.

life. Importantly for Harrison this is firstly an ontology *of the dead*, in that "the corpse [and our disposal of it] is one of the most primordial of human institutions."[119] Disposing of the dead establishes place, and "mortalises" time, in a mode of being rehearsed later by statues and gravestones, among other objects, all of which demand awareness of humanity's finitude and memorialization of and care for what has passed.[120] I do not inherit his thought uncritically. As critical theorist Ewa Domańska observes, Harrison writes in a register that is "humanistic, anthropocentric, and Eurocentric, essentialist, and Christian."[121] But I think it is possible to rehabilitate the *humus* in postmodern directions: to, as Edwards put it, encounter the dead as "materializing (and often decomposing) […] heteroglossias, necroglossias, and object-oriented *res*glossias that problematize the binary between body and discourse, matter and information."[122]In the polyphony of the lawscape the humus can be understood to do more for law than impose (for Harrison), or bemuse and resist (for Martel), or represent silences (for Vines). In a materialist theory, the *humus* participates in the making and unmaking of law, much like other cultural formations, through both presence *and* absence, law *and* non-law, autonomy and heteronomy, all of which messily, fractiously and uncontrollably, compose (and decompose and recompose) differentiations within the lawscape.[123]

As a cadaver is taken up by worms, its material presence—and rights, duties and powers indexed to the corpse—alters, resulting in changes to how others lawfully orient and relate to a physical and social space. A burial spot may require additional care until the iron-clad corpse falls apart into the soil, becoming fit for re-use once decomposed;[124] decay may effect a pestilence (or, depending on the theory of contagion, a miasmatic atmosphere) that

[119] Ibid, 92-93.
[120] Ibid.
[121] Ewa Domańska, "Necrocacy" (2005) 18:2 *History of the Human Sciences* 111, 117.
[122] Edwards (2018), *supra* note 92 at 41.
[123] Harrison (2003), *supra* note 6.
[124] *Gilbert* (1820), *supra* note 20.

necessitates closing intramural facilities displacing them without the city limits;[125] sanitation, decency and the preservation of coronial evidence may require the prompt and secure retrieval, transfer and storage of the dead prior to an inquest.[126] Concurrent to these changes is the re-composition of physical and social space, and the normative worlds staged in and through that space.[127] But irrespective of the particular lawscapes a corpse challenges and sustains, decomposing bodies resist and open up the lawful as it is spaced through the craft of disposal, potentially authorizing novel and different ways of relating to the dead and the spaces they occupy.[128] Here lies the lawscape of the human dead, awaiting use by the jurisprudent attuned to its capacities.

3.2. The *Aestheses* of Humic Lawscapes

The architectonics of the corpse might be difficult to plot where the jurisgenerative duration—the spacing of non-law—is so abbreviated: the movement from *Locus Sacralus* to a status of (more) open use happens at the instant decomposition completes and apparently at no moment before or after. The case of *Gilbert* (1820) might suggest to some readers a conceptual as opposed to a material change.[129] The difficulty with plotting the humic lawscape might also arise because its effects are contained and orderly. The concept of jurisgenerativity may seem unnecessary where the outcome of change in status is repeated,

[125] With respect of animal bodies and miasmas, and the institutional response to these apparent dangers, see Marc Trabsky, "Institutionalising the Public Abattoir in Nineteenth Century Colonial Society" (2014) 40:2 *Australian Feminist Law Journal* 169.
[126] Trabsky (2019), *supra* note 11.
[127] See Andreas Philippopoulos-Mihalopoulos, "Law is a Stage: From Aesthetics to Affective Aestheses" in Emilios Christodoulidis, Ruth Dukes and Marco Galdoni, eds, *Research Handbook on Critical Legal Theory* (London: Elgar, 2019), 201-222 [Philippopoulos-Mihalopoulos (2019)]. Also see Shaw (2024), *supra* note 11.
[128] With respect of jurisdiction and authorisations of the lawful in instances involving the dead, see Barr (2016), *supra* note 11; Shaw (2020a), *supra* note 8; Trabsky (2019), *supra* note 11. Also see Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Abingdon: Routledge, 2012) [Dorsett and McVeigh (2012)].
[129] Regarding conceptual change, see Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1970).

predictably, with each burial. Owing to both challenges, it might strain thought to attribute the jurisgenerativity to the material process of decomposition itself, or to feel compelled to trace the atmospherics of a humic lawscape. However, in instances where the decomposition is prolonged, it becomes clearer to see how this arises in the physical matter of the corpse, and why jurisgenerativity and atmosphere are helpful concepts on which to draw. Prolonged decompositions also entail longer periods of unruliness—greater exposure to antinomian potentials—which contribute to qualitative changes in the law that settles. To further demonstrate the viability of this materialist theory of law and the dead, the next section, then, addresses such a situation where the process of decomposition is prolonged, is uncontained and bears on an example of bodies becoming equivalent to, if not properly, waste. Here the *aestheses* of the humic lawscape—the "visive, affective and sensuous dimensions [which] are animated through a given configuration of power relations that order, distribute and enframe the world"[130]—are given thicker description.

3.2.1. *Nineteenth-century Burial Law Reforms*

The dead body's inviolable status in ecclesiastical law and theory was sundered in the nineteenth century amidst a series of reforms. The presence of ecclesiastical law significantly reduced as courts of common law or equity gained the Church's temporal jurisdiction, and Church lawyers fled the increasing irrelevance of the Doctors' Commons to become barristers of Inns or to claim other appointments.[131] These transfers of power coincided with statutes that closed churchyards within cities and towns,[132] prohibited burials within municipal

[130] Matthews and Wall (2022), *supra* note 99 at 2.
[131] See generally R.B. Oathwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500-1860* (Cambridge: Cambridge University Press, 2006) [Oathwaite (2006)]; John Baker, *Monuments of Endlesse Labours: English Canonists and Their Work, 1300-1900* (London: Hambledon Press, 1998) [Baker (1998)].
[132] See e.g., *Metropolitan Interments Act* (1850), *supra* note 21; William Cunningham Glen, *The Metropolitan Interments Act, 1850, with Introduction, Notes, and Appendix* (London: Shaw and Sons, 1850) [Glen (1850)].

limits[133] and increasingly transferred authority over burying the dead to private corporations or municipal authorities who opened extramural burying grounds or cemeteries.[134]

In *Gilbert* (1820), on the precipice of reform, the process of decomposition materialized in the change in the body's legal status—from physical presence to immaterial spirit, from an earthly domain to incorporeal interregna in waiting for one's eventual resurrection—which ordered legal relations that arose with parishioners' deaths. But after nineteenth-century law reforms, decomposition could matter differently. The dead were profaned in images of their decomposition: slowly as effluvia in and on the earth, or quickly in the white-hot crematory. The decomposing dead threatened the living.[135] Decay proliferated decay, in an ever-expanding ring of annihilation, where the smallness of nothingness, uselessness, of loss, smothered the vibrance of human existence.[136] Decomposition no longer formed a secure part of a Christian eschatology, even as secular courts and jurists retained reference to "Christian burial,"[137] the decomposing corpse threatened to seep outside the bounds once occupied by the canons, and now claimed by common and statutory law, eviscerating the once staid form of bodily disposal.

For example, in England and Wales, *The Metropolitan Interments Act 1850* created a corporate body, the General Board of Health, which was empowered to purchase land, "having regard to the public health," so to provide burial grounds for inhabitants of London,

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[133] *Metropolitan Interments Act* (1850), *supra* note 21.
[134] See e.g., *Burial Act 1852*, 1852 c 85, s 1 (UK) [*Burial Act* (1852)].
[135] Such a threat is apparent, for example, in Chadwick (1843), *supra* note 22; also see L. Letheby, *Report of the Medical Officer of Health of the City of London, upon the New River Water, and the Church Yard of St. Andrew's, Holborn* (London: M. Lownds, 1855) [materials located within the archives of the Wellcome Collection in London, UK]; Sir John Simon, *Introductory Report, Suggesting the Outline of a Scheme for Extramural Interment* (London: C. Dawson, 1853) [materials located within the archives of the Wellcome Collection in London, UK].
[136] See e.g., discussion in Chadwick (1843), *supra* note 22.
[137] See e.g., *Bradshaw v Beard* (1862), 12 CB(NS) 344, 348, 142 Eng Rep 1175 (Court of Common Pleas) (UK) [*Bradshaw* (1862)]; *Doodeward* (1908), *supra* note 60 at 415; *R v Newcomb* (1898), 2 CCC 255, 1898 CarswellNS 110 (Nova Scotia County Court), para 4 [*Newcomb* (1898)]; *R v Stewart* (1840), 12 AD&E 773, 775, 113 ER 1007 (Court of Queen's Bench) (UK) [*Stewart* (1840)]; *Ex Parte Wurtele* (1851), 2:5 Canadian Ecclesiastical Gazette 35 (Upper Canada) [*Wurtele* (1851)].

Westminster, Southwark (and any other prescribed places that formed part of "The Metropolitan Burial District").[138] The burial grounds could initially be within or without the Burial District, along with authority to enlarge the burial ground where it was "necessary or expedient […] to do so,"[139] but the Board of Health could not bury bodies within 200 yards of any dwelling,[140] and burials under a chapel, and within ten feet of the chapel's outer wall, were prohibited.[141] The Queen-in-Council could authorize the discontinuance of parish churchyards, with the advice of the Boards of Health responsible for the Burial District,[142] which was promptly undertaken.[143] The *Burial Act 1852* transferred the Board of Health's jurisdiction to the Secretary of State, making room for other corporate bodies to provide burial grounds;[144] but, new burial grounds could not be within two miles of the Metropolis without the approval of the Queen-in-Council. Subsequent *Burial Acts* expanded the scheme to other cities and towns of England and Wales, generally closing intramural churchyards administered by ecclesiastical authorities and opening extramural burial grounds under public and private corporate bodies.[145]

The Provinces of Canada, Newfoundland and New Brunswick enacted similar legislation. In New Brunswick, for example, the Legislature enacted statutes that closed public burial grounds, noting that continuing to inter remains on those grounds could 'be

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[138] *Metropolitan Interments Act* (1850), *supra* note 21.
[139] Ibid, s 6.
[140] Ibid, s 24.
[141] Ibid.
[142] Ibid.
[143] See generally Julie Rugg, "Constructing the Grave: Competing Burial Ideals in Nineteenth-Century England" (2013) 38:3 *Social History* 328 [Rugg (2013)]. Rugg describes the *Metropolitan Interments Act* (1850), *supra* note 21, as a failure in that the Board of Health was swiftly disbanded. However, it began England's interventions in burial and its basic principle was rehabilitated in subsequent *Burial Acts*. Rugg clarifies that Chadwick's objectives less so failed than were accomplished by different means. Also see Julie Rugg, "Nineteenth-Century Burial Reform in England: A Reappraisal" (2021) 16 *Histoire, médecine et santé* 79.
[144] Rugg (2013), *supra* note 157; also see *Burial Act* (1852), *supra* note 147 at s 1.
[145] See e.g., *Burial Act 1853*, 1853 c 134 (UK).

detrimental to the health of the inhabitants.'[146] A provision in one of those acts prohibited a new burial ground from being established within one mile from a certain river within the county.[147] Acts of incorporation were also passed, establishing companies that would provide burying grounds safely without the town's limits.[148] In Canada, the Legislature prohibited interment within the most populous wards of the city of Quebec as it was "essential to the salubrity of the City" and the "health of the inhabitants."[149] Within Toronto, the Legislature authorized the closure and sale of Potter's Field, which had become swallowed by the expanding Village of Yorkville.[150] The statute also required the transfer of buried bodies to the newly acquired Toronto Necropolis and Mount Pleasant Cemetery which were, at the time, well beyond the bounds of Yorkville and the city of Toronto.[151] Other statutes, in other regions of Canada, similarly incorporated cemetery companies that would operate "near to, but without the limits" of the respective town or city for the sake of public health.[152] These same statutes prohibited the burial of bodies under, and within fifteen feet of the outer walls of,

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[146] *An Act relating to the Public Burial Grounds in the Town of Saint Andrews*, 19 Vic 1856 c 27 (New Brunswick); *An Act relating to the Public Burial Grounds in the Parish of Saint Stephen*, 20 Vic 1857 c 21 (New Brunswick) [*Saint Stephen Burial Ground Act* (1857)]. Also see in Newfoundland the prohibition of burial within St. John's for reasons of public health, *An Act to prohibit Interments within the Town of St. John's*, 12 Vic 1849 c 13 (Newfoundland).
[147] *Saint Stephen Burial Grounds Act* (1857), *supra* note 160 at s 3.
[148] *An Act to incorporate the Saint Andrews Rural Cemetery Company,* 20 Vic 1857 c 26 (New Brunswick); *An Act to incorporate the Saint Stephen Rural Cemetery,* 19 Vic 1856 c 28 (New Brunswick).
[149] *An Act to prohibit Interments in certain Burial Grounds in the City of Quebec,* 18 Vic 1855 c 141.
[150] See Toronto General Burying Grounds Trust, *Historical Sketch and Rules and Regulations (Illustrated)—Toronto, Canada 1826-1891* (Privately printed 1891) [located within the digital archives of Canadiana by CKRN in Ottawa, ON].
[151] *An Act to enable the Trustees of the Toronto General Burying Ground, to close the same, to sell a portion thereof, and to acquire other ground for the purposes of the Trust*, 18 Vic 1855 c 146 (Canada), s 1.
[152] *An Act to incorporate the Cataraqui Cemetery Company*, 13&14 Vic 1850 c140 (Canada) [*Cataraqui Cemetery Company Act* (1850)]. Also see *An Act to incorporate The Mount Hermon Cemetery*, 12 Vic 1849 c 191 (Canada) [*Mount Hermon Cemetery Act* (1849)]; *An Act to authorize the formation of Companies for the establishment and management of Cemeteries in Upper Canada*, 13&14 Vic 1850 c 76 (Canada) [*Cemeteries of Upper Canada Act* (1850)]; *An Act to amend and consolidate the several Acts incorporating the Mount Royal Cemetery Company,* 20 Vic 1856 c 128 (Canada) [*Mount Royal Cemetery Company Act* (1856)]; *An Act to Incorporate the Montreal Cemetery Company*, 10&11 Vic 1847 c 67 (Canada).

chapels or any other buildings erected within the burial grounds,[153] and required cemetery companies to prevent "offensive matter from the […] cemetery" from "[be]foul[ing]" any waterways or watering places.[154] Municipalities were also empowered to pass by-laws that prohibited the interment of dead bodies within their municipal boundaries.[155]

Allusions to the decomposing corpse pervade these statutes, where putrefaction was the mischief that repeatedly begged for their enactment. A fuller description can be traced from other literatures coinciding with the legislation of this period, where dead bodies demonstrably factor in the rendering of legal norms. Perhaps the best exemplar is the parliamentary study led by social reformer Sir Edwin Chadwick,[156] documented in 1843 with the publication of "A Supplementary Report on the Results of a Special Inquiry into the Practice of Interment in Towns."[157] The report recommended law reform, which the English House of Commons generally took up in *The Metropolitan Interment Act 1850*,[158] with variations introduced by subsequent *Burial Acts*.[159] The Supplementary Report is replete with reference to the effects of human remains, which were understood to have physical and moral consequences pertaining to illness generally, but also one's appearance and tendency

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[153] *Cataraqui Cemetery Company Act* (1850), *supra* note 166 at s 13; *Mount Hermon Cemetery Act* (1849), *supra* note 166 at s 16; *An Act to incorporate the Toronto Necropolis,* 13&14 Vic 1850 c 141, s 11 (Canada) [*Toronto Necropolis Act* (1850)]; *Cemeteries of Upper Canada Act* (1850), *supra* note 128 at s 11; *Mount Royal Cemetery Company Act* (1856), *supra* note 166 at s 23. Also see within New Brunswick the prohibition of interment under or within one hundred yards of the Trinity Church in the City of Saint John, and the same of any other church erected in the province with *An Act for erecting a Parish in the City of Saint John, and incorporating the Rectors, Church Wardens and Vestries of the Church of England in the several parishes of this Province*, 29 Geo III 1789 c 1, s 8. An exception had to be legislated for Lieutenant-Governor Smyth who desired to be buried within his parish church, *An Act to provide for the permanent Interment of the Remains of the late Lieutenant-Governor Smyth, within the Walls of the Parish Church of Fredericton,* 5 Geo IV 1824 c 12 (New Brunswick). Section 4 of that *Act* prevented this singular burial from being considered a precedent.
[154] *Cataraqui Cemetery Company Act* (1850), *supra* note 167 at s 17; *Mount Hermon Cemetery Act* (1849), *supra* note 167 at s 26; *Toronto Necropolis Act* (1850), *supra* note 167 at s 15; *Cemeteries of Upper Canada Act* (1850), *supra* note 166 at s 15.
[155] *An Act to incorporate the City of St. Hyacinthe,* 20 Vic c131, s 74 (Canada).
[156] S.E. Finer, *The Life and Times of Sir Edwin Chadwick* (London: Routledge, 1952); Hugh Small, "Edwin Chadwick: A Biographical Update" (2022) 30:2 *Journal of Medical Biography* 118.
[157] Chadwick (1843), *supra* note 21.
[158] Glen (1850), *supra* note 145.
[159] Rugg (2013), *supra* note 157.

to certain acts. These effects were specifically associated with the "emanations from human remains in a state of decomposition,"[160] made worse by an "over-crowd[ing] with bodies."[161] This observation emboldened a desire to move interment from its intramural status, or within the limits of the city or town, to an extramural situation or without city limits.[162] Before reaching this conclusion, Chadwick weighed evidence that decomposing remains posed a pestiferous danger. For instance, he quoted extensively from the statements of the French physician and hygienist Alexandre Parent-Duchâtelet,[163] with Chadwick emphasizing an apparent contradiction: Parent-Duchâtelet claimed there were no risks with intramural burial whilst he also enjoined the hasty disposal of anatomical viscera.[164] Chadwick wrote:

> After having strenuously asserted the general innocuousness of such emanations, and the absence of foundation for the complaints against the anatomical schools, Parent-Duchâtelet concludes by an admission of their offensiveness, and a recommendation in the following terms:—
>
> "Instead of retaining the 'debris' of dissection near the theatres of anatomy, it would certainly be better to remove them every day: but as that is often impracticable, there ought, on a good system of assainissement' to be considered the mode of retaining them without incurring the risk of suffering from their infection."[165]

There were, from Chadwick's perspective, numerous misattributions that failed to capture the chain of causation, or attempted to conceal it.[166] The chain of causation between emanations and illness, when properly viewed, was "constantly traceable":[167] the decomposition of the dead injured, although not necessarily in the form of a specific disease, but by variable

[160] Chadwick (1843), *supra* note 21 at 2.
[161] Ibid.
[162] Ibid, 23.
[163] Editors, "A.J.B. Parent-Duchatelet (1790-1835)" (1936) 137 *Nature* 732.
[164] Chadwick (1843), *supra* note 21 at 6.
[165] Ibid, 7.
[166] Ibid.
[167] Ibid, 12.

means of malady which ranged from low fevers to instant death.[168] The effect was analogized to the then undisputed, long-observed-phenomenon of general illness following the injection of dead, decomposing matter into the body.[169] But its unique etiology involved the perfusion of particles of putrefying matter into the atmosphere, taken up in the lungs and which were then entered into the pulmonary system of the human body, at which point the matter could, depending on quantity or concentration, effect destruction. Edward Bascome, a contemporary of Chadwick, referred to these as "atmospheric vicissitudes,"[170] where "processes of respiration and combustion perpetually tend to the destruction of the vital air, and the substitution of another, which is a deadly poison to animal life."[171] Another, unknown writer, albeit identified as a Fellow of the Massachusetts Medical Society, emphasized that putrid matters spread by air and touch, whose "local cause, cooperating with the atmospheric morbific tendency, is sufficient to unfold […] disease."[172] Putrefaction was the "disorganization" of organic matter, "abandoned to the laws of chemical agency" where matter "decomposed into their constituent elements" which "being vaporized by heat […] blended with the atmosphere."[173] The laws of chemistry resulted in the liquification, and eventual sublimation, of the body, eviscerating the body's unity as it proliferated:

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[168] Ibid, 23. Likewise others maintained that there was no specific disease caused, but rather a general disorganisation of the organic body that threatened, if it did not cause immediately, death. Within England, see e.g., Edward Bascome, *Prophylaxis; or, the Mode of Preventing Disease, by a Due Appreciation of the Grand Elements of Vitality: Light, Air, and Water with Observations on Intramural Burials* (London: S. Highley, 1849), 1-2 [Bascome (1849)] [located within the digital archives of the Wellcome Foundation in London, UK]. Within Canada, also see a general chemistry text published in Halifax, Nova Scotia, "prescribed by the Council of Public Instruction for Use in the Public Schools" as part of the Nova Scotia School Series: Stevenson MacAdam, *The Chemistry of Common Things* (Halifax: A&W MacKinlay & Co 1880), 157-158 [MacAdam (1880)] [located within the digital archives of Canadiana by CKRN in Ottawa, ON].
[169] See e.g., Bascome (1849), *supra* note 182 at 20; Anonymous, *Remarks on the Dangers and Duties of Sepulture: or, Security for the Living, with Respect and Repose for the Dead* (Boston: Phelps and Farnham, 1823), 23 [Anonymous (1823)] [located within the digital archives of the Wellcome Foundation in London, UK].
[170] Bascome (1849), *supra* note 182 at 2.
[171] Ibid, 8.
[172] Anonymous (1823), *supra* note 183 at 20.
[173] Ibid, 23.

> Take for the focus of this infection the grave-yard of Trinity Church, saturated with dissolved semi-liquid human flesh, oozing from every pore, and the incumbent atmosphere filled with noxious effluvia, concurring with the air of the city, contaminated by unexampled quantities […][174]

For Chadwick, the nose was a "sentinel," in that it could alert us to the presence of such noxious matters through smell, but decay and putrefaction could also go unnoticed.[175] Elsewhere, it was stated miasmas were "exceedingly difficult to prevent," and that these gases could be "subtle and penetrating."[176] It was generally understood that decay and putrefaction were favoured by "marshes, bogs and other uncultivated and undrained places," in "ill-ventilated, and crowded apartments" and in the "confine[s] […] of densely-populated cities, where little attention [was] paid to the removal of putrefying and excrementitious matters."[177] Bascome similarly identified conditions of stagnant air, poor light, overcrowding and insufficient drainage as conducive to pestilence:[178] of these elements, Bascome identified air as the primary mischief to which legislation should address, as the absence of ventilation allowed noxious vapours to accumulate and overwhelm the human body.[179] Heat, particularly entrapped in humid air, was also a culprit.[180] Others worried coming into physical contact with putrid matters was enough to beget their own decay. This was the view of Chadwick; quoting the testimony of British scientist and frequent government commissioner Dr. Lyon Playfair,[181] Chadwick noted:

> Both decaying and putrefying matters are capable of communicating their own state of putrefaction or of decay to any organic matter with which they may come in contact. To take the simplest case, a piece of decayed wood, a decaying orange, or a piece of tainted flesh is capable of causing similar decay or putrefaction in another piece of wood, orange, or flesh.[182]

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[174] Ibid, 20.
[175] Chadwich (1843), *supra* note 21 at 23-24.
[176] Anonymous (1823), *supra* note 183 at 19-20.
[177] Chadwick (1843), *supra* note 21 at 19.
[178] Bascome (1849), *supra* note 182.
[179] Ibid, 7, 12-13.
[180] Anonymous (1823), *supra* note 183 at 19-20.
[181] A. Butler, "Lyon Playfair (1818-1898) and Compulsory Vaccination'"(2006) 51:3 *Scottish Medical Journal* 43.
[182] Chadwick (1843), *supra* note 21 at 19.

Irrespective of the precise mechanism imagined by writers, each similarly encountered the decomposing corpse through a sanitary frame which factored in, and, in doing so, gave a general shape to, proposals for law reform. Noxious vapours transformed soil into a deathly kind, with the escape of decaying and putrefying matters from the body and its seeping into the earth, determining, from the perspective of avoiding injury, the lawful use of urban space. This was exemplified in discussion of the location of interment, but also the depth of interment, noting that burying too deep may indeed belie our intuitions by creating, in place of the body once decomposed, a reservoir of gasses below the surface of the earth, draining deeper and leading to the "pollution of springs."[183] Some suggested to inter without coffins, as they slowed decomposition and rendered it "less perfect," and to prohibit shared family graves which, with each death, invited re-exposing the body to the air.[184] Also, the materiality of the soil or surrounding area, like pavement or the presence of water or certain clays, might slow decomposition or otherwise trapped effluvia, increasing exposure and limiting proper release and dissipation of the noxious matters into the atmosphere which would render them, under ideal conditions, innocuous.[185] It was feared that trapped gases suddenly released did so with special vengeance having built pressure without relief, becoming especially lethal in "long confinement and concentration,"[186] which motivated banning burial under structures like chapels, and the immediate yet careful reinterment of remains elsewhere.[187] Petitioning for extramural burial, an unknown author

[183] Ibid, 28.
[184] Anonymous (1823), *supra* note 183 at 34.
[185] See e.g., Chadwick (1843), *supra* note 21 at 27-30.
[186] Anonymous (1823), *supra* note 183 at 19-20.
[187] Ibid.

described these matters in verse as engaged in endless germinations, virally reproducing in their sweep of the city.[188]

Earth burials were nonetheless desired, but only if "buried at a sufficient depth, in a proper place, and the grave be not opened before its entire decomposition."[189] Chadwick, among other writers, thereby implored lawmakers to turn to the art of landscaping, to remake their physical and social environments in the image of sanitary design:[190] a materiality infused by norms of a healthy public order, where the agencies of decaying matters were contained, controlled and diverted in ways amenable to urban life.[191]

3.2.2. *Atmospheric mediations*

The corpse's dreadful emanations were not felt equally among the colonies. For example, the Province of Nova Scotia was only limitedly concerned with burial law reforms during the

[188] Anonymous, *The Cemetery: A Brief Appeal to the Feelings of Society in Behalf of Extra-Mural Burial* (London: William Pickering, 1848), 11-12 [Anonymous (1848)] [located within the digital archives of the Wellcome Foundation in London, UK].
[189] Anonymous (1823), *supra* note 183 at 33-34.
[190] Chadwick (1843), *supra* note 21 at 127-133.
[191] See its uptake in case law, as well, where it was acknowledged that statutory regulations were vital to controlling and eliminating nuisances that would otherwise result from interring the dead within cities or towns. *Slattery v Naylor,* [1888] UKPC 26, LR 13 App Cas 446 (Privy Council) (New South Wales); *Ex Parte Flack* (1880), 1 NSWLR 27, 1 LR (NSW) 27 (NSW Supreme Court) (New South Wales). The case of *Slattery* was cited positively by *Virgo v Toronto (City)* (1894), 22 SCR 447, 1894 CanLII 1.

same period, with only two statutes apparently enacted for this purpose.[192] It may be intuitive, but it is difficult to attribute the difference in law to the size and density of population; certainly towns in Nova Scotia were smaller, and more sparsely populated than Toronto, Montreal, Quebec and London, but Nova Scotia had a larger population than New Brunswick throughout the nineteenth century (e.g., in 1851, Nova Scotia's census was 276,854 and New Brunswick's census was 193,800) and, as the legal history of New Brunswick suggests, several communities were concerned with miasmas associated with burial grounds.[193] Rather, the difference appears to be mediated in part by conditions of Nova Scotia's environment.

[192] In 1833, Nova Scotia's General Assembly enacted a statute that sought to discontinue the practice of interment within the town of Halifax. See *An Act concerning Cemeteries and Burial Grounds for the Town of Halifax*, 3 Geo III 1833 c 32, s 1 (Nova Scotia) [*Halifax Cemeteries and Burial Grounds Act* (1833)]. That same statute authorized the Crown to appropriate a portion of the Halifax Common, at the time set apart from the town of Halifax, for the purpose of establishing a new public cemetery that would not be injurious to the public. Despite the enabling legislation, the cemetery did not initially open due to disputes with the military over the appropriation of the Common. However, in 1844, the cemetery—Camp Hill Cemetery—opened alongside the closure of the Old Burying Ground administered by St. Paul's Church. See Kim McGuire, "The Rural Cemetery Movement in Halifax, Nova Scotia". BA Thesis, Saint Mary's University, 1990. In 1864, apparently at the urging of the Yarmouth Free Discussion Club whose members were discussed the public health risks of intramural interment, the General Assembly enacted a statute that closed the Yarmouth Public Cemetery, then located at the "centre of the town," after having incorporated the Yarmouth Mount Cemetery Company in 1860 to administer an extramural cemetery. Otherwise, the General Assembly appears to have only passed private statutes to incorporate companies who were assigned pre-existing, but unsupervised, burial grounds within small localities. See *An Act to amend the Act for establishing a Public Cemetery in the Town of Yarmouth, and for other purposes,* 1864 c 55, s 1; *An Act to incorporate the Mountain Cemetery Company of Yarmouth*, 1860 c 77; also see microfilms at Nova Scotia Archives, specifically Microfilm Roll 4901 pertaining to the Herald in Yarmouth discussing the Yarmouth Free Discussion Club in 1859.

[193] Colonies' rates of population can be found archived on Statistics Canada's website: https://www150.statcan.gc.ca/n1/pub/98-187-x/4064809-eng.htm.

English settlers marveled at Nova Scotia for its salubrious climate.[194] There was prevalent fog among the coastal regions of Nova Scotia, but it was cool to the touch and underwent regular ventilation due to the maritime winds: two atmospheric properties that were not conducive to injurious miasmas.[195] *The Pearl*, a Halifax newspaper, recounted stories of miasmas in cemeteries, such as in France, but did not turn their concern to Halifax;[196] at most they stressed the sentimental value of beautifying cemeteries,[197] or published excerpts that, whilst acknowledging the threat of pestilence, stressed that these threats arose in "the most crowded and dirty parts of British metropolis."[198] The Eastern Chronicle, a newspaper from Pictou, Nova Scotia, suggested a predisposition to tuberculosis occurred with repeated exposure to effluvia;[199] however, cemeteries were not specifically named. Instead, the Eastern Chronicle referred generally to "damp and unwholesome climates, [and] the contaminated atmosphere of privies, sewers, and close rooms of factories and workhouses," and mentioned "the unnatural intermixture of blood" in interracial relations

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[194] Joseph Bouchette, *Topographical and Statistical Description of the Provinces of Lower and Upper Canada, Nova Scotia, the Islands of Newfoundland, Prince Edward and Cape Breton* (London: Longman, Rees, Orme, Brown, Green and Longman, 1832), 46 [located within the digital archives of Canadiana by CKRN in Ottawa, ON]; Joseph Outrem, *Nova Scotia, Its Condition and Resources* (London: Blackwood 1850), 13 [located within the digital archives of Canadiana by CKRN in Ottawa, ON]; Thomas Chandler Haliburton, *An Historical and Statistical Account of Nova-Scotia* (London: J Howe 1829), 354 [located within the digital archives of Canadiana by CKRN in Ottawa, ON]. Although, one writer noted it could not compete with the south of France, although it was nonetheless a "wholesome climate, well agreeing with a British constitution." See Anonymous, *A Genuine Account of Nova Scotia* (London: 1750), 4, 11 [located within the digital archives of Canadiana by CKRN in Ottawa, ON].

[195] Anonymous, *The Present State of Nova Scotia: With a Brief Account of Canada, and the British Islands on the Coast of North America* (London: Robinson & Co, 1787), 36 [accessible by archive.org]. The text was later attributed to S. Hollingsworth. Also see Sara Spike, "'A Salubrious, Saline Exhalation' Health in Colonial Newfoundland and Nova Scotia" (2020) *Network in Canadian History and Environment*: https://niche-canada.org/2020/08/27/a-salubrious-saline-exhalation-fog-and-health-in-colonial-newfoundland-and-nova-scotia/.

[196] Anonymous, "The Plague and Burials at Marseilles" in *The Pearl* (1838), 147 [located within the digital archives of Canadiana by CKRN in Ottawa, ON].

[197] Anonymous, "Rural Cemeteries" in *The Pearl* (1838), 270 [located within the digital archives of Canadiana by CKRN in Ottawa, ON].

[198] Anonymous, "Inhumation of the Dead in Cities" in *The Pearl* (1838), 257 [located within the digital archives of Canadiana by CKRN in Ottawa, ON]. It was an excerpt from an English book, J.G. Millingen, *Curiosities of Medical Experience* (London: Bentley, 1838).

[199] Anonymous, Title mangled, in *Eastern Chronicle* (7 July 1869) Vol 27, No 52, p. 3 [located within the digital archives of the Nova Scotia Archives in Halifax, NS].

between white and Black peoples, "excessive labour" and an overconsumption of spirit and pork as sanitary threats.[200] Elsewhere in the Eastern Chronicle, the nuisance of "offensive effluvia […] breed[ing] a pestilence" is noted in an editorial item, but the body at issue was a dead cow left "lying on the side of the road."[201] With the enactment of a statute in 1833 that sought to discontinue the practice of interment within the town of Halifax,[202] the Acadian Recorder did not comment on the purpose of, or the context requiring, the legislation; instead, the writer expressed concern for public feelings toward the sanctity of burial grounds.[203] Nova Scotia appeared indifferent to the threat of putrefaction, perhaps owing to its local atmosphere permitting the hasty disappearance of offensive matters. Comparison to Nova Scotia suggests that decompositions mattered differently depending on the context of expression; countervailing materialities or cultural distinctions could silence the annihilation portended by the corpse.

Further, not all decompositions were equivalent. It was by prolonging decay that the dead resulted in nuisance, which practices motivated from an overabundance of sentiment, population and carelessness, especially among the working class, facilitated. But, for some, if the process of decomposition was accelerated by fire, its noxious properties could be avoided, merely accreting a residue of "inorganic" ashes or bonestuffs to be easily discarded. Some writers thereby stressed the sanitary principles of cremation and advocated for its uptake in law reform. George Baynes, a professor at McGill University who celebrated fire as "the emblem of purification,"[204] wrote in 1875:

> If the ultimate result is the same by any process, vis: That the human body must return to its affinities, whether by a slow or a rapid process—yet return it must,—and If in the

[200] Ibid.
[201] Editors, "Editorial items" in *Eastern Chronicle* (12 June 1869) Vol 27, No 45, p. 3 [located within the digital archives of the Nova Scotia Archives in Halifax, NS].
[202] *Halifax Cemeteries and Burying Grounds Act* (1833), *supra* note 206.
[203] Anonymous, "Legislative Proceedings" in *Acadian Recorder* (20 April 1833) Vol 21, No 16, p. 3 [located within the digital archives of the Nova Scotia Archives in Halifax, NS].
[204] George A Baynes, *Disposal of the Dead: By Land, By Water, or By Fire; Which? Being the Last Lecture of the Course on Hygiene and Public Health* (Montreal: Witness, 1875), 23 [Baynes (1875)] [located within the digital archives of Canadiana by CKRN in Ottawa, ON].

> slow process all manner of danger threatens the survivors, what possible argument can be raised against a more rapid and safe mode of arriving at the same end? Can anything commend itself more than to assist nature to return at once to her constituent elements? Water to water—sulphur and acids to be oxidized into other combinations, leaving the dust to return to dust, or be preserved in the urn that respect or regard may have prepared for it.—And thus in an hour effecting the work of a long process of dangerous transmutations for years in some cases, through a scene described by our Lord and Master in Matthew xxiii, 27, as "full of dead men's bones and all uncleanness."[205]

The body's dissolution was necessitated by the "order of the universe," a physical law that claimed all matter; the difference lied in whether this process was administered quickly, or not, with a slower temporarily tending to injure the living who found themselves increasingly unable to escape the corpse's by-products.[206] Fire hastened a physical process that would occur anyway, and in doing so enabled the decomposition with "far less corruption."[207] For Baynes, among others, the law needed to be rid of prejudices against cremation, as the application of fire would restore the dead to a harmless position relative to the living.

Others disagreed with cremation but similarly advocated for legislation responsive to the physical behaviour of the corpse, suggesting the body could fall apart and away with propriety. For example, some thought a "natural" disposal, removed from the impediments of society, could resolve the threat of putrefaction.[208] In England, Francis Seymour Haden argued for the disuse of vaults, hermetically sealed coffins, and coffins of lead and iron. He maintained that the body was required by "cosmical law" to decompose and that efforts to

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[205] Ibid, 21.
[206] Ibid, 19. The corpse was not an inert object for Baynes, but rather replete with activity. At p. 19, quoting another writer, Baynes stated "Sir Henry Thompson observe[d], 'Rest! No, not for an instant. Never was there greater activity than at this moment exists in that still corpse. Activity, but of a different kind to that which was before.'"
[207] Ibid, 23.
[208] There were opponents to cremation on religious grounds, namely arguments that, holding close the idea of *imago Dei,* the human body was sacred, and with which could not be interfered (or desecrated). But some dispensed with theological opposition by noting the physical matter of the corpse was not what was sacred. See for e.g., T. Spencer Wells, "Cremation and the Clergy" (1889) *The Theological Monthly* 125. Although not addressing cremation, a similar distinction is made by the Bishop of Toronto in advocating for the disinterment and reinterment of the dead at another burial ground. See Lord Bishop of Toronto, *Thoughts on the Rebuilding of the Cathedral Church of St. James* (Toronto: Private circulation, 1850) [located within the digital archives of Canadiana by CKRN in Ottawa, ON].

preserve the body transgressed that law, hopelessly, as "preventing their dissolution" only "cause[d] […] their embarrassing accumulation."[209] The embarrassment of rotted flesh invariably reached the living as their noxious emissions were impossible to contain, leading to more, not less, disorder and decay.[210] A "proper" burial—ensuring that the "earth may have access to [the body]"—would transmit organic matter safely to the atmosphere, "fulfil[ing] the cycle of its pilgrimage by becoming again the source and renewal of life."[211] For Haden, cremationists erred in treating the hastened destruction of the body as equivalent to decomposition by natural means: cremation rushed nature; it meddled by preventing nature from "proceed[ing] slowly and by measured steps, each step depending for its perfection on the perfection of the step that immediately preceded it."[212] Legislation was required to effect "a complete and radical change in the law that relates to the disposal of the dead,"[213] with Haden recommending that the body be buried without ornaments and vaults, in a manner coordinated temporally with the law of nature, in soil "competent to effect [the] resolution" of body and earth.[214]

Whether by fire, or by some proper mode of burial, Baynes and Haden reflect different modes of response that shared in attempting to force the decomposing corpse into a familiar shape: the bid to effectively contain decomposition within the mould of legal relations evinced in *Gilbert* (1820), where the physical matter of the decomposing corpse—its materiality—functions as an intermediary between legal statuses where one status, and the relations that comprise it, become another once decomposition is complete.[215] The appearance of this structure in both calls for law reform becomes apparent in their reference to God and the Last

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[209] Francis Seymour Haden, *The Disposal of the Dead: A Plea for Legislation, and a Protest Against Cremation* (London: Bemrose & Sons, 1888), 5 [Haden (1888)] [located within the digital archives of the Wellcome Foundation in London, UK].
[210] Ibid, 9.
[211] Ibid.
[212] Ibid, 11.
[213] Ibid, 15.
[214] Ibid, 16.
[215] *Gilbert* (1820), *supra* note 20.

Judgment, drawing on Christian eschatology to narrate the lawful conduct of the material corpse.[216] Returning to the concept of jurisgenesis, Baynes and cremationists sought to re-establish this mould by truncating the temporality of non-law—the duration of chaos between legal statuses—in a flash of white heat. Haden, and others advocating for a form of "natural" burial, sought to restore chaos to a place at a remove from, and unfettered by, social order, where it could form a necessary part of God's design through the laws of the cosmos.

3.2.3. *Humic Lawscapes as Antinomian in Ontological Structure*

Without nineteenth-century burial law reforms, England and her colonies feared the corpse's decomposition risked overtaking life; risked overtaking the structure of lawful relations evinced in *Gilbert* (1820). The corpse's capacity to destroy and to disorder threatened to widen the spacing of non-law,[217] extending in duration and remit, so that more and more matter surrounding the corpse disassembled through the evacuating touch of its vapours. The extended form of non-law underwent a qualitative change as it, in the view of settlers and Britons, accumulated volume, in that effluents threatened to leak beyond the dead's place of rest and besiege, and extinguish the light of, civil order. Civilization—it was feared—was threatened by the soft stuff of the corpse: the flesh that folded, distended and perforated that possessed the capacity for mass death.

In a sense, such ideas were part of, then dominant,[218] Christian and Western narratives already. Cultural theorist Nick Land, in *The Thirst for Annihilation*, describes:

> The usage of the difference between the hard and soft parts of the body as a logical operator in discourse on matter and death. For instance, differentiation between eternal form and perishable substance, celestial purity and terrestrial filth, divine architecture and base flow. The skeleton is thus conceived of as an invisible harmonious essence,

[216] Baynes (1875), *supra* note 218; Haden (1888), *supra* note 223.
[217] Slaughter (1992), *supra* note 61.
[218] At other points, that which was corporeal was hallowed including the emissions of the body. See e.g., Bynum (1989), *supra* note 49.

> an infrastructure beneath the disturbing tides of soft pathology. It is the prototype of intelligible form, contrasted with the decaying mass of the sensible body.[219]

Land continues:

> The skeleton is the relatively dead part of an organism, and because of this it is also the part relatively immune to dissolution. Which is another way of saying that the hard parts of an organic body are those most isolated from the communicative general-economic flows of its metabolism, but also the parts it most faithfully transmits into the future. The residues of life follow upon a pre-emptive compromise with death; what remains of life is only the disloyal part of itself.[220]

What differed here was the extent of decay, the extent of fluid, oozing, destruction. Flesh consumed bit by bit, slab by slab, in decomposition, flowing outward beyond the bounds of skin in decay and putrefaction. In that, the body expressed a certain unwillingness to stay in place, to defy the quiet dissolution of bone, to expand as excremental mass, converting what it touched into earth in a contagious process of decomposition. Sanitary reformers narrated the tendency of all matter to dissolution, which storied a qualitative difference in the effects of the decomposing corpse, so that its excremental mass stretched farther than before, contaminating more, destroying more.[221] Here the rites of Christian burial, the legal relations structured by the corpse in *Gilbert* (1820), risked being washed away by putrid flows. No longer could the skeleton follow divine rites of ashes to ashes, quietly degrading under pressure and becoming but a lump of earth,

Human remains became, or risked becoming, a fixture of non-law in England and the colonies: an anarchic permanence structuring the formation of law as it portended law's complete abandon.[222] The decomposing corpse no longer facilitated a mere change in legal status. The corpse demanded its relocation, segregated from the social and physical lives it

[219] Land (1992), *supra* note 25 at 126.
[220] Ibid.
[221] See e.g., Chadwick (1843), *supra* note 21.
[222] Martel (2018), *supra* note 88. On law and anarchy generally, see Elena Loizidou, "What is law?" in Carl Levy and Saul Newman, eds, *The Anarchist Imagination: Anarchism Encounters the Humanities and the Social Sciences* (Abingdon: Routledge, 2019), 181-193.

once formed part, unless others were eager to join its eternal repose. The variability between these cases suggests the absence of determinate structure between spacings of non-law and law. Land argues there is no "elemental duality [between rigidity and fluidity] at stake here;"[223] no dialectic synthesising oppositions in space, time and matter in predictable forms.[224] Rather law, in its individuation of order, reflects a provisional and "unilateral deviation from fluidity" of matter which are invariably "crumbled and swept away from the deep flows of the Earth."[225] Spacings of law, in other words, are temporary arrestments. Eventually law's monuments, like others, return to the movement of decomposition. But each return is uniquely choreographed.

Jurisgenesis then is the eruption toward arrest: the constitutive, world-making duration of space, time and matter coming together as *nomos*.[226] This process of individuation,[227] where a form finds expression from material and immaterial forces preceding it, is an unending process of becoming that accretes in the specificity of place (no form emerges outside the context of its arrival).[228] These constitutive forms to the *nomos* are dynamic—at most it is provisionally metastable within an environment which is itself a metastability—always retaining the possibility of coming apart into elementary forces that do

[223] Land (1992), *supra* note 195 at 128.
[224] Ibid.
[225] Ibid.
[226] Cover (1983), *supra* note 62; also see Pheng Cheah and Elizabeth Grosz, "The Body of the Law: Notes Toward a Theory of Corporeal Justice" in Pheng Cheah, David Fraser and Judith Grbich, eds, *Thinking Through the Body of the Law* (New York City: New York University Press, 1996), 3-25; David Delaney, *The Spatial, the Legal and the Pragmatics of World-Making* (Abingdon: Routledge, 2010) [Delaney (2010)].
[227] Gilbert Simondon, *Individuation in Light of Notions of Form and Information* (Minneapolis: University of Minnesota Press, 2020) [Simondon (2020)]; also see Shaw and Mykitiuk (2023), *supra* note 23.
[228] Shaw and Mykitiuk (2023), *supra* note 23; Simondon (2020), *supra* note 241. Also see Rosi Braidotti, *Metamorphoses: Towards a Feminist Theory of Becoming* (London: Polity, 2001) [Braidotti (2001)]; Elizabeth Grosz, *The Incorporeal: Ontology, Ethics and the Limits of Materialism* (New York City: Columbia University Press, 2017) [Grosz (2017)]; Erin Manning, *Always More Than One: Individuation's Dance* (Durham: Duke University Press, 2013) [Manning (2013)].

something altogether different.[229] Critical legal theorist Margaret Davies describes biogenesis as potentially partaking in jurisgenesis, in that the formative processes of organic life conduce orderly ways of relating; the teleological performance of matter toward the holding of a body (and bodies) together.[230] Non-organic physical matter can be understood as participating in teleological performances, too; theories of entropy suggest the probabilistic tendency to disintegration, to disorder, toward randomness, which may characterize law as well.[231] Organic bodies, including humans, are also subject to entropy—organic lifeforms are comprised of processes that work to, temporarily, maintain order, also known as the operation of negative entropy—and so the end of life in, and decomposition of, organic bodies may affect the individuation of *nomos*; conclusions supported by the cases considered above.

Bodily decomposition, facilitated by depth, soil-kind and crowding, might be understood to resist and open up the lawful spaced through the craft of disposal. As discussed above with reference to Slaughter, Slaughter describes that which "lies outside law," as "chaos, fragmentation, hybridisation, and decomposition" in contrast to "law belong[ing] to and creat[ing] an order of things" that connects, unifies *and* "survives the individual parts."[232] These physical processes comprise a point or duration of "non-Law" or "antinomian" rupture.[233] Similarly, with the disposal of the human dead, "antinomian"

[229] Braidotti (2001), *supra* note 242; Grosz (2017), *supra* note 242; Manning (2013), *supra* note 242; Shaw and Mykitiuk (2023), *supra* note 23; Simondon (2020), *supra* note 241.
[230] Davies (2022), *supra* note 9; Davies (2017), *supra* note 16; Shaw and Mykitiuk (2023), *supra* note 23.
[231] Davies (2022), *supra* note 9. Also see Lucy Finchett-Maddock, "Seeing Red: Entropy, Property, and Resistance in the Summer Riots 2011" (2012) 23 *Law and Critique* 199 [Finchett-Maddock (2012)].
[232] Slaughter (1992), *supra* note 61 at 228.
[233] Ibid.

bodies,[234] in the leaks, excesses, instabilities of form there is a sense to matter that always defies the constraint of information, always engendering a disassembly (and potentially the re-assembly) of lawful relations, inattentive to principle, inattentive to the incarnation of figures.[235] These bodies "throw" their presence open through fragments, mixtures and adulterations, existing in their comings, spacings, constantly creating as they touch and breach and exceed other bodies, whilst always circulating, connecting, and hybridizing, defying the signs of order and intelligibility that the *nomos* incarnates.[236]

French philosopher Jean-Luc Nancy, whose essay *Corpus* repeatedly calls on bodies decomposing, wrote:

> […] the opening [of the world through bodies] is […] a letting go: bodies let go, they loosen up, features retreat, colour swallows itself or else spits itself up. […] Bodies […] decompose the world […] dislocation and dislocalisation. […] a body is also its consumption, its degradation, even as stinking pus or paralysis. Existence not only requires excrement […]: a body is also, and makes itself, its own excretion. A body spaces itself, a body expels itself[237]

For Nancy, these dense, fibrous spacings of the "world of bodies" are "creation[s] without a creator," they are worldings that "[do not] return to anything or anyone" as they are "without principle and [without] end."[238] Understanding jurisgenesis as such, it is possible to revisit, and deconstruct, the burial law reforms discussed above. With these reforms, the spacing of non-law stretches beyond a situation external to the human subject. Putrid airs beget putrefaction in all organic matter, including living humans.

The legislative spark, and its particular spatiotemporalities, may also be understood through ideas of the monstrous which, by chance of being dominant cultural repertoires

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[234] In a different, yet related sense, I have developed a concept of antinomian bodies. See e.g., Shaw (2020a), *supra* note 8; Shaw (2021), *supra* note 68; Shaw and Mykitiuk (2023), *supra* note 23. I developed the concept whilst reading material, corporeal feminist accounts of leaky bodies, discussed in Chapter 1. See e.g., Grosz (1994), *supra* note 24; Longhurst (2001), *supra* note 24; Shildrick (1997), *supra* note 24.
[235] Shaw (2020), *supra* note 8; Shaw (2021), *supra* note 68; Shaw and Mykitiuk (2023), *supra* note 23.
[236] Nancy (2008), *supra* note 25.
[237] Ibid, 105.
[238] Ibid, 107.

available for interpretation, assisted Britons and settlers with representing and narrating the operations of matter. In Chapter 1, I noted that the figure of the monster mediates intense sites of abjection, by appearing as both different from and the same as oneself.[239] As cultural theorist Margrit Shildrick argues, the monster figuring difference and sameness disrupts the security of the idealized body by exposing its fragile existence, "promis[ing] to dissolve"[240] the boundaries of the "putative norm"[241] and the security, propriety and naturalness of being within the norm.[242] As critical legal theorist Andrea Mubi Brightenti elaborates:

> What is crucial [in an analysis of the monstrous] is not [the monster's] morphology *per se*, as much as the fact that the monster entertains a *qualitatively distinct* connection with its environment from ours (or, what we repute to be our own). What is precisely monstrous, is not the sheer 'order of the other,' but my embodying that order, that is, that order embodied-—even imaginatively or fleetingly—in me.[243]

Likewise, the decomposing corpse is not only different from the "living," portending an extrinsic threat of annihilation; the corpse often also brandishes an unmistakable similarity with the human, as it is what *remains*, at least for a time, of the human. That sameness is enhanced narratively as the corpse is imagined as the future-present of one's own mortality, and decomposition as latent in the living body. It is unnecessary to summon zombies to encounter the monster in the corpse;[244] the corpse exists for law already as monstrous.

Collectively then, the Briton and settler, both preserved in the secular, civilizing process of the municipality, set themselves apart and above the barbaric natures unkind to

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[239] Shildrick (2002), *supra* note 25.
[240] Margrit Shildrick, "Posthumanism and the Monstrous Body" (1996) 2:1 *Body and Society* 1, 2 [Shildrick (1996)].
[241] Ibid, 3.
[242] Ibid.
[243] Andrea Mubi Brighenti, "Monster-Measures and Monstrous Values: A Short Reflection on the Foundations of Individual-Environmental Theory" in Caterina Nirta and Andrea Pavoni, eds, *Monstrous Ontologies: Politics Ethics Materiality* (Malaga, SP: Vernon Press, 2020), 1-14, 3.
[244] Edwards (2018), *supra* note 92. Erin Edwards observes how the zombie as a monstrous figure is derived from the Haitian lore of *zonbi*, animate yet soulless bodies indentured in an endless condition of slavery. As Western filmmakers adapted Haitian lore for popular thriller films, its origins in Haiti were obscured, but within white imaginaries zombies remained associated with racialized peoples. In other words, the state of being a zombie, of contagion of decomposition, were entwined with film representations of racialized peoples as non-human.

commerce and order just without the city limits, and mirror this in the liberal ideas of being persons, separate and individuated, delimited from the world by their bodily vessels bounded by white skin. The Briton and settler appear to both fear not just the corpse, but also the disordering affections of putrid, decomposing flesh, an inevitable fate identified in all organic matter, including themselves. Closed in by bodies piled on bodies, without consolation of Christ's carnal economy effected by ecclesiastical jurisdiction, the lawful choice appears as spatial ejection of the monster, to defer succumbing to its pestiferous influence, and cleanse urban life. Here, in this space of encounter, is the jurisgenerative ontology of human remains, in the excess of the monstrous that creeps beneath our skin and extends in the lawscape of the city.

3.3. Hauntings at Sea

Law reforms of the nineteenth century seized on the corpse relative to the earth. The body's liquification, and resultant vapours, threatened to overwhelm the apparent solidity of land and of social forms established atop it. Bodies were imagined to distend, to burst, to ooze, to froth or otherwise waste away, belying or exceeding the orderly bounds of, what was supposed, the parishioner's final pilgrimage to meet again with their kindred, parental earth.[245] To decompose in *this* way, the corpse refused the finality of disposal; a fleshy "recalcitrance"[246] in that the body, and its effluents, remained to riot among the living, unwilling to abide by received principles of the cosmos in their return to the soil. Britons and settlers, particularly those convinced of sanitary frames, feared that all matter would suffer that fate. All that was seemingly required was to come in contact with such effluents; to be proximate to the wasting flesh and their wasteful byproducts. Decomposition spread by atmosphere, in the air or otherwise, affecting all organic matter, which would pulverize organised life into elements

[245] See discussions of eschatology in *Gilbert* (1820), *supra note* 21, for example.
[246] Mykitiuk (1994), *supra* note 17.

with no intelligible structure, meaning or experience, and so, if taken to its greatest extent, herald the loss of civilization. Translated into theoretical terms, the decomposing corpse portended a spacing of non-law—the dissolution of lawful order[247]—distended through the vector of miasma. All was endangered of irreversibly becoming liquid; and no civilized order could sustain without stable, material ground.

The "liquid poetics"[248] of the corpse took on a different valence with the lawful disposal of the seafaring dead under admiralty and maritime law.[249] The "office for Burial at Sea"[250] entailed certain customs—namely, the body's swift disposal where chains or cannonballs were fastened to quicken its watery descent. Swift disposal guarded seafarers from their unwitting exposure to that emitted from the corpse,[251] and to commit the body to the depths by use of a solid weight kept the corpse from being pulled in the ship's wake, trailing its former crew and attracting sea monsters.[252] Among ecclesiastics, it also diminished the sense of "casting" the corpse away; the quality of "cast[ing] [the body] away" was avoided with earth burials by "lay[ing] [the body] in the ground, delivering it into safe custody [of the earth], as a seed for eternity."[253] Cannonballs or chains achieved something similar for sea burial;[254] the dead were respectfully guided through the fathomless depths, to "slumber"

[247] Slaughter (1992), *supra* note 61.
[248] Liquid poetics refer to the literary material of water or similarly fluid things, which can select for certain ways of relating and experience. See an example of its use in Steven Swarbrick, "The Life Aquatic: Liquid Poetics and the Discourse of Friendship in *The Faerie Queene*" (2015) 30 *Spenser Studies* 229.
[249] To see accounts of the custom of "committing [the body] to the deep" by way of burial at sea, see Bell (1908), *supra* note 26; J.E. (1873), *supra* note 26; Faughnan (1879), *supra* note 26; Marshall (1876), *supra* note 26; Palmer (1891), *supra* note 26; Stewart (2005), *supra* note 26.
[250] Anonymous, "Notes on the Occasional Services: No. 4—The Burial of the Dead" (1880) 5:5 *Church Work* 65 at 67 [located within the digital archives of Canadiana by CKRN in Ottawa, ON]. *Church Work* was published in Halifax, Nova Scotia, by J.D.H. Browne.
[251] Sanitary reasons are identified in Anonymous, "Burial at Sea" (1907) 2:2427 *The British Medical Journal* 1 at 42.
[252] See Baynes (1875), *supra* note 218 at 22.
[253] Ibid, 66.
[254] Ibid, 67.

"sweetly," unmarked, "pass[ed] o'er" and without disturbance until the fateful resurrection gave up the sea-dead.[255]

Nineteenth-century writers referred, with trepidation, to the sudden or near-sudden disappearance of the corpse as it was committed to the sea:

> It is customary during a burial at sea, for the vessel to lay to. The body having been brought to the lee gangway, and the crew collected by the boatswain's mates, the chaplain proceeded to read the burial service.
>
> This was the first time I had ever been present on such an occasion, and the unfamiliar ceremony made a deep and lasting impression on my mind. The crew were assembled with uncovered heads, and the mournful silence was unbroken, save by the soughing of the blue deep, so soon to receive the cold clay of another mortal, and the clear, soft voice of the chaplain, as he intoned the solemn and beautiful service for the dead. At the words 'we commit his body to the dead,' the body was slid from the board on which it lay, feet foremost into the water. As usual it was sewed up in strong canvass, with heavy, iron shot at the feet, so that the plunge and disappearance were almost instantaneous. To me it seemed horrible,—the sudden sinking into the fathomless, trackless ocean,—and after the ship resumed her course I could not help gazing long astern, at the place, to mark, if possible, the spot where the body of a human being had disappeared forever.[256] (my emphasis)

Another writer similarly described the body's plunge into the depths, grieving the loss of their presence but with knowledge that there remained the possibility of being reunited with the eventual resurrection.

> Reverently stood that stricken band, and listened to those ever-beautiful and touching words, "We commit her body to the deep in sure and certain hope of the resurrection to eternal life." Then the last mournful plunge, and the cherished ones were on that long, dreary march to the grave, to rest amid the buried treasures of the deep. Five hours ere they shall reach the tomb! Sleep! sleep! Fair daughter of grief, but when the broad, lonely sea shall unveil her depths, thou shalt rejoin the glorious assemblage in thy Father's house, where are many mansions.[257] (my emphasis)

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[255] Henry G Adams, *Original poems* (St. John, NB: Progress Print 1899), 53 [located within the digital archives of Canadiana by CKRN in Ottawa, ON]. Henry Adams's poetry was published in New Brunswick. Also see Anonymous, "Burial at Sea" (1891) 4:2 *The Land We Live In* 1 at 12 [located within the digital archives of Canadiana by CKRN in Ottawa, ON]. The *Land We Live In* was published in Quebec. Palmer (1891), *supra* note 26 at 26.

[256] Marshall (1876), *supra* note 26 at 53-54.

[257] Margaret Elizabeth Des Brisay, *Memorials of Margaret Elizabeth, Only Daughter of Rev Albert Des Brisay, of the Province of New-Brunswick* (London: Carlton and Phillips 1856), 176 [located within the digital archives of Canadiana by CKRN in Ottawa, ON]. An extract of the same text was published in the Halifax newspaper, *The Provincial Wesleyan* in 1853, but was attributed to Bessie Beranger. See Bessie Beranger, "Burial at Sea" (1853) 5:4 *The Provincial Wesleyan* 1 at 1-2 [located within the digital archives of Canadiana by CKRN in Ottawa, ON].

In verse, another writer recalled the immensity of the sea in familiar terms of depth, size and the violence of its waves, but also less familiarly in the urgency of seafarers' duties. Working at sea consumed and exhausted life in the performance of duty, and the duty did not abate for long.[258] Taken together, these conditions prevented ships from staying in one spot for too long. There was no time for an enduring relation to place to be formed.

> At midnight paused the great ship in its course;
> And for a space the angry waves were hushed,
> As though to Death they would obeisance make.
>
> Fresh from their toil the night crew stood around,
> Ghostly and gaunt in the dim lantern light;
> While flapped the pall upon the humble bier.
>
> 'Eternal rest' chanted the priest, the while
> The night wind softly kissed the sacred stole,
> And space stooped down to hear the sad refrain.
>
> Then coffinless he sank unto the depths,
> Nor was there time for tears since duty called,
> And might not be gainsaid though men should die.
>
> No loved one marked the lonely sepulchre
> Where he shall sleep until the trumpet call—
> But from the murky sky a star looked down.[259] (my emphasis)

Unlike the earth in its apparent solidity, the sea was inhuman in the extremis. The sea supplied a constant flux of movements, and unknowable depths, which defied settlement or control: two means by which humans have oriented to place.[260] Committing the dead to the sea was a compromise; an effort to reconcile with its tempestuous force to ensure the ship's and crew's survival, to survive without sacrificing the dignity conferred by sepulchral rites and ward off spirits.[261] But to be reconciled with the sea did not empower Britons or settlers to

[258] Also see reference to duty paused in Stanley McKeown Brown, *The Royal Canadians* (Toronto: Toronto Publishers' Syndicate, 1900), 52 [located within the digital archives of Canadiana by CKRN in Ottawa, ON].
[259] Daniel Aloysius Casey, *Leaves on the Wind* (Toronto: McClelland and Stewart, 1919), 26.
[260] Harrison (2003), *supra* note 6 at 11-15; Pottage (2019), *supra* note 27; Shaw (2020), *supra* note 8.
[261] Stewart (2005), *supra* note 26.

dominate it, to settle or control this fluid plane. No claim to that place could be sustained through interment, as there was no land available upon which to affix jurisdiction and no reliable way to return.[262] Even as sepulchral rites were performed, writers mourned the loss of the body to the fathomless sea, and sought consolation in the promise of resurrection, putting faith in an inhuman God to wrest control over what humans could not. The sea consumed law's artifices just as it consumed seafarers. No trace remained in that yawning blue. Such depths were, as the Canadian poet Alan Sullivan impressed, "where space is not and time itself is old."[263] In its withdrawal, lost to an inhuman time, the depths were placeless, senseless, lifeless, and, accordingly, lawless; an unreachable expanse to which the dead were given up. There the corpse was miscible; its liquid poetics one with the sea.

The corpse presented no threat once committed to the sea; had the sea been accessible to everyone, such burials might have replaced other forms as the sanitary method *par excellence*.[264] Rather the corpse disappeared in spacings of non-law bounded by civilization's shores, which enwalled the ocean external to—without—the limits of the lawful community. In a sense, the sea exemplifies a similar logic to extramural burial: the extrication of non-law or that which threatened to produce it. There is a liquidity underlying the poetics of both. But in the duration before the sea burial, on the ship, there is a moment of difference apparent in disputes of maritime law, such as the 1940-case of *Brambir v Cunard White Star Limited.*[265] There the similarity between ocean and extramural burial breaks down.

In *Brambir* (1940), an American court heard the claim of the deceased seafarer's next of kin against a ship captain, holding that "the decedent died aboard ship more than five days

[262] This situation is unlike the making of jurisdiction with earth burial, such as that described by Barr (2016), *supra* note 11. Also see Harrison (2003), *supra* note 6; Shaw (2020), *supra* note 8.
[263] Alan Sullivan, "Burial at Sea" (1911) 36:3 *Canadian Magazine* 251 [located within the digital archives of Canadiana by CKRN in Ottawa, ON].
[264] Baynes (1875), *supra* note 218 at 22.
[265] *Brambir v Cunard White Star Limited*, 37 F Supp 906 (SDNY 1940) (United States) [*Brambir* (1940)].

before the voyage's end and that consequently the body *had to be* buried at sea" (my emphasis).[266] As the court put it, it was "self-evident that a death at sea eliminates the usual method of burial," no matter what the next of kin would have wanted, unless some contract required a further step like embalming.[267] Otherwise, the seafarer, by "book[ing] passage on an ocean-going steamer […] impliedly acquiesce[d] to be bound by the custom of the sea and consent[ed] to burial therein in the event of death during the voyage."[268] That custom empowered the captain to dispose of the dead according to custom, against the land-based rights or entitlements of the next of kin.[269] Performing the duty prevented harm to, and the demoralization of, the crew unable to escape the corpse's exposure, a consequence of ocean-going travels where space is starkly limited and the risk of mutiny is high. It is in this duration that the jurisgenerativity of the corpse matters, although with different effect; a duration refracted, ineluctably, by the context of a towering and vast sea.

Whilst the sea appears fathomless and lawless in these liquid poetics, postcolonial legal scholar Renisa Mawani observes the sea was subjected to, and a substrate for, imperial power, through which it "inspired new forms of law, sovereignty, violence and

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[266] *Brambir* (1940), *supra* note 279. But, where the master of a ship has produced an agent capable of embalmment, has carried out embalmment, is inbound to shore and is capable of making it ashore in time, the master cannot wantonly cast the body to sea. However, as Justice Cuthbert W Pound noted in his concurring opinion, "An indignity to the dead is an offence to the living. But it cannot be said that under ordinary circumstances the next of kin of a person who dies on shipboard have such a legal right to the possession of the body that they may recover damages because the burial is at sea. A decent committal of the body to the deep in accordance with the custom in such matters ordinarily discharges the duty which the law imposes. In this case, for example, if the death had occurred on the outward-bound voyage, what greater obligation would be implied in the absence of a special contract?" See *Finley v Atlantic Transport Co.,* 220 NY 249 (1917) (United States).

[267] Ibid. The Court cites obiter dicta in *Kanavan's Case*, 1 Greenl 226, 1 Me 226 (1821) (United States) as authority. There, the Supreme Court of Maine note 'Our funeral rites and services are adapted to make deep impressions and to produce the best effects. The disposition to perform with all possible solemnity the funeral obsequies of the departed is universal in our country;—and even on the ocean, where the usual method of sepulture is out of the question, the occasion is marked with all the respect which circumstances will admit.'

[268] *Brambir* (1940), *supra* note 279.

[269] Ibid. Also see *Floyd v Lykes Bros Steamship Co Inc,* 1988 AMC 1805, 844 F2d 1044 (Court of Appeal) (United States).

territorial control."[270] As Mawani states, "[i]t was struggles at sea, over trade, commerce, and control that resulted in the European production of new global lines."[271] In a different yet related sense, the legal geographer Irus Braverman also challenges characterisations of the ocean as lawless, calling attention to the "blue legalities" that form in relation to the more-than-human phenomena inhabiting oceanic depths.[272] I do not repudiate these claims. Rather I put on display the liquid poetics of decomposition, averring to the sea as its fluid materiality was incorporated in these special literatures of law. The lawlessness of the sea, like fluidity more generally, arises in a particular duration, which may coincide with and contradict others. As I explore, with respect of the dead, that duration authorised certain narratives to sense and make sense of the body's decompositions. Jurisgenesis in the tendency to destroy, to disorder, to liquify, to waste, obtains its significance in the specificity of duration where meaning and matter combine.

The heteronomy immanent to the decomposing corpse is thereby inflected by its environs. Land, sea, cremation, soil, within the city limits, without its limits—each circumstance depends on distinct convergences of affection that alter the course of decomposition and how it matters outside the corpse, including how decompositions are thrown, becoming present in the disruption and genesis of law. But despite their variability, the common law right to burial, nineteenth-century burial law reforms and sea-burial all share in the materiality of the human body composing law. Conventional legal doctrine and jurisprudence elide how the body matters to the lawful use and disposal of human remains, and yet the corpse embodies law, making a difference in how life and death are carried.

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[270] Renisa Mawani, "Postcolonial Legal Studies" in Mariana Valverde, Kamari Clarke, Eve Darian-Smith and Prabha Kotiswarann, eds, *Routledge Handbook of Law and Society* (Abingdon: Routledge, 2021), 47-52, 51.
[271] Ibid.
[272] Irus Braverman, "Animals" in Mariana Valverde, Kamari Clarke, Eve Darian-Smith and Prabha Kotiswarann, eds, *Routledge Handbook of Law and Society* (Abingdon: Routledge 2021), 73-75, 75. Also see Elizabeth R Johnson and Irus Braverman, "Blue Legalities: Governing More-Than-Human Oceans" in Irus Braverman and Elizabeth R Johnson, eds, *Blue Legalities: The Life and Laws of the Sea* (Durham: Duke University Press, 2020), 1-24.

Chapter 4 — Antirrhetic Flesh

Abstract

To lawfully come to and obtain custody over the human body, to render its flesh into parts, has a long history in English law and the laws of British colonies, traces of which stain the contemporary use of the human dead and tissue. This chapter considers events in the law of dissection, from its English origins in punishment where a convict's body was "at the King's disposal," to the powers conveyed to physicians in diverse offices, public or otherwise. The language of "being at the King's disposal" is an artefact of mediaeval and early modern legislation, but the character of its relationship to the human body persists conceptually in the common law, especially (albeit not exclusively) where it is aided by exceptions to the no-property rule from the *Haynes's Case*. Chief among the cases addressed in the chapter is an inquiry, appointed by South Australia's legislative assembly, into charges brought against Dr. William Ramsay Smith in 1903. Ramsay Smith was a civil servant who held numerous appointments in the Province of South Australia in the late nineteenth- and early twientieth-centuries, including hospital superintendent, anatomy inspector and coroner. The charges brought against Ramsay Smith pertained to his dissection of numerous dead bodies, from which he prepared anatomical specimens and sent many of such specimens to the University of Edinburgh among other institutions. The inquiry decided in Ramsay Smith's favour, holding that, although the dissections were done outside the scope of South Australia's anatomy legislation, Ramsay Smith was nonetheless authorised to dissect the bodies in his possession and, where he did not lawfully possess the bodies, with the non-objection of others who did have a right of possession. The inquiry's report, as well as notes of evidence, together with the Australian High Court case of *Doodeward v Spence* (1908), thereby form the central case-study by which the author explores how the authority of "medical men" over specimens was construed through the common law, at least for a time, especially its reliance on the body being in parts. A significant consequence of such a relationship is the "making an object among objects," which allows for, and reinforces other instances of, de-humanization and racialization of human matter. The author argues that the spattering of cases relied on demonstrate the conceptual structure attending to the process of dissecting the body, which allows the author to consider them together as a mode of blazoning.

To lawfully come to and obtain custody over the human body, to render its flesh into parts, has a long history in English law and the laws of British colonies. Traces of that history still stain the contemporary use of the human dead and tissue, having bled through the fibres of the common law. Since as early as the thirteenth century at common law,[1] and fourteenth century with the *Treason Act 1351*,[2] English law authorized the act of being drawn and

[1] See e.g., Henry de Bracton, *On the Laws and Customs of England* (Cambridge, MA: Harvard University Press, 1968-1977), 334, https://amesfoundation.law.harvard.edu/Bracton/Unframed/English/v2/334.htm [Bracton (1235)].
[2] *Treason Act 1351*, 25 Edw 3 St 5 c 2 (England) [*Treason Act 1351*].

quartered as punishment for those convicted of certain offences.[3] To be killed by hanging was insufficient; the King had to further squelch the eschatological promise of the Last Judgment by mutilating the convict's body—a demonstration of His Majesty's strength and threat to those who dared challenge him, which exploited, and displayed the exploitation of, his subjects' corporeal vulnerability.[4] That mutilation would take on a different form as early as the sixteenth century, where those executed for an increasing number of offences against the King's peace were sent, pursuant to royal charter, to surgeons and barbers for dissection;[5] in the eighteenth century, dissection as punishment was explicitly required under the *Murder Act 1751*.[6] But both forms shared a conceptual structure: the bodies of convicts, sentenced to execution and mutilation, were "at the King's disposal."[7] His Majesty held a divine right to the body which, when exercised, made that body eminently disposable like discard. It responded to aberrance through the deprivation of integrity, as an effect of sovereign power.[8]

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[3] See Arnold Blumberg, "The Law of Treason in Medieval England: Drawn and Quartered" (2015) 5:2 *Medieval Warfare* 49 [Blumberg (2015)].
[4] Ibid.
[5] See e.g., *An Act concerning Barbers and Surgeons to be of one company 1540*, 32 Hen St 8 c 42 (England) [*Barbers and Chirurgians Act 1540*]. The *Act* entitled the newly joined Company of Barber-Surgeons to four executed convicts for public dissection and study.
[6] *Murder Act 1751*, 25 Geo 2 c37 (England) [*Murder Act 1751*].
[7] William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769* (Chicago: University of Chicago Press, 1979), https://press-pubs.uchicago.edu/founders/documents/a3_3_1-2s8.html [Blackstone (1765)].
[8] See generally Michel Foucault, *Discipline and Punishment* (London: Penguin, 1978) [Foucault (1978)]. Also see Robert M. Cover, "Violence and the Word" (1986) 95 *Yale Law Journal* 1601, 1606 [Cover (1986)]. Cover, in footnote 14, refers to Blackstone describing the corpse of the executed convict being "at the King's disposal." In different terms from Foucault, yet with similar emphasis, Cover draws on lawful execution to exemplify the immensity of death and violence effected within the law, by which "legal interpretation" imbedded in "collective action" becomes viscerally felt and ontologically destructive.

The conceptual structure of being at the King's disposal survived in the claims of "medical men"[9] to human corpses and tissue, even as dissection fell away from punishment. Medical claims to the body likewise depended on transgression, albeit transgression in the organic body as opposed to a body politic, which authorized (indeed made it necessary to) cut into and take from the body in the interests of the living:[10] science for the medical man, the realm for the sovereign. The mutilation of the body—which was to be carried out in a particular manner in both cases—then properly rendered the part at the King's and medical man's sovereign disposal, whose use enlarged his power over others. In other words, to be at the King's disposal indexed, conceptually, an entitlement to the human body and its parts which drew power from its capacity to reduce being to an object-like status (*contra* personality) and graft the mutilated body, and its parts, onto something else. Herein lay the capacity to become disposable; to sever the connective tissue between a part and subject, rendering it part of something else. Until it was not.

Elsewhere critical theorist Jasbir Puar theorizes a "right to maim" as a mode of producing debility amongst a population—including, and yet exceeding, that recognized as disability—to control that population.[11] In Puar's case-studies, that "right" could involve both sovereign *and* dispersed forms of "biopolitical" power which, taken together, reduced individuals and collectives to a status of being less than human, "deny[ing] a being

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[9] I use the gendered nouns "medical men" and "medical man" deliberately (and admittedly performatively) throughout this chapter, so to emphasize how the law embodied the violence of their social position often (if not almost exclusively) as men in these social contexts. As with any social construct, others whose physiology does not necessarily correspond with the classification of man may very well occupy and perform these roles as well, and with equal violence. Also, as Sara Ahmed observes, this gendered embodiment to the law was often a racialised embodiment as well; see generally, Sara Ahmed, "Deconstruction and the Law's Other: Towards a Feminist Theory of Embodied Legal Rights" (1995) 4:1 *Social and Legal Studies* 55 [Ahmed (1995)].

[10] Also see generally Michel Foucault, *The Birth of the Clinic: An Archaeology of Perception* (London: Penguin, 1973) [Foucault (1973)]; also see a contemporary discussion of the expression of sovereign power of physicians relative to organic transgression in Joshua David Michael Shaw, "The Spatio-Legal Production of Bodies Through the Legal Fiction of Death" (2021) 32:1 *Law and Critique* 69 [Shaw (2021)].

[11] Jasbir K Puar, *The Right to Maim: Debility, Capacity, Disability* (Durham: Duke University Press, 2017), xiv-xv [Puar (2017)].

humanness on the basis of object-like status."[12] Puar argues the debility effected through a sovereign's right to maim is "productive,"[13] in that it further legitimates the sovereign's surveillance and control of a maimed population;[14] a guarded calibration between a state's imperatives to kill and make life.[15] At the core of it, to be at the King's disposal might be thought of as akin to a right to maim. An individual's death was not the end of power,[16] rather the use and disposal of the human body after death was enrolled in the making of debility which extended from the body under dissection itself, grafting onto others to whom the dissected body was culturally (and legally) related. That process was magnified—and increasingly reconfigured as biopolitical—as dissection separated from penal authorities and, instead of serving the King, folded into the common and statutory powers of physicians and surgeons for whom tissue became objectified within systems of (medical or scientific) knowledge production.[17] But with different emphasis from Puar, I maintain that this power was also jurisgenerative in the articulation of norms for conduct which could survive the immediate context of power and govern future action. To mutilate the body was more than mere control. To mutilate was, as critical legal theorist Peter Goodrich describes, an "antirrhetic" form in that it was a mode of denunciation: of eviscerating the soundness of another principle or sense of order embodied in the body under dissection, and that stood in

[12] Ibid at 26.
[13] Jasbir Puar, "The 'Right' to Maim: Disablement and Inhumanist Biopolitics in Palestine" (2015) 14:1 *borderlands* 1, 2 [Puar (2015)].
[14] Ibid, 7.
[15] Ibid.
[16] Accounts of necropolitics and thanatopolitics make productive use of this thesis in varied analyses of power. See e.g., Jin Haritaworn, Adi Kuntsman and Silvia Posocco, eds, *Queer Necropolitics* (Abingdon: Routledge, 2014); Achille Mbembe, "Necropolitics" (2003) 15:1 *Public Culture* 11; Michael Taussig, *The Magic of the State* (Abingdon: Routledge, 1997).
[17] Regarding legislation, see Ruth Richardson, *Death, Dissection and the Destitute* (Chicago: University of Chicago Press, 2001) [Richardson (2001)].

opposition.[18] Norms for conduct emerged in the oppositional relation that subtends mutilation.[19] Not only then was violence performed and legitimated through mutilation, but normative orders were instantiated as well supplying a sense of lawful action toward others' bodies.[20]

Then the notion of being at the King's disposal was not only a historical form located in mediaeval common law and statutes. Nor did it merely supply a means of control. Rather being at the King's disposal survived in the structure of lawful access to bodies and tissues, in that the character of its relationship to the human body persisted conceptually in the common law, tending to bring forth certain effects in the social organization of life. This conceptual structure, carried out in the mutilation of the body, was conducive of a condition of disposability which were not merely imposed on the body; both were generated in tandem with the body's materiality and materiality of action relative to the body.[21] In contexts of punishment, that is brought into focus by considering the ancient construct of the King's two bodies—a body natural and a body politic—where the body politic incorporates and instrumentalises the bodies of his subjects.[22] As critical legal theorist Stephen Young writes, "[l]aw inflect[ed] the monarch's 'natural body,' which throws into question the relationship

[18] Peter Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (Berkley: UC Press, 1995) [Goodrich (1995)]; also see Peter Goodrich, "The Continuation of the Antirhettic" (1992) 4:2 *Cardozo Studies in Law and Literature* 207 [Goodrich (1992)]; MM Slaughter, 'Sacred Kingship and Antinomianism: Antirrhesis and the Order of Things' (1992) 4:2 *Cardozo Studies in Law and Literature* 227 [Slaughter (1992)].
[19] Goodrich (1995), *supra* note 18.
[20] Goodrich (1992), *supra* note 18; Slaughter (1992), *supra* note 18.
[21] As I observed in earlier chapters, corporeal feminists attend to the interaction of the body with discursive regimes that seek to fix and regulate bodily performance. Power is instituted in the dynamic exchange between physical and cultural forms, which may supply meaning for the body at least partly informed by the body's materiality. The body then is not a passive, receptive surface that obtains meaning from language alone, although the meaning acquired in a context does not necessarily follow from its materiality. Its identity is a contingent relationship. See e.g., Elizabeth Grosz, *Space, Time and Perversion* (London: Routledge, 1995) [Grosz (1995)]; Roxanne Mykitiuk, "Fragmenting the Body" (1994) 2:1 *Australian Feminist Law Journal* 63 [Mykitiuk (1994)]; Margrit Shildrick, *Leaky Bodies and Boundaries: Feminism, Postmodernism and Bio(Ethics)* (London: Routledge, 1997) [Shildrick (1997)].
[22] Stephen M Young, "Our Legal Borders: Interrelated Constructions of Individual and Political Bodies" (2023) 34 *Law and Critique* 207, 210 and 214 [Young (2023)].

between law, nature, and the body."[23] Acts of the natural body then were conducive of law, like the body politic, embrangled together in an ongoing performance. In instances of mutilation, law also inflected the natural bodies of the King's subjects whose embodied existence, even as entrails, enlarged the King's own. By analogy the powers of physicians, surgeons and other anatomists were through-and-through legally embodied.[24] Specimens were more than the factual products of cutting up the body in the application of "work and skill;"[25] specimens also depended on and were incorporated in the exercise of lawful power relative to the human body. It poses little difficulty to extend the concept of being at the King's disposal to surgeons and other medical men who received and worked on human bodies, especially where, in doing so, they occupied a position comparable to the King's executioners in that anatomy effected punishment; each act of mutilation branded the convict's flesh with the word and violence of the King's "Law."[26] But the conceptual relation persists even where dissection no longer functioned as punishment.

In this chapter I demonstrate how medical men exhibited the conceptual structure of being at the King's disposal in my reading of *Re Dr. Ramsay Smith* (1903)—an inquiry into charges brought against Dr. William Ramsay Smith in Adelaide, South Australia.[27] The charges related to misconduct alleged to have occurred during the performance of his duties as city coroner among other public offices; namely, gruesome mutilations of bodies of deceased humans, creating specimens of soft tissue, skeletons, bone fragments, etc.,[28]

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[23] Ibid, 210.
[24] See e.g., in Shaw (2021), *supra* note 10.
[25] *Doodeward v Spence* (1908), 6 CLR 406 (High Court of Australia) (Australia) [*Doodward* (1908)].
[26] Peter Linebaugh, "The Tyburn Riot against the Surgeons" in Douglas Hay, Peter Linebaugh, John G Rule, EP Thompson and Cal Winslow, eds, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Verso, 1975), 65-118 [Linebaugh (1975)].
[27] Report of Board of Inquiry Re Dr. Ramsay Smith (22 September 1903) (South Australia) [records were produced from the archives of the City of Adelaide in Adelaide, Australia, and copies remain on my person] [*Re Ramsay Smith* (1903)].
[28] Ibid.

which in many cases were sent overseas to the University of Edinburgh.[29] Importantly, none of these dissections were with the authority of anatomy legislation, nor authorized by the office of coroner; yet, the Board of Inquiry concluded that it did not matter.[30] Ramsay Smith was entitled to do as he did at common law, a power that existed for duly qualified medical men "before [any anatomy] act was passed."[31] Putting aside doctrinal questions regarding the common law power to dissect (instead, see Chapter 2), I consider the case of Ramsay Smith as demonstrative of the contribution of the body, and action relative to the body, in jurisgenesis. I read the case alongside decisions of the High Court of Australia in *Doodeward v Spence* (1908) and Court of Queen's Bench in the *Case of the Hottentot Venus* (1810),[32] along with Black feminist writings,[33] to critically describe the power over specimens and facilitate theorisations about the effects of bodily matter on the organization of lawful life. Such readings lead me to argue that mutilation tended to be inscribed in a practice of sorting, categorizing, and ordering "species" with the effect of making and naturalizing racialized (and other morphological) differences. There is a specific debility sustained in rendering the species through such acts, which at least in part is sustained through the meanings authorized through the lawful use and disposal of the body and its parts. Consistent with my

[29] Cressida Fforde, *Collecting the Dead: Archaeology and the Reburial Issue* (Bristol: Bristol Classic Press, 2004) [Fforde (2004)].
[30] *Re Ramsay Smith* (1903), *supra* note 27.
[31] Ibid.
[32] *The Case of the Hottentot Venus* (1810), 13 East 195, 104 ER 344 (Court of King's Bench) (UK) [*Hottentot Venus* (1810)]; *Doodeward* (1908), *supra* note 27.
[33] See e.g., Katherine McKittrick, *Demonic Grounds: Black Women and the Cartographies of Struggle* (Minneapolis: University of Minnesota, 2006) [McKittrick (2006)]; Christina Sharpe, *In the Wake: On Blackness and Being* (Durham: Duke University Press, 2016) [Sharpe (2016)]; Hortense Spillers, *Black, White, and in Color: Essays on American Literature and Culture* (Chicago: University of Chicago Press, 2003) [Spillers (2003a)]; Alexander G Weheliye, *Racializing Assemblages, Biopolitics, and Black Feminist Theories of the Human* (Durham: Duke University Press, 2014) [Weheliye (2014)]; Sylvia Wynter, "Towards the Sociogenic Principle: Fanon, the Puzzle of Conscious Experience, of 'Identity' and What It's Like to be 'Black'" in Mercedes Durán-Cogan and Antonio Gómez-Moriana, eds, *National Identity and Sociopolitical Change: Latin America Between Marginalization and Integration* (Minneapolis: University of Minnesota Press, 1999), 30-66 [Wynter (1999)].

principal argument, those meanings are better understood through an atmospheric account of law that foregrounds the materialities of law in social situations (see Chapter 1).[34]

Previously, historians and social theorists related the practice of anatomy to the spectacular and sovereign power of punishment,[35] in that surgeons necessarily reproduced that inexhaustible relation of dominion in a manner that can be genealogically traced to sovereign power.[36] Variations of the argument are made by Ruth Richardson, for example, which enables her to describe the marginalization—often of the economically dispossessed or "destitute"—caused in the intersection of anatomy and poor laws in the nineteenth century.[37] But I see myself advancing a distinct argument, one that is benefited by an attention to the common as opposed to statutory law, as historians and social theorists have previously done. The common law poses different configurations of power than statutes*;* the character of the former situates medicine and its associated milieu more centrally to claims of authority, including proximity to the materiality of the remains themselves, rather than figuring questions of legislative authority. Medical practitioners relied on assumptions of access, use and control authorised separately from and above any autonomy claimed by the individual dissected; and the ontological features of these assumptions are given fuller expression in the adjudicative context. In focussing on the conceptual relation in the understudied context of the common law, including its inheritances and transformations, I am better able to posit a

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[34] See discussion in Daniel Matthews and Illan rua Wall, "Legal *Aesthesis*: Affect, Space and Encounter" (2022) *Law, Culture and the Humanities*, https://doi.org/10.1177/17438721211056512 [Matthews and Wall (2022)]; Illan rua Wall, *Law and Disorder: Sovereignty, Protest, Atmosphere* (Abingdon: Routledge, 2021) [Wall (2021)].

[35] See Foucault (1978), *supra* note 8; Linebaugh (1975), *supra* note 26; Richardson (2001), *supra* note 17.

[36] See especially formulations of sovereign power by Foucault in Foucault (1978), *supra* note 8; Foucault (1973), *supra* note 10.

[37] Richardson (2001), *supra* note 17. Reading legislative "Hansard" or their equivalent shows concerns for the disproportionate effect of anatomy on the economically dispossessed were voiced in debates over bills that would eventually become, for e.g.: *Anatomy Act 1832*, 2 & 3 Will IV c 75 (UK) [*Anatomy Act* (1832)]; the see e.g., the *Act to regulate and facilitate the study of anatomy,* 7 Vict c 5 (United Canadas) (1843) [*Anatomy Act* (1843)]; Nova Scotia's *Anatomy Act 1870*, SNS 1870, c 3 (Nova Scotia) [*Anatomy Act* (1870)].

theory of how the materiality of mutilation contributes to forms of law rather than merely describe a law's discriminatory effects.[38]

I conclude in a speculative mode, thickening the theoretical description of law, by returning to the argument begun in Chapter 3. In that speculative mode I elaborate plausible ontological features of law, namely the specific spacing of non-law that arises in mutilation.[39] In a manner similar to the body decomposing (see Chapter 3), mutilation effects a spacing of non-law.[40] However, mutilation is distinct spatially and temporally from decomposition, which factors differently in how the spacing of non-law contributes to the making of law and legal meaning. I argue that mutilation appears in law in a form akin to "the blazon"—a sixteenth-century textual practice through which writers selected, isolated and expounded the qualities of a part of the (often female) body—in that the performer (i.e. the surgeon with dissection, the writer with rhetoric) deconstruct an object of attention so to evaluate and promote or denounce its form.[41] Blazons were either adulatory or critical, but shared in relating the part to a greater semio-material structure or system although generally not the system with which the whole body originally formed part; in effect, a cultural form of re-sorting, re-categorizing,

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[38] *Contra* Richardson (2001), *supra* note 17, where Richardson principally documents the inequities of social policy around anatomy.

[39] See especially Slaughter (1992), *supra* note 18; also see Goodrich (1995), *supra* note 18; Goodrich (1992), *supra* note 18. Also note, I discussed methods and methodology in Chapter 1. There I explain that the case-study method allows me to undertake an "abductive" mode of thought where plausible explanations, based on a bricolage of experiences and ideas, are re-assembled in my narration of the case. Abduction enables me to construct insights that make sense of an occurrence having regard to its context, extant knowledge and experiences, and seeking inspiration. This is the exemplary knowledge of phronesis, where explanation is specific to experience in a particular context and is not immediately interested in generating generalizable theory. Of course, such insights may inspire deductive and inductive thought processes for the purposes of generalizable theory. See e.g., Gary Thomas, "Doing Case Study: Abduction Not Induction, Phronesis Not Theory" (2010) 16:7 *Qualitative Inquiry* 575.

[40] Slaughter (1992), *supra* note 18.

[41] Goodrich (1995), *supra* note 18. See generally Jonathan Sawday, *The Body Emblazoned: Dissection and the Human Body in Renaissance Culture* (London: Routledge, 1995) [Sawday (1995)]; Nancy Vickers, "Members Only: Marot's Anatomical Blazons" in David Hillman and Carla Mazzio, eds, *The Body in Parts: Fantasies of Corporeality in Early Modern Europe* (London: Routledge, 1997), 3-22 [Vickers (1997)]. Also see Joel Grossman, "Remembering and Dismembering Henry Howard: Blazon and Beheading in Sir John Cheke's Elegy on the Early of Surrey" (2021) 72:303 *The Review of English Studies* 41, 46 [Grossman (2021)].

and re-ordering the human body.[42] The writers of blazons often practiced dissection, or fraternized with those who did, suggesting a *sympoiesis* between poetics and anatomical study.[43] Blazons were also, like anatomical specimens, collected and transited between enthusiasts, forming an economy of bodily fragments that, whilst done so representationally in the situation of the blazon, separated these parts from their sources and transplanted them into different regimes.[44] By analogy, I construct a legal materiality to dissection having regard to the corporeal poetics of blazons—simultaneously a physical, textual and normative practice—which create an isolate simultaneously separate from and yet formative to other cultural forms. In a sense my analogy builds on Peter Goodrich's own to "the law of 'blazoning,' of heraldry and arms," which for Goodrich denoted the early common law's thoroughly antirhettic nature: a law oriented to the rhetorical evisceration of that which was other (especially women, flesh and the carnal) so to construct an image of itself (the "Common Law") as ancient, from natural reason and totalizing.[45] The common law power to dissect can thereby be thought of as sharing generally the structure of the early common law as Goodrich describes it. But I also attempt to go further as the argument pertains to the power to dissect; specifically, that mutilations of the human body, rending the body into parts, potentiates change or transformations that allow alternate laws to take place. There is an *antinomic* quality to cutting or fragmenting the body which unsettles a *nomos* readying its substitution.[46] Describing that quality requires attuning to the "somatics," as opposed to the

[42] Sawday (1995), *supra* note 41; Vickers (1997), *supra* note 41.
[43] Sawday (1995), *supra* note 41. Regarding *sympoiesis*, Donna J Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (Durham: Duke University Press, 2016); Wynter (1999), *supra* note 33.
[44] Sawday (1995), *supra* note 41.
[45] Goodrich (1995), *supra* note 18 at 83.
[46] See Goodrich (1992), *supra* note 18; Slaughter (1992), *supra* note 18; also see my treatment of the antinomian in Joshua David Michael Shaw, "Confronting Jurisdiction with Antinomian Bodies" (2020) *Law, Culture and the Humanities,* online: https://doi.org/10.1177/1743872120942770 [Shaw (2020)].

mere rhetorics, of law, as a performance that is also material in that it is embodied and physical and, thus, sometimes created without the assistance of words.[47]

4.1. The Power "to Anatomise and Turn a Man into Atoms"[48]

Dr. William Ramsay Smith was a notable medico-legal authority in Australia.[49] He held various coronial appointments in the Colony of South Australia and the Dominion of Australia in the late-nineteenth and early-twentieth centuries.[50] There were also periods in which he served as anatomy inspector among other roles concurrent to his coronial appointments,[51] and he wrote law books on "medical jurisprudence"[52] (medical jurisprudence being practical laws pertaining to coroners and inquests, and medical practitioners testifying in criminal trials).[53] Due to his appointments, Ramsay Smith enjoyed generous access to corpses and human tissue often from Indigenous peoples,[54] but also racialised immigrants and others who were socially and economically marginalized.[55] Ramsay Smith would experiment on these specimens, ostensibly to the advantage of his forensic analyses,[56] and send the parts to

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[47] Peter Goodrich, "Rhetoric and Somatics: Training the Body to do the Work of Law" (2001) 5:2 *Law Text Culture* 241 [Goodrich (2001)]; also see Sean Mulcahy, "Dances with Laws: From Metaphor to Methodology" (2021) 15:1 *Law and Humanities* 106 [Mulcahy (2021)]; Joshua D.M. Shaw and Roxanne Mykitiuk, "Jurisgenerative Tissues: Sociotechnical Imaginaries and the Legal Secretions of 3D Bioprinting" (2023) 34 *Law and Critique* 105 [Shaw and Mykitiuk (2023)].
[48] Board of Inquiry, "Notes of Evidence" (7 September 1903) (South Australia), 243 [record GMG24_6_0_498_1005-1903 was produced from the archives of the City of Adelaide in Adelaide, Australia, and a copy remains on my person] [Notes of Evidence Re Ramsay Smith (1903)].
[49] Fforde (2004), *supra* note 29; also see Marc Trabsky, *Law and the Dead: Technology, Relations and Institutions* (Abingdon: Routledge, 2019) [Trabsky (2019)].
[50] Fforde (2004), *supra* note 29; Trabsky (2019), *supra* note 49.
[51] Fforde (2004), *supra* note 29; Trabsky (2019), *supra* note 49.
[52] As discussed in Trabsky (2019), *supra* note 49. See e.g., William Ramsay Smith, *Medical Jurisprudence from the Judicial Standpoint* (London: Stevens and Sons, 1913); William Ramsay Smith, *A Manual for Coroners: Being a Guide to Coronial Inquiries and Inquests in South Australia and Throughout Australasia and in England* (Adelaide: Hussey and Gillingham, 1904). Copies of both are on file with the author.
[53] The term "jurisprudence" here does not denote any theoretical or philosophical inquiry. See discussion in Julius Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control, A Study in Jurisprudence* (Buffalo, NY: Hein and Co., 1946) [Stone (1946)].
[54] Fforde (2004), *supra* note 29.
[55] See e.g., the victims described in Letter #3 Re Ramsay Smith (1903), *supra* note 82; Letter #4 Re Ramsay Smith (1903), *supra* note 83; Letter #5 Re Ramsay Smith (1903), *supra* note 84.
[56] Trabsky (2019), *supra* note 76.

friends at the University of Edinburgh where a large collection remains in the university's anatomical museum.[57] He did so for years without complaint, until the Attorney General brought certain charges against Ramsay Smith related to the bodies of numerous deceased between 1900 and 1903.[58] There were eighteen charges in total, which included:

1. [Ramsay Smith] illegally took possession of the dead body of an Aboriginal named T. Walker, who died at the Adelaide Hospital, and mutilated the same and shipped part of the same to parts beyond the seas.
2. That on or about the 15th November 1902, [Ramsay Smith] illegally took possession of the dead body of a Chinaman named Ah Kion who died at the Parkside Lunatic Asylum, and mutilated the same and shipped part of the same to parts beyond the seas.
3. That on or about the 3rd January 1902, [Ramsay Smith] illegally mutilated the dead body of one James Powell, who died at the Adelaide Hospital, by cutting off the head of the said body and that [Ramsay Smith] illegally removed the said head from the Adelaide Hospital Morgue.
4. That [Ramsay Smith] illegally mutilated the dead body of one E. Harris, who died at the Adelaide Hospital by cutting off the head of the said body and shipping the said head too parts beyond the seas.[59]
5. That on or about the 6th August 1900 [Ramsay Smith] illegally and in violation of [his] duty as Coroner mutilated the dead body of one Minna Goldstucker who died at the Adelaide Hospital and upon which [Ramsay Smith] held an Inquest as Coroner, by cutting off the head of the said body and that [Ramsay Smith] shipped the said head to parts beyond the seas.
6. That on or about the 24th day of July last, [Ramsay Smith] illegally and in violation of [his] duty as Coroner, mutilated the dead body of one E. Green upon which [Ramsay Smith] held an Inquest as Coroner, by cutting off the head of the said body and preventing the same from receiving decent burial.[60]

The other charges involved mutilation of bodies generally by the cutting of heads, retaining portions of bodies or sending those parts "beyond the seas," like those charges set out

[57] Ibid; Fforde (2004), *supra* note 29; Ross James and Helen James, "Historical Perspective: Retention of Human Organs and the Dismissal of Ramsay Smith" (2001) 33 *Pathology* 172; also see Alexander Pring and george smith, "William Ramsay Smith" South Australian Museum, https://www.samuseum.sa.gov.au/collection/archives/provenances/aa263.
[58] Letter from the Office of the Attorney General to Dr. William Ramsay Smith, *RE: Pertaining to charges* (11 August 1903) [record GMG24_6_0_498_1005-1903 was produced from the archives of the City of Adelaide in Adelaide, Australia, and a copy remains on my person] [Letter #1 Re Ramsay Smith (1903)].
[59] Ibid.
[60] Letter from the Office of the Attorney General to Dr. William Ramsay Smith, *RE: Pertaining to further charges* (13 August 1903) [record GMG24_6_0_498_1005-1903 was produced from the archives of the City of Adelaide in Adelaide, Australia, and a copy remains on my person] [Letter #2 Re Ramsay Smith (1903)].

above.[61] The Attorney General declined to bring two more charges against Ramsay Smith because, upon making enquiries, he found "that in these cases there was ground on [Ramsay Smith's] part for the belief that the cutting off of these heads and their removal to Adelaide was necessary to enable [him] as medical witness."[62]

Ramsay Smith was initially dismissed from all public appointments because of the charges, although he was later reinstated after a Board of Inquiry found no merit to the charges.[63] A board of inquiry was appointed by the Governor "to enquire into and report on" those charges,[64] a process that Ramsay Smith was entitled to under the *Civil Service Act 1874,*[65] as an officer of the Crown.[66] In deciding the charges had no merit, the Board agreed with Ramsay Smith that he, like other medical men of the time, was entitled by custom to take custody over, retain, and disseminate human tissue, which the "state of the law" (even in

[61] Letter from the Office of the Attorney General to Dr. William Ramsay Smith, *RE: Pertaining to even further charges* (31 August 1903) [record GMG24_6_0_498_1005-1903 was produced from the archives of the City of Adelaide in Adelaide, Australia, and a copy remains on my person] [Letter #3 Re Ramsay Smith (1903)].
[62] Letter from the Office of the Attorney General to Dr. William Ramsay Smith, *RE: Pertaining to charges not pursued* (13 August 1903) [record GMG24_6_0_498_1005-1903 was produced from the archives of the City of Adelaide in Adelaide, Australia, and a copy remains on my person] [Letter #4 Re Ramsay Smith (1903)].
[63] Minutes forming enclosure to LSO No 1005, 1903 (24 September 1903) (South Australia) [record GMG24_6_0_498_1005-1903 was produced from the archives of the City of Adelaide in Adelaide, Australia, and a copy remains on my person] [Minutes from 24 September 1903].
[64] Ibid.
[65] *Civil Service Act, 1874*, 37&38 Vic 3, s 24 (South Australia).
[66] Letter from Dr. William Ramsay Smith to the Office of the Attorney General, *RE: Regarding request for inquiry* (24 August 1903) [record GMG24_6_0_498_1005-1903 was produced from the archives of the City of Adelaide in Adelaide, Australia, and a copy remains on my person] [Letter #5 Re Ramsay Smith (1903)]; Letter from the Office of the Attorney General to Dr. William Ramsay Smith, *RE: Regarding request for inquiry* (24 August 1903) [record GMG24_6_0_498_1005-1903 was produced from the archives of the City of Adelaide in Adelaide, Australia, and a copy remains on my person] [Letter #6 Re Ramsay Smith (1903)].

the absence of authorising statute) recognised and guarded in the interests of the living.[67] Importantly, the Board did not appear to come to this conclusion by error; transcripts show exceptional care in the work of the Board and the parties' legal counsel, all jurists of note within the colony.[68] Further, the existence of a common law power to dissect was actually the view of the Court of Queen's Bench in *R v Price* (1884),[69] and of law writers up until the enactment of the *Human Tissue Act 1961* in England and Wales (see Chapter 2).[70]

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[67] Board of Inquiry, "Report of Board of Inquiry Re Dr. Ramsay Smith" (22 September 1903), 1 (South Australia) [record GMG24_6_0_498_1005-1903 was produced from the archives of the City of Adelaide in Adelaide, Australia, and a copy remains on my person] [Board of Inquiry Report (1903) or *Re Ramsay Smith* (1903)]. In similar disputes in the United Canadas, medical practitioners in favour of a common law power to dissect referred to this "state of the law" as the "law of the land." See Editors, "The Provincial Lunatic Asylum" (1851) *The Upper Canada Journal of Medical, Surgical and Physical Science* 378, 379 [Editors (1851)]; Editors, "The British American Journal's Lecture on Medical Ethics" (1852) *The Upper Canada Journal of Medical, Surgical and Physical Science* 419, 422 [Editors (1852a)]; *contra* Editors, "The Provincial Lunatic Asylum and the U.C. Journal" (1852) *The British American Medical and Physical Journal* 404, 405 [Editors (1852b)].

[68] Notes of Evidence Re Ramsay Smith (1903), *supra* note 48. The Board was composed of three civil servants: a commissioner (J.G. Russell), a master of the Supreme Court (Alexander Buchanan), and a college headmaster and barrister-at-law (William G. Torr). Russell was formerly a justice of the Supreme Court of South Australia and sat on numerous royal commissions, see Robert Thornton, "Russell, James George (1848-1918)" in *Australian Dictionary of Biography (Volume 11)* (Melbourne: Melbourne University Press, 1988). Ramsay Smith was represented by Senator Sir Josiah Symon, a future Attorney General, and A.J. McLachlan, who would later become a senator, Attorney General and government leader, see Judith Brown, "McLachlan, Alexander John (1872-1956)" in *The Biographical Dictionary of the Australian Senate (Volume 2)* (Melbourne: Melbourne University Press, 2004); Don Wright, "Symon, Sir Josiah Henry (1846-1934)" in *Australian Dictionary of Biography (Volume 12)* (Melbourne: Melbourne University Press, 1990). H.A. Parsons was counsel for the government, who would later be awarded King's Counsel, serve as Attorney General and sit as a Supreme Court justice, see Elizabeth Kwan, "Parsons, Sir Herbert Angas (1872-1945)" in *Australian Dictionary of Biography (Volume 11)* (Melbourne: Melbourne University Press, 1988).

[69] *R v Price* (1884), 12 QBD 247 (Court of Queen's Bench) (UK) [*Price* (1884)].

[70] James Brooke Little, *The Law of Burial* (London: Shaw and Sons, 1894), 11 [Brooke Little (1894)]; Arthur Turnour Murray, *The Law of Hospitals, Infirmaries, Dispensaries, and Other Kindred Institutions Whether Voluntary or Rate-Supported* (London: J. Murray, 1908), 45 [Murray (1908)]; E. Lewis Thomas (ed) *Baker's Law Relating to Burials* (London: Sweet and Maxwell, 1901), 36. Thomas, for example, stated that "[t]he custom of disposing of the dead in this country […] has from time immemorial been by burial, but it cannot now be doubted that disposal by other decent means is lawful." Arthur Turnour Murray wrote, "Dissection at Common Law.—'The practice of anatomy is lawful and useful, though it may involve an unusual means of disposing of dead bodies and thought it certainly shocks the feelings of many persons.'" Also see C.J. Polson, *The Disposal of the Dead (2nd Edition)* (London: English Universities Press, 1962), 41-50 [Polson (1962)]. Here Polson, in describing the state of law prior to the *Human Tissue Act 1961*, 1961 c 54 (UK), strongly insisted on the illegality of practices conducted outside the anatomy legislation, referring to the post-mortem examination and retention of tissues practiced by physicians as lacking legal authority. This differs markedly from his account in the first edition of his book, where he admits its lawfulness is the view of some, see C.J. Polson, *Disposal of the Dead* (New York: Philosophical Library, 1953).

A report of the Board was printed by order of the House of Assembly of South Australia on 22 September 1903,[71] which set out their reasons. Here the Board offered their interpretation of the laws pertaining to the use and disposal of dead bodies and body parts, noting the "absence of judicial authority"[72] on the precise questions raised regarding these charges (which alleged breaches of South Australia's *Anatomy Act* (1884)).[73] The Board provided a full-throated defence of the claim of a common law entitlement to dissect, concluding that the absence of authority under the *Anatomy Act 1884* was inconsequential:

> The question of legality or illegality of the matters charged, for the most part, depends upon what is held to be the true scope and effect of the "Anatomy Act of 1884" (No. 317), and, in the absence of judicial authority, we deem it necessary to shortly state our views of the effect of that Act. The charges referred to, so far as they relate to breaches of the Anatomy Act, are that Dr. Ramsay Smith, not being a person licensed under that Act, performed anatomical examinations at places not licensed under the Act, and that such examinations were, therefore, illegal; and sections 4, 12, 14, 16, and 18 were particularly relied upon.
>
> We are of the opinion that this is a mistaken view of the law. The Act, in its main provisions, is similar to the Imperial Anatomy Act (2&3 of Wm. IV., c. 75). Before that Act was passed, it appears to us that anatomical examinations were lawfully taught and openly practised. The whole history of the subject shows that anatomy of the human body developed from most ancient times to a systematic practice, resulting in the establishment of schools and other institutions for that purpose.[74] (my emphasis)

Further, the board noted bodies were lawfully dissected after being obtained from those who had lawful possession, whom could be the next of kin or others like hospitals and physicians:

> So general was the practice of anatomy [since the 17th century] that the legitimate demand for dead bodies for anatomical dissection brought into existence the class of wretched criminals known as "Resurrectionists," and even murderers, such as Burke, who was executed for the offence in 1829. We differ with the contention of [counsel for the Attorney General], that at that time the only legal source of supply of bodies for anatomical dissection were those upon which *post-mortems* had been held under coroners' inquests and the bodies of murderers under the statute law. It appears obvious from the history of anatomy that another, and the chief source of supply, was the bodies obtained from relatives or other persons having the lawful possession. […] It cannot be doubted that, if it had been unlawful to practice on bodies supplied by the persons in lawful possession, the reports would have contained many cases of

[71] Board of Inquiry Report (1903), *supra* note 67.
[72] Ibid, 1.
[73] Ibid; also see *Anatomy Act 1884*, 47&48 Vic 317 (South Australia) [*Anatomy Act* (1884)].
[74] Board of Inquiry Report (1903), *supra* note 67 at 1.

> prosecutions. That, in our opinion, was the state of the law up to the passing of the Imperial Anatomy Act in 1832.[75] (my emphasis)

That state of the law continued in England despite the *Anatomy Act* (1832), and the *Anatomy Act* (1884) in South Australia, having regard to the historical context, the language of the acts and titles thereof ("to authorise the establishment of Schools of Anatomy, and to regulate the practice of anatomy therein"):

> [The *Anatomy Act 1832*] was a complete recognition of the existence of a proper demand, in the interest of the living, of bodies for dissection, and it increased the supply, particularly from certain public institutions. Our Act makes it a condition that the bodies to be dissected under its provisions go only to Anatomical Schools, which were to be licensed, and that the bodies themselves should be anatomically examined by students and others, all of whom were also to be licensed and be subject to the control of inspectors. Each of the Acts was a measure to facilitate and regulate the systematic study and practice of anatomy, and not a measure to curtail or interfere with the right of a medical man to perform surgical operations, *post-mortem* examinations, and removal of parts of the body, as in his judgment might be necessary; all of which remained, in our opinion, unaffected by the Act. It is his business to do all such things. He is paid for his judgment and skill for the purpose, and his very living will always depend upon his discretion and nice sense of what is fitting between himself and his patients and their friends. Each medical man must judge for himself, and at his own risk, what is the proper course of action in each particular case.[76] (my emphasis)

The Board thereby asserted that physicians—whether in private practice or at public institutions—were "equally free to follow the ordinary rules and usages of the medical profession as to performing *post-mortem* examinations, where deemed necessary and in proper circumstances, and by so doing, no breach is committed of the provisions of the Anatomy Act."[77] The Board held that "it is certainly a part of the duty and in the ordinary course of the practice of the medical profession, to remove parts of the human body from the living as well as from the dead bodies," and the amount of human matter to be removed "and how it should be disposed of, must of necessity rest on the judgment and good taste of the medical man in the particular case."[78] There was also no evidence that Ramsay Smith acted

[75] Ibid; also see *Anatomy Act* (1832), *supra* note 37.
[76] Board of Inquiry Report (1903), *supra* note 67 at 2.
[77] Ibid.
[78] Ibid.

against the wishes of individuals in lawful possession of the bodies*, if not him*.[79] Accordingly, Ramsay Smith had not committed any offences with which he was charged in taking custody, dissecting, retaining or transferring bodies and parts.[80] Exoneration was not provided by way of a legislative permission; rather, the Board drew on language that strongly characterised a right at common law. In this way, the board recognized the lawfulness of what was described by numerous witnesses as being "usual practice,"[81] without "impropriety,"[82] and "regarded as custom."[83]

4.1.1. *To be at the King's Disposal*

Apart from demonstrating the existence of a power to dissect and take specimens at common law, the case of *Re Ramsay Smith* (1903) is helpful in that it records a challenge to that authority, exposing the conditions of those claims, including their content and the apparent source of their authorisation.[84] In particular, having that authority challenged illustrates the relations effected in the act of dissection, bringing me nearer to a description of the legal materiality of mutilation. Those relations pertain to the response to aberration, the assumption of access based one's status relative to the body, and the visibility of mutilation,

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[79] Ibid.
[80] Ibid at 3-4.
[81] John Lewis (or Louis) Dyer (Mortuary Attendant) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 39; Charles John Dolley (Mortuary Attendant) in Notes of Evidence Re Ramsay Smith (1903*),* supra note 48 at 50-51; William Lennox Cleland (Colonial Surgeon and Resident Medical Officer at the Parkside Lunatic Asylum) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 53-54.
[82] Arthur Francis Lynch (Pathologist) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 151; also see Richard Sanders Rogers (Member of Board of Management of Adelaide Hospital) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 219. One expert witness testified contrarily, Dr. Harry Swift (General Practitioner) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 220; however, upon examination by the Board and in cross examination the quality of his testimony is brought into doubt having regard to bias and contradictions in his answers (see e.g., Notes of Evidence Re Ramsay Smith (1903) at 226).
[83] Arthur Francis Lynch (Pathologist) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 150. Also see Dr. Edward Angas Johnson (Curator of the Pathological Museum, and Demonstrator of Anatomy) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 163.
[84] It is admitted that *Re Ramsay Smith* (1903), *supra* note 67, has limited precedential value as the output of an administrative tribunal (as opposed to a proper court of law), but I am not looking to the case for that kind of authority. Rather, I am looking to it as a possible exemplar of the conditions for articulating legal claims.

which analogize to being at the King's disposal. Each set of relations formed part of the technē—the practice or artful craft of a lawful life—by which jurisdiction or power over the body was authorised.[85]

Prior to dissection, the body bore some aberration that justified the physician's interference. Numerous witnesses testified to there being "peculiar condition[s]"[86] warranting medical or scientific study, or specimens having "great value"[87] for anthropological research as "rare and interesting"[88] (like those of "dying races" or a "splendid head for showing the configuration of [a racialised] character").[89] Emphasis was placed on the part's abnormality, caused by disease or some other pathology (of which race could be perceived as forming a part) that necessitated its removal and retention: like a monstrous birth, a fractured skull or cancerous tissue.[90] Although a great range of pathology was possible, the morphological structure of each specimen shared in leaking outside a medically normed view of the body, necessitating close examination with an eye toward its correction or prevention.[91] When it was intimated that the collection of specimens was a personal pursuit done with too great of fervour, witnesses consistently situated the practice relative to the interests of the living as

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[85] Olivia Barr, *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place* (Abingdon: Routledge, 2016) [Barr (2016)]; Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Abingdon: Routledge, 2012) [Dorsett and McVeigh (2012)]. Also regarding technē and bodies, see Margrit Shildrick, *Visceral Prostheses: Somatechnics and Posthuman Embodiment* (London: Bloomsbury, 2022) [Shildrick (2022)]; Nicki Sullivan and Samantha Murray, "Introduction" in *Somatechnics: Queering the Technologisation of Bodies* (Farnham: Ashgate, 2009), 1-10 (Sullivan and Murray (2009)].

[86] Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 43.

[87] Ibid, 151.

[88] Ibid, 53.

[89] Ibid, 162, 188.

[90] See e.g., ibid, 168-169, 182-183. Also consider e.g., the two-headed foetus in *Doodeward* (1908), *supra* note 27, or Dr. Luney, discussed in Chapter 2, who had a private museum of hundreds of gross (as in large) specimens, as well as microscopic preparations, taken from many physicians in Ontario (including his own gallblader preserved by his attending physician from when Dr. Luney was young). This collection—including bone and soft tissue—was meticulously recorded, with specimens recorded as part of the museum between 1930 and 1960. Luney's private collection disappeared with his death, although hundreds of records remain documenting the collection. Each demonstrates an abnormality. See Dr. Luney's fonds, accessible at *The Congregation of the Sisters of St. Joseph in Canada Archives*, in London, Ontario, Canada.

[91] See also Robyn Longhurst, *Bodies; Exploring Fluid Boundaries* (London: Routledge, 2001); Shaw (2001), *supra* note 10; Shildrick (1997), *supra* note 20.

advancing the medical arts and science.[92] The lawful use and disposal of specimens by medical men served public policy, not merely their individual interest, which by dint of training their professional office was specially equipped to address.[93] No other office possessed the necessary skill and knowledge to lawfully create and handle specimens, conferring a near absolute authority on medical men to mutilate.[94] This depended on representing the body's materiality—specifically in the part or eventual specimen—as accessible only to a medical gaze.[95] In the possession of medical men such specimens could be studied, enhancing their personal knowledge or skill, and potentially of others as well;[96] the threat of abnormality mollified in the extraction of knowledge, made "permanent" in medical and scientific periodicals that enlarged scientific mastery over the world.[97]

Practitioners' access to specimens were assumed from their proximity to the body (bringing it actually or potentially within their possession), and status (or office) as medical men.[98] Even where the body was not of a practitioner's former patient, the body's placement in a hospital morgue or equivalent facility suggested a shared entitlement among medical men, unless it was required for a coroner's inquest, or another medical man had claimed the part.[99] Medical men telephoned, or otherwise conveyed messages, notifying each other of the arrival of bodies of interest (often racialised, or otherwise bearing some morphological difference).[100] Where there was interest from multiple practitioners, attendants would assist with cutting out and setting aside different portions of the body to meet the requests.[101]

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[92] Notes of Evidence Re Ramsay Smith (1903), *supra* note 48.
[93] Ibid.
[94] Ibid; also see *Re Ramsay Smith* (1903), *supra* note 67.
[95] Foucault (1973), *supra* note 10; also see Shaw (2021), *supra* note 10.
[96] Notes of Evidence Re Ramsay Smith (1903), *supra* note 48.
[97] Ibid, 186. In an examination of Ramsay Smith it is asked, "Did you give them [the fractures] permanency?" to which Ramsay Smith replies, "I gave them permanency in medical journals."
[98] See regarding proximity, in both senses of macro- and micro-geographies of medical practice, see Shaw (2021), *supra* note 10.
[99] Notes of Evidence Re Ramsay Smith (1903), *supra* note 48.
[100] Ibid.
[101] Ibid.

Generally, whoever superintended the morgue or facility in which the body was placed was responsible for handling the body, including sorting requests from, and dispensing permissions to, other medical men interested in the specimens—that person was seen as having lawful possession of, and a superior right of control over, the corpse.[102] Importantly the entitlement to specimens were the privileges of duly trained medical men alone; no one without that office was authorized to dissect and take from the body, unless a medical student and supervised.[103] Medical men were described as coming in and out, taking what they wanted without regard for friends or family of the deceased (unless a prohibition was recorded and conveyed to them).[104] Access to such facilities was not otherwise possible, and even if non-medical men did gain access (such as a police officer who might keep a replicate key) their presence alone did not authorize dissection.[105] One's status as a medical man, gained upon receipt of education and the conferral or issuance of certain degrees and licenses, enframed the medical office to which they belonged; and it was that office which was a necessary condition for their authority to dissect and take from the body.[106] Placing of bodies within medical spaces thereby secured their belonging to medical men, severing, at least temporarily, ties to others who might take interest in their use and disposal.[107]

Specimens could also be "removed at any time"[108] whilst the body was accessible, and by multiple persons, although always by duly qualified medical men or under their direct supervision and only after it was no longer needed for anatomical examination or inquests.[109] Ramsay Smith testified that he would not dissect or take specimens from a body intended for

[102] Ibid.
[103] Ibid.
[104] Ibid.
[105] Ibid.
[106] Ibid.
[107] See discussion of belonging in Sarah Keenan, *Subversive Property*: *Law and Production of Spaces of Belonging* (Abingdon: Routledge, 2015) [Keenan (2015)].
[108] Arthur Francis Lynch (Pathologist) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 150.
[109] Ibid.

inquest prior to that use; he would only do so after the inquest was done (except, as Ramsay Smith qualified, if he was the coroner although such a qualification was made relative to the *appearance* of impropriety rather than its actual occasion).[110] Medical space was thereby ordered temporally and spatially having regard to the overlaying of different authorities that might converge on the body; the power to dissect, whilst dependent on the body's placement within that space, was modified by other forms of power that might lawfully arise.[111]

The authority to dissect and take specimens not only charged select persons with the power to mutilate; mutilation also had to be done in a certain manner to retain that authority.[112] Some of those conditions are already suggested in the description above: the office of medical men legitimated the gruesome work of dissection and specimen-making narrowly. Such work was limited to where it would have use for medical arts (for study, personal or otherwise) and scientific discovery.[113] To mutilate without that object centrally in mind risked needless acts, which could obscure if not destroy its scientific value and fall outside the limits of one's authority,[114] becoming an indecency or indignity subject to criminal law.[115] Without advancing a scientific or educational purpose cleaved to the medical office, there was no longer an excuse for the kind of act dissection entailed; responsibilities were thereby placed on medical men to conduct themselves strictly by scientific or educational principle—a selfless act in furtherance of their office—and to ensure their colleagues did the

[110] Ramsay Smith in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 189.
[111] Keenan (2015), *supra* note 107; also see, in a different context, the intertextuality at work in the production of authority relative to the body in Joshua DM Shaw, Tyler J King, and Liam Kennedy, "Constructing Risk Through Jurisdictional Talk: The Ontario Review Board Process under Part XX.1 of the Criminal Code" (2023) 38:2 *Canadian Journal of Law and Society* 180 [Shaw et al. (2023)].
[112] Notes of Evidence Re Ramsay Smith (1903), *supra* note 48.
[113] Ibid.
[114] Ibid.
[115] See e.g., *R v Lynn* (1788), 1 Leach 497, 168 ER 350 (Great Britain) [*Lynn* (1788)]; *R v Sharpe* (1857), Dears & Bell 162, 169 ER 959 (Court of Criminal Appeal) (UK) [*Sharpe* (1857)]; also see *Re Campbell* (1819) Unreported (High Court of Justiciary) (Scotland) but copy on file with me; *R v Gilles* (1820), Unreported yet discussed in *R v Duffin and Marshall* (1818), Russ & RY 366, 168 ER 847 (Surrey Assizes) (UK).

same.[116] Otherwise, medical men lost the privileges of their office and risked exposure to criminal or civil liability. It is in this respect that the visibility of mutilation and of the mutilated part mattered in how the board described the limits of lawful mutilation, as it came to index the propriety of the act.

The visibility of the practice was in part evinced in the distinctions drawn between anatomical examinations (the proper subject of anatomy acts), post-mortem examinations that formed part of coroner inquests, and dissections performed outside of (or in addition to) inquests and anatomy.[117] Anatomical examination required medical men, over a prolonged period (approximately one year), "to minutely dissect all the tissues of the body layer by layer in successive stages," with "a view to learn the various component parts of the human body."[118] The mutilated body was fully exposed within the anatomical school, done according to strict procedures specifically designed and ordered to maximally effect its systematic examination.[119] Inquests involved post-mortem examinations of the body as part of investigations of death by violence, which were conducted (or often simulated) in front of a coroner's jury.[120] The body's mutilation was circumscribed, in time and object, so to identify and deliver evidence. In both cases of anatomy and inquest, the mutilated body was to be given a decent burial after it was no longer needed, carried under cover of shroud or coffin to the place of interment and deposited at proper depth so to suppress its exposure.[121]

Dissection by contrast was privately done at the initiation of medical men, encompassing a range of acts which could be done discreetly and quickly (many testified to it taking as little as an hour) for the purpose of study.[122] Although bodies were significantly

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[116] Notes of Evidence Re Ramsay Smith (1903), *supra* note 48.
[117] Ibid.
[118] Arthur Francis Lynch (Pathologist) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 149. Also see Edward Angas Johnson (Curator and Demonstrator) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 170.
[119] Notes of Evidence Re Ramsay Smith (1903), *supra* note 48.
[120] Ibid.
[121] Ibid.
[122] Ibid; see e.g., Ramsay Smith in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 176.

altered in such work—with entire heads, flesh and bone removed and placed in tins, organs jarred, and skeletons stripped and separated from soft tissues—every act had to be purposefully and skillfully done, having regard to the objects of medical or anthropological study which constrained the extent and quality of mutilation.[123] Dissection did not have the same systematic procedure as anatomy,[124] but there was a purpose and skill to dissection that was assessed visually by observers (attendants, students, other medical men) concurrent to and after its commission; unlawful acts would appear in the alteration of the body and the specimen extracted, as rough and indiscriminate cuts and injudicious quantities that exceeded the needs of medical office.[125] For example, it would be improper to "[descend] upon [the] body like Kites or [hack] it to pieces;"[126] medical men responsible for laboratories or similar places "would not stand by and witness" unnecessary mutilation.[127]

Whilst dissections were done at the initiation of individual medical men, and without administrative oversight, many dissections were completed with an audience of students or other practitioners.[128] Such audiences were specially convened for the purpose of a clinic or dissertation on the dissected parts, for whom their presence was the privilege of being a medical man or one of the men and women attending university to become one.[129] Dissection then was not a totally private act, but its visibility to the public was controlled.[130] For example, the Crown enquired about the presence of women at dissections, with apparent concern for

[123] Notes of Evidence Re Ramsay Smith (1903), *supra* note 48.
[124] Ibid.
[125] Ibid.
[126] Arthur Francis Lynch (Pathologist) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 154. Also see Edward Angas Johnson (Curator and Demonstrator) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 168.
[127] Arthur Francis Lynch (Pathologist) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 154.
[128] Notes of Evidence Re Ramsay Smith (1903), *supra* note 48.
[129] Ibid.
[130] See discussions of anatomy as a spectacle in Elizabeth Stephens, *Anatomy as Spectacle: Public Exhibitions of the Body from 1700 to the Present* (Liverpool: Liverpool University Press, 2011) [Stephens (2011)].

the decency of the acts;[131] although the Board seemed satisfied that these women were also training as medical practitioners and were not out of place despite their gender.[132] Likewise in another dispute—pertaining to Dr. John Scott of nineteenth-century Toronto[133]—the editors of a medical journal complained of the overabundance of sensitivity among the public and its interference with the customs and usages of dissection, and although generally supportive of the impugned doctor suggested he acted improperly by not taking greater care to conceal the mutilation he committed.[134] Specimens belonged in personal collections in the medical man's private dwelling or office, or museums attached to universities or other institutes;[135] in that way, specimens were to be kept from an unwitting public perceived to lack the hardened fortitude of intellectuals.[136]

Relatedly, the sentiment of friends and family could mediate the authority to dissect. When asked if consent of friends and family were the foundation for dissections, and the taking of specimens, Dr. Arthur Francis Lynch, a pathologist, responded "Yes, generally speaking […] I would be *guided* by the wishes of the friends" (my emphasis). But that consent only mattered where friends refused dissection; where "there [was] no one to give permission" or a practice not outright forbidden he "invariably [took] it for granted that these [were] cases which [were] always open to examination."[137] The curator of the pathological

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[131] Notes of Evidence Re Ramsay Smith (1903), *supra* note 48.
[132] Ibid.
[133] AW Rasporich and IH Clarke, "SCOTT, JOHN," in *Dictionary of Canadian Biography,* vol 9 (Toronto: University of Toronto/Université Laval, 1976); TJW Burgess and JV Anglin, "Abstract of a Historical Sketch of Canadian Institutions for the Insane" (1899) American Journal of Psychiatry 667, 680. Burgess and Anglin state that Dr. Scott resigned in 1852, but a letter from Dr. Scott in 1853 communicates his resignation and encloses an annual report from the Board of Commissioners for the Asylum [cite letter]. Also see Editors, "Legislative Assembly" (1851) 7:4 *The British American Medical and Physical Journal* 185, 185-187.
[134] Editors (1851), *supra* note 67 at 379; Editors (1852a), *supra* note 67 at 422; *contra* Editors (1852b), *supra* note 67 at 405.
[135] Editors (1851), *supra* note 67.
[136] Ibid. A view that also pervaded the common law regarding bodies generally, such as in *R v Newcomb* (1898), 2 CCC 255, 1898 CarswellNS 110 (Nova Scotia County Court) [*Newcomb* (1898)].
[137] Arthur Francis Lynch (Pathologist) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 161.

museum at the University of Adelaide, and demonstrator of anatomy, Dr. Edward Angas Johnson similarly testified that diseased parts examined and removed in dissections were done without hesitation provided they were unclaimed—such bodies were "Government one[s] and […] practically ours."[138] But even claimed bodies were not untouchable; provided the matters of interest were diseased or pathological—"anything deviating from normal"[139]—medical men enjoyed "free hand" to do whatever they desired in the interests of science and medicine.[140] The most authoritative witness, Professor Charles Sterling, stated "proper regard should be paid to the feelings of friends," but that this was just a "guide" and "a great deal depend[ed] upon what the use [was]"—if the specimen were "a bit the size of a pea […] [he] might not [have been] guided" by the stated wishes of friends, but if it were a head he would "draw the line at taking" what was forbidden.[141] Sterling further observed that there was "a difference between prohibition [by refusal of friends] and not having obtained consent," and that enquiring about consent may not have been necessary depending on the size and kind of specimen desired.[142] Such was also the view of Ramsay Smith who completed dissections with and without the consent of friends, in non-inquest and inquest cases (although in inquest cases, always after an inquest was completed and never on a body upon which he held an inquest).[143] Generally, as long as there was scientific value and it did not cause shock to friends, dissection and taking of specimens were authorized even where friends forbade it.[144]

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[138] Edward Angas Johnson (Curator and Demonstrator) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 165.
[139] Ibid, 171.
[140] Ibid, 170.
[141] Charles Sterling (Professor of Pathology) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 144.
[142] Ibid, 144.
[143] Ramsay Smith in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 176, 198-199.
[144] Richard Sanders Rogers (Member of Board of Management of Adelaide Hospital) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 215-217.

Where an inquest was held, no regard for friends was needed as the body was not in their lawful possession.[145]

The size and kind of specimen appear to have related to the visibility of mutilation, with the authority to dissect and take from the body affected by the extent that would be noticed.[146] A smaller specimen from inside the body was easier to justify taking, whilst a larger specimen on the surface was more difficult.[147] As Dr. Richard Sanders Rogers testified:

> 4555. You think it is quite the proper thing to take the head off the dead body?—*In certain circumstances yes.*
>
> 4556. What conditions?—*Where there is a scientific value attached to the operation and where the feeling of friends would not be shocked.*
>
> 4557. Where there are friends would you interfere with the head of a body?—*If I wanted a specimens and I could get it without their knowledge or shocking their feelings yes.*
>
> 4558. When a Dr. is performing a post-mortem where there are friends does he not always have in his mind the fact that the friends will see the body after the post-mortem?—*No. They do not always see a body*.
>
> 4559. Does he not have that in his mind?—*No he must select his conditions*.
>
> 4560. You have performed post-mortems where there are friends?—*I have done several*.
>
> 4561. You have done so?—*Yes*.
>
> 4562. Did you not keep in your mind the fact that the friends might see the body?—*I always study their interests and if I thought they might see the body afterwards I would not deprive the body of any part that would shock them.*

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[145] Ibid, 218. A related argument appears in *Davidson v Garrett* (1899), 30 OR 353, 5 CCC 200 (Ont High Ct) [*Davidson* (1899)], where it is noted that family of the deceased held no property in the body, and that those assisting the coroner had authority to dissect the body owing to the coroner's ancient powers. Ontario's High Court of Justice held that a parol order from the coroner authorized the dissection of a body by a surgeon in anticipating of holding an inquest. Such authority emanated from the ancient rights of the coroner at common law, namely the judicial discretion as a judge of a court of record to undertake dissections without a panel of witnesses. The surgeon entered the property and undertook the dissection in accordance with the coroner's order, in good faith, and without unnecessary violence or indignity. Also see a more conservative view expressed by Benjamin Poulton (Medical Practitioner) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 235, although, like Harry Swift, it was shown in cross examination that Poulton was prejudicial against Ramsay Smith and had agreed with others to 'boycott' him professionally and socially (see e.g., at 237-238).
[146] Notes of Evidence Re Ramsay Smith (1903), *supra* note 48.
[147] Ibid.

> 4563. Knowing there were friends in a case without their consent would you not take such a specimen as a head?—*If I thought they would not see the body afterwards and discover the missing portion and if the part were of scientific interest, I would take it*. [148]

Likewise, expectations of skill and professional propriety that prevented wanton use, like needlessly hacking a body or abandoning parts on the laboratory floor as refuse,[149] appears to have depended in part on the visibility of mutilation to friends and family. The more inhuman one's appearance after dissection, evincing the cutting up and out of the body, the greater shock caused to friends and family which, whilst not determinative, could affect professional judgement.[150]

4.2. Making "an Object among Objects"[151]

Drawing attention to the conditions of authority claimed in *Re Ramsay Smith* (1903) brings me nearer to describing the legal materiality of mutilation. But, whilst my reading of *Re Ramsay Smith* (1903) excavates much of the conceptual structure of being at the King's disposal, there are important differences in social context between the exercise of royal prerogative and the medical man's common law power. Those historical differences require revision to my analogy, by describing further concepts that facilitated medical power and its consequences for human bodies. Namely, I orient to claims of *private* or *chattel property* in human bodies and parts, which uniquely bore (and continue to bear) on the legal status of bodily matter in modern law.[152] In Chapter 2, I noted the doctrine sometimes relied on to make sense of the status of the body and parts as property. This section re-treads some of

[148] Richard Sanders Rogers (Member of Board of Management of Adelaide Hospital) in Notes of Evidence Re Ramsay Smith (1903), *supra* note 48 at 217.
[149] Notes of Evidence Re Ramsay Smith (1903), *supra* note 48.
[150] Ibid.
[151] Frantz Fanon, *Black Skin White Masks* (New York City: Grove Press, 1967) [Fanon (1967)].
[152] See discussion in Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property and Personality* (Farnham: Ashgate, 2001) [Davies and Naffine (2001)].

that ground, largely in discussion of the High Court of Australia decision in *Doodeward v Spence* (1908).[153] However, I also, and principally, orient critically to the topic, fingering the sinews between such concepts and experience. In doing so I am sensitive to how, to quote Frantz Fanon, flesh becomes "an object among objects,"[154] for it is in that process of objectification and de-personalization that the human body and its parts obtain a qualitatively different status,[155] begun and yet unfulfilled in the power to dissect.

As scholars from Black studies argue, the assertion of property over the body necessarily objectifies and de-personalises.[156] Property cleaves the body or parts from a place of belonging (to an individual or community for whom the body or parts previously mattered), substituting an attachment conditional to the caprice of the chattel owner.[157] The freedoms and affections of being human are razed, subordinated to the control of another.[158] Sustained by systems of racial control, objectification and de-personalization of the body, and the resulting contingency and domination, become indexed to physical differences which appear, in their sociocultural milieu, *as* property.[159] That milieu is, as Sylvia Wynter describes it, sociogenic in that the physicality of the body enfolds a dynamic, genre of social practice which makes and stages the "Human Being";[160] namely, a white, male and able human

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[153] *Doodeward* (1908), *supra* note 27.
[154] Fanon (1967), *supra* note 153.
[155] Ibid; also see Weheliye (2014), *supra* note 33.
[156] McKittrick (2006), *supra* note 33; Weheliye (2014), *supra* note 33.
[157] See discussion of the paradigm of property in Nicole Graham, *Lawscape: Property, Environment, Law* (Abingdon: Routledge, 2010) [Graham (2010)]. Regarding belonging and property, see Keenan (2015), *supra* note 107. Different belongings may compete relative to the dead body. For e.g., see *Takamore v Clarke* [2012] NZSC 116, where the Whakatōhea and Tūhoe whānau of a dead man obtained his body and buried it according to Māori law, against the wishes of the man's partner and children. Māori disposal of the dead considered different relations of belonging than the common law, the latter of which the Supreme Court of New Zealand favoured. See discussion in Hinematau Naoami McNeill, Hannah Linda Buckley, and Robert Marunui Iki Pouwhare, "Decolonizing Indigenous Burial Practices in Aotearoa, New Zealand; A Tribal Case Study" (2022) *OMEGA—Journal of Death and Dying*, https://doi.org/10.1177/00302228211070153.
[158] McKittrick (2006), *supra* note 33; Weheliye (2014), *supra* note 33.
[159] McKittrick (2006), *supra* note 33; Weheliye (2014), *supra* note 33.
[160] Demetrius L Eudell, '"Come on Kid, Let's go Get the *Thing*": The Sociogenic Principle and the *Being* of Being Black/Human' in Katherine McKittrick, ed, *Sylvia Wynter: On Being Human as Praxis* (Durham: Duke University Press, 2015), 226-248 [Eudell (2015)]; Wynter (1999), *supra* note 33.

(Man),[161] whose being is "selected" and distinguished from other organisms as the author of culture.[162] From the perspective of Man, the Black, female and disabled human becomes Man's negation: "as embodiments of Ontological Lack" and "'proof' […] of the functioning of an infranatural process of genetic selection" in their supposed imprisonment to nature and incapacity for civilization.[163] As Sylvia Wynter writes:

> In the new governing code of "life" and "death" the slave and Caliban symbol of sensory-nature Otherness had been displaced by the empirical figures and hypher-signs of "natives and "Negroes," both men and women, in the context of the nineteenth-century European order of discourse, so that the Hottentot woman with her steatoygous buttocks and Hottentot "apron" became the signifying category of an ostensibly atavistic mode of human female sexuality. The European prostitute, like all lower-class women to varying degrees, was therefore assimilated to the abject category of the Hottentot woman in medical and criminological discourses; similarly, as Fanon shows in his critique of the North African syndrome of the mainstream colonial psychiatry of the time, the mental illness of native Algerian men was diagnosed as "proof" of the fact that they were decorticalized, born as atavistic throwbacks without a frontal cortex, a proof therefore of a genetically determined mode of human differential value.[164]

Those not selected remain amongst nature, open to appropriation as property.[165] Further, as Wynter notes through the figure of the "pieza" (a standard of abstracted value in the chattel slave from the fifteenth century that fixed characteristics of the Black body to alienated quantities of labour), other practices assist with transforming the racialized body into a fungible object for the extraction, exchange and hoarding of value by Men.[166]

Having regard to the scientific racism of which Ramsay Smith's specimens formed a part,[167] similar processes appear to me in the power to dissect, which, although not the focus

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[161] Eudell (2015), *supra* note 163; Wynter (1999), *supra* note 33.
[162] Sylvia Wynter, "Beyond the Word of Man: Glissant and the New Discourse of the Antilles" (1989) 63:4 *World Literature Today* 637, 640 [Wynter (1989)].
[163] Ibid, 641-642.
[164] Ibid, 644.
[165] Graham (2011), *supra* note 159.
[166] Sylvia Wynter, "Beyond the Categories of the Master Conception: The Counter-doctrine of the Jamesian Poiesis" in Paget Henry and Paul Buhle, eds, *C.L. J. James's Caribbean* (Durham: Duke University Press, 1992), 63-91 [Wynter (1992)]; also see Max Hantel, "Plasticity and Fungibility: On Sylvia Wynter's Pieza Framework" (2020) 38:2 *Social Text* 97 [Hantel (2020)].
[167] Fforde (2004), *supra* note 29.

of Black scholars, reinforce the conceptual work of Man and property.[168] Thinking with the writings of Black scholars, in this section, I suggest the concepts underlying the power to dissect and property work complementarily which, taken together, accrete as a totalizing power over the flesh of another especially (although not exclusively) as a technology or technique of race.[169] On that basis, I attempt to show how a critical understanding of property in the human body should assist with elaborating the conceptual structure of the power to dissect.

The conceptual architectonics of this process warrant explication: (1) the subject-object relations occupied by persons and property;[170] and (2) the sympoiesis between the auto-instituting, sociogenic Man and Man's environment, which facilitate the differentiation between being and non-being, readying the body as a candidate for property.[171] These together structure the common law power to dissect and the resulting objectification of human specimens, which prepares flesh for its extraction and use in social formations. They also suggest how the act of mutilation, in relation to its environment, is constitutive for law having regard to the recent history of medical practice. That will lead me to the more speculative rendering of mutilation, wherein the materiality of mutilation as a form for law is given thicker expression.

4.2.1. *Subject-object Relations*

The distinction between subject and object, and what results relative to this distinction, are integral to property at the common law.[172] With respect of the human body, this is demonstrated in *Doodeward* (1908), a case where the High Court of Australia found one

[168] Which is not to suggest they are never discussed by Black scholars. See e.g., Spillers (2003a), *supra* note 33.
[169] Weheliye (2014), *supra* note 33.
[170] Graham (2011), *supra* note 159.
[171] Eudell (2015), *supra* note 163; Wynter (1999), *supra* note 33.
[172] Graham (2011), *supra* note 159; also see Johanna Gibson, *Owned, an Ethological Jurisprudence of Property: From the Cave to the Commons* (Abingdon: Routledge, 2019) [Gibson (2019)].

could interfere with the right to possess a stillborn two-headed baby as a property claim (specifically as a tort of detinue).[173] In so concluding, the case exemplifies the genesis of property where a labourer applies "work and skill"—a thesis taken from John Locke's *Second Treatise of Government*[174]—which prefigures a mode of relating to the world (and objects contained in it) from the distinct position of the person-subject.[175]

In *Doodeward* (1908), a mother gave birth to the body of a two-headed baby in New Zealand in 1867.[176] The birth was a still-birth, with the prospective child described by the majority of the High Court as a "two-headed baby" and alternatively as a "still-born baby" or "still-born child," by which it was understood "to never have had an independent existence."[177] Much like the medical men in *Re Ramsay Smith* (1903), the medical attendant to the birth, Dr. Donahoe, took the body away, and then preserved and kept it in a cabinet in his surgery. The appellant, Mr. Doodeward, gained possession of the body upon Donahoe's death in 1870, acquiring the specimen in an estate auction, and brought it to Australia. The respondent, Mr. Spence, an Inspector of Police, confiscated the foetus when Doodeward was prosecuted for exhibiting it publicly in Sydney. Doodeward brought an action of detinue against Spence, initially dismissed by a district court for disclosing no triable action; an appeal to the Supreme Court of New South Wales was also dismissed;[178] but the High Court of Australia granted the appeal and reversed the decision of the lower court.[179] The majority

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[173] *Doodeward* (1908), *supra* note 27. See discussion in Kate Falconer, "Reconceptualising the Law of the Dead by Expanding the Interests of the Living" (2019) 45:3 *Monash University Law Review* 757 [Falconer (2019)]; P.D.G. Skegg, "Human Corpses, Medical Specimens and the Law of Property" (1975) 4 *Anglo-American Law Review* 412 [Skegg (1975)].
[174] John Locke, *Second Treatise of Government* (Cambridge, MA: Hackett, 2011), originally published in 1689 [Locke (1689)]. See also Remigius N Nwabueze, "Biotechnology and the New Property Regime in Human Bodies and Body Parts" (2002) 24 *Loyola of Los Angeles International and Comparative Law Review* 19, 40 [Nwabueze (2002)].
[175] Graham (2011), *supra* note 159.
[176] *Doodeward* (1908), *supra* note 27.
[177] Ibid, 410.
[178] *Doodeward v Spence*, (1907) 7 SR (NSW) 727 (Supreme Court of New South Wales) (Australia).
[179] *Doodeward* (1908), *supra* note 27.

of the High Court found detinue could be claimed with respect of the body; the body became property when Donahoe applied "work and skill" in its preservation:

> By whatever name the right is called, I think it exists, and that, so far as it constitutes property, a human body, or a portion of a human body, is capable by law of becoming the subject of property. It is not necessary to give an exhaustive enumeration of the circumstances under which such a right may be acquired, but I entertain no doubt that, when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject of course, to any positive law which forbids its retention under the particular circumstances.[180]

In countenancing the right, the High Court drew on, by implication, Locke to argue that private property in the body can result from the expense of labour.[181] Labour was an action that brought a subject into an intimate mixture with the matter of a thing; that mixture transformed the thing by infusing it with a person's qualities, "remov[ing] [it] out of the state that nature hath provided,"[182] or as Justice Griffith put it in *Doodeward* (1908), "differentiating it from a mere corpse awaiting burial."[183] Such a thesis has alternatively been described as a reified perspective of property, in that it attends to "the thing [of property] itself" to which "control and dominion" could be asserted, altering the thing "from its original naturally occurring state."[184] Importantly, labour endowed an object with qualities derived from the subject, establishing a right to the object as an owner enforceable against the world, but could not divine a subject out of the object.[185] The subject remained differentiated from the object as the seat of reason—the mind—directing the operation of the body and all the body physically possessed including property.[186]

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[180] Ibid, 414.
[181] Davies and Naffine (2001), *supra* note 154.
[182] Locke (1689), *supra* note 175.
[183] *Doodeward* (1908), *supra* note 27 at 414.
[184] Nwabueze (2002), *supra* note 175 at 39-40.
[185] Graham (2011), *supra* note 159.
[186] Ibid.

Legal geographer Nicole Graham characterizes Locke's theory of property as paradigmatic, in that the supposition and embodiment of his theses prefigures action, structuring how one orients to and experiences the world and that which one finds in it.[187] With property generally, Graham sees the common law as, in relying on Locke's paradigm, "dephysicalizing" property, isolating property in the abstract relation to the *thing*-object to be owned and controlled by the *person*-subject.[188] Dephysicalization occurs despite a reified perspective of property, in that the thing of property only forms a limited part of the normative ordering, principally to justify the genesis of property relation.[189] Ultimately, however, the genesis of property relation entails cultivating a thing so it *becomes* placeless, or as belonging anywhere, rendering it suitable for exchange once its present owner decides to alienate it by gift or sale.[190] Property conceived as an immaterial relation between person and thing conditions the unfettered movement of things in extraction and trade, without regard to the consequences of this selective mobility (of objects, commodities, things) on relations of a place.[191] Such as in Karl Marx's critique of "alienation," the object of property is transformed into a commodity without direct, or any, regard for the object's use-value at the spot of its production;[192] instead, the "individuality of […] things" or plurality of uses and meanings potentially of an object are alienated, subjugated to a system of rationalized value (within capital, this determined by the unit of labour-time) that allows for the exchange of that property for monies (and the extraction of surplus value by those who own the means of

[187] Ibid.
[188] Ibid.
[189] Nwabueze (2002), *supra* note 175 at 40-41; also see J.E. Penner, *The Idea of Property in Law* (Oxford: Clarendon Press, 1997) [Penner (1997)]; James Penner and Michael Otsuka, eds, *Property Theory: Legal and Political Perspectives* (Cambridge: Cambridge University Press, 2018).
[190] Graham (2011), *supra* note 159; also see Keenan (2015), *supra* note 107.
[191] Graham (2011), *supra* note 159.
[192] See e.g., Karl Marx, *Economic and Philosophic Manuscripts of 1844* (Moscow: Progress Publishers, 1959).

production).[193] The property can belong to anyone but for the claim of title that finitely tethers thing to a person.[194]

The noncoincidence of subject and object is fundamental to this lifeworld.[195] Whilst phenomenologists have critiqued the mind/body and subject/object dichotomies pervasive in Western philosophy and culture, noting that one exists simultaneously as subject and object,[196] the common law insists such a union is an impossibility.[197] Otherwise, the separability of subject and object, and the assignment of rights, duties, powers and disabilities predicated on that system of separation, collapse, become unactionable.[198] The common law requires the subject (Donahoe/ Doodeward) to always be a subject, and the object (the two-headed body) to always be an object, preserving the natural order between persons and things without perversion.[199] The work-and-skill doctrine maintains this natural order, just as labour did in Locke's *Second Treatise*, in that it establishes the transcendental person-subject as naturally apart from the environment, owing to the capacity to reason and act intentionally.[200] Objects are only elevated out of a state of common nature as property through the conduct of the transcendental person-subject, and brought into the lawful

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[193] Georg Lukács, *History and Class Consciousness: Studies in Marxist Dialectics* (Cambridge, MA: MIT Press, 1971), 92 [Lukács (1971)].
[194] Graham (2011), *supra* note 159; Penner (1997), *supra* note 189.
[195] Graham (2011), *supra* note 159; also see Sara Ahmed, *Queer Phenomenology: Orientations, Objects, Others* (Durham: Duke University Press, 2006) [Ahmed (2006)]; Keenan (2015), *supra* note 107.
[196] See Ahmed (2006), *supra* note 195; Maurice Merleau-Ponty, *Phenomenology of Perception* (Abingdon: Routledge, 2002); Alfred Schutz, *Phenomenology of the Social World* (Evanston, Ill: Northwestern University Press, 1967); also see e.g., Joy Twemlow, Catherine Turner and Aisling Swaine, "Moving in a State of Fear: Ambiguity, Gendered Temporality, and the Phenomenology of Anticipating Violence" (2022) 48:1 *Australian Feminist Law Journal* 87, 96.
[197] Graham (2011), *supra* note 159; also see Margaret Davies, "Material Subjects and Vital Objects: Prefiguring Property and Rights for an Entangled World" (2016) 22:2 *Australian Journal of Human Rights* 37; Margaret Davies, Lee Godden and Nicole Graham, "Situating Property within Habitat: Reintegrating Place, People, and Law" (2021) 6 *Journal of Law, Property and Society* 1.
[198] Graham (2011), *supra* note 159.
[199] Ibid.
[200] Ibid.

possession of other person-subjects according to rules of commerce so that subjects' autonomies only limitedly interfere.[201]

The taking, preservation and storage of the still-born child by Donahoe like any other object of dissection thereby transformed what might otherwise have been a "mere corpse awaiting burial" into a specimen with "actual pecuniary value."[202] That transformation enabled its removal from the mother, its purchase at auction, its move to and exhibition in Australia, and its eventual return under the tort of detinue to Doodeward. That the still-born child was human, and remained human in origin, did not deter the High Court. The majority of the High Court demonstrated that the process of alienation can extend, and has extended, to human bodies.[203] Indeed, as Chief Justice Griffith wrote, "a human body, or a portion of a human body, is capable by law of becoming the subject of property."[204] By contrast, Justice Higgins, in dissent, wrote "there is no instance that […] an action of trover or detinue lying for a thing which cannot be the subject of property."[205] He continued, drawing a distinction from chattel slavery:

> Property involves a right of exclusive and permanent possession. Trover lay for negroes, at the time when the British law recognized property in negroes: *Chambers v Warkhouse* (3). They were then merchandize—property. But no one ever heard of an action of trover or detinue for a human being whether alive or dead unless in the case of a slave.[206]

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[201] Ibid. Under capital, that noncoincidence between subject and object is, in actuality, adulterated by the objectification of the working person whose qualities and labour become commodified, so that person is exclusively encountered as an object of alienated value measured by the transfer of their labour, in time, into commodities they produce (and upon which the owner of means of production extracts surplus value in a subsequent relation of exchange). This reification, as Georg Lukács argued, is the totalization of capital wherein things actually relate to other things. Despite these relations, the system presents subjects (owners) as transacting with other subjects (workers), holding onto a legitimacy predicated on the sovereignty of free individuals (which is itself necessary for the ongoing exploitation of an expendable and exchangeable work force). See Lukács (1971), *supra* note 193.
[202] *Doodeward* (1908), *supra* note 27.
[203] Ibid.
[204] Ibid*,* 414.
[205] Ibid.
[206] Ibid*,* 418.

Black feminist scholars have amply theorized the alienation of human beings.[207] Having regard to the transatlantic slave trade practiced by Britons and Canadians, and the ongoing marginalization of Black and other racialized peoples through institutions genealogically related to chattel slavery, Black feminist scholars have shown how people were equivalently dephysicalized—in the sense that one is abstracted from the specificity of relations—and objectified.[208] Notably, Hortense Spillers distinguished flesh from the body as the moment transits of personality and of kinship, flowing to and from the body, are blocked in captivity, clotted by mutilation,[209] so that flesh becomes "a prime commodity of exchange,"[210] "account[ed] as *quantities*" (emphasis in original)[211] rather than qualities of being human.[212] Flesh is the body made abject, consumed in the constitution of the colony, where "the procedures adopted for the captive flesh demarcate[d] a total objectification, as the entire captive community bec[ame] a living laboratory"[213] figuratively in the "*willful* and violent"[214] maltreatment of Black slaves, and literally in "medical experimentation on Black bodies."[215] For example, Spillers quoted from an American abolitionist, William Goodell, and an advertisement from the *Charleston Mercury*, which demonstrated the objectification of the enslaved in medicine:

> Among the myriad uses to which the enslaved community was put, Goodell identifies its value for medical research: 'Assortments of diseased, *damaged*, and disabled Negroes, deemed incurable and otherwise worthless are *bought up,* it seems … by medical institutions, to be experimented and operated upon, for purposes of "medical

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[207] See e.g., Simone Brown, *Dark Matters: On the Surveillance of Blackness* (Durham: Duke University Press, 2015) [Brown (2015)]; McKittrick (2006), *supra* note 33; Sharpe (2016), *supra* note 33; Spillers (2003a), *supra* note 33; Weheliye (2014), *supra* note 33; Wynter (1999), *supra* note 33.
[208] Brown (2015), *supra* note 210; McKittrick (2006), *supra* note 33; Sharpe (2016), *supra* note 33; Spillers (2003a), *supra* note 33; Weheliye (2014), *supra* note 33; Wynter (1999), *supra* note 33.
[209] Hortense Spillers, "Mama's Baby, Papa's Maybe: An American Grammar Book" in *Black, White and in Color: Essays in American Literature and Culture* (Chicago: University of Chicago Press, 2003), 203-229 at 206-207 [Spillers (2003b)].
[210] Ibid at 220.
[211] Ibid.
[212] Ibid.
[213] Ibid at 208.
[214] Ibid at 206.
[215] Ibid at 208.

education" and the interest of medical science' (86-87). From the *Charleston Mercury* for October 12, 1838, Goodell notes this advertisement:

> To planters and others.—Wanted, fifty Negroes, any person, having sick Negroes, considered incurable by their respective physicians, and wishing to dispose of them, Dr. S. will pay cash for Negroes affected with scrofula, or king's evil, confirmed hypochondriasm, apoplexy, diseases of the liver, kidneys, spleen, stomach and intestines, bladder and its appendages, diarrhea, dysentery, etc. The highest cash price will be paid, on application as above, at No. 110 Church Street, Charleston (87).[216]

That state of captivity continued in the wake of slavery, even as former slaves and subsequent generations were recognized as legal persons.[217] An existence equivalent to property survived at the interstice of cultural and political institutions known as white supremacy, seemingly forever differentiating non-white peoples as inferior, separable and, ultimately, disposable in the denial of agency and security in life.[218]

For example, in *The Case of the Hottentot Venus* (1810), the Court of King's Bench affirmed a Black woman's capacity, as a legal subject, to enter a contract despite conditions that suggested she was, in fact, a slave.[219] The Black woman, Saartje Baartman, was brought by the Englishman, Dr. Alexander Dunlop, to London from the Cape of Good Hope in the Dutch Cape Colony, along with Hendrik Cesar (a Cape-born man "of colour").[220] Baartman worked as a washer and nursemaid in households in the Cape, when the master of the last household, Cesar, introduced her to Dunlop.[221] Dunlop was a military surgeon also

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[216] Ibid. Spillers is quoting from William Goodell, *The American Slave Code in Theory and Practice Shown by its Statutes, Judicial Decisions and Illustrative Facts* (New York City: American and Foreign Anti-Slavery Society, 1853).
[217] Rinaldo Walcott, *The Long Emancipation: Moving toward Black Freedom* (Durham: Duke University Press, 2021) [Walcott (2021)]; Frank B Wilderson III, *Afropessimism* (New York: Liverlight Publishing, 2020) [Wilderson (2020)].
[218] Walcott (2021), *supra* note 220; Wilderson (2020), *supra* note 220.
[219] *Hottentot Venus* (1810), *supra* note 32. The case was subsequently cited by courts as precedent for the rule that a third party could bring a writ of *habeas corpus* on behalf of someone else if there was sufficient reason the affected individual could not themselves, see e.g., *Re Parker (The Case of the Canadian Prisoners)* (1839), 151 ER 15. It was also cited in support of the rule that *habeas corpus* applied to subjects and aliens, provided the aliens were not enemies, see e.g., William Blackstone, *Commentaries on the Laws of England, Volume 2* (London: JP Lippencott & Co, 1895).
[220] See account of Mansell Upham, "From the Venus Sickness to the Hottentot Venus. Saartje Baartman and the Three Men in Her Life: Alexander Dunlop, Hendrik Caesar and Jean Riaux" (2007) 61:1 *Quarterly Bulletin of the National Library of South Africa* 9 [Upham (2007)].
[221] Ibid.

engaged in the collection and trade of animal specimens, which he commonly sent back to England.[222] Dunlop arranged for Baartman to travel to London to be exhibited; the Times reported the contents of an affidavit from a Mr. Bullock of the Liverpool Museum, filed in court, which stated in effect:

> that some months since a Mr. Alexander Dunlop, who, [Mr. Bullock] believed, was a surgeon in the army, came to him to sell the skin of a Camelopard, which he had brought from the Cape of Good Hope. Mr, Bullock refused to buy the skin from the high price set upon it. Some timeafter, [sic] Mr. Dunlop again called on Mr. Bullock, and told him, that he had then on her way from the Cape, a female Hottentot, of very singular appearance; that she would make the fortune of any person who shewed her in London, and that he (Dunlop) was under an engagement to send her back in two years : he wished to dispose of the Camelopard's skin and the Hottentot together, and pressed them on Mr. Bullock. "This (said the Attorney-general) shewed, that he felt himself as having the property."[223]

Upon Baartman's arrival to London, Dunlop and Cesar exhibited her as the "Hottentot Venus" at Picadilly Circus in the manner of a "freak" show, like the "Irish Giant" Charles Byrne.[224] An abolitionist group, the African Institute, was alarmed by Baartman's performances, suspecting she was put to work against her will, and petitioned the Court to free her.[225] The Times reported that Bartmaan was displayed on "a stage raised three feet from the floor, with a cage, or enclosed place at the end of it" and she "was within the cage" until "being ordered by her keeper, she came out."[226] She was "produced like a wildbeast, and ordered to move backwards and forewards, and come out and go into her cage, more like a bear in a chain than a human being."[227] The Court ordered Dunlop and Cesar to show cause as to 'why a writ of habeas corpus should not issue directed to them, commanding them to have the body of a certain native of South Africa […] denominated the Hottentot Venus, before this Court

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[222] Ibid.
[223] Anonymous, "Legal Report" in *The Times* (26 November 1810), p. 3 [*The Times* (1810)].
[224] GJ van Niekerk, "*The Case of the Hottentot Venus*: An Exercise in Legal History" (2007) 13:2 *Fundamina* 146, 149 [Niekerk (2007)]; also see discussion of Charles Byrne in Mary Lowth, "Charles Byrne, Last Victim of the Bodysnatchers: The Legal Case for Burial" (2021) 29:2 *Medical Law Review* 252.
[225] Upham (2007), *supra* note 223.
[226] *The Times* (1810), *supra* note 226.
[227] Ibid.

immediately.'[228] The Court desired to have Baartman examined by a coroner and Attorney General to ascertain the circumstances of her being in London,[229] to address whether Baartman, performing as the Hottentot Venus in London, was abducted from the Cape of Good Hope, and kept and made to perform without her consent.[230] Following the examination, the case was dismissed.[231] The Court was not satisfied that Baartman was restrained.[232] Reportedly, Baartman was "happy in England," which the Times emphasized with her interest in the profits of her exhibition.[233] However, many have doubted the veracity of the account.[234] Baartman was sold four years later to Jean Riaux in France, who allowed her to be repeatedly examined by French anatomists and naturalists like Dr. Georges Cuvier until her death in 1815.[235] Upon death, her remains were dissected (by Cuvier himself), collected and displayed in France until her repatriation in 2002.[236] Despite the ruling from the King's Bench, Baartman appears to have been treated in life and in death as property, voided of autonomy as her body was displayed, probed and examined as a specimen; an experience not unlike other Black people's even after abolition.[237] The law still found a way back to, what Wynters called, the pieza framework.[238]

Frantz Fanon characterized his experience as a Black man as "being an object among objects," splayed like a specimen, "returned to [him] spread-eagled, disjointed, redone."[239] What Fanon referred to as his body-schema—the phenomenon structuring the relation

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[228] *Hottentot Venus* (1810), *supra* note 32 at 344.
[229] Ibid.
[230] Ibid.
[231] Ibid.
[232] Anonymous, "Law Report" in *The Times* (29 November 1810), p. 3.
[233] Ibid.
[234] Christina Sharpe, *Monstrous Intimacies: Making Post-Slavery Subjects* (Durham: Duke University Press, 2010) [Sharpe (2010)]; also see Niekerk (2007), *supra* note 227 at 152-159; Weheliye (2014), *supra* note 33 at 41.
[235] See discussion in Stephen Jay Gould, "The Hottentot Venus" in *The Flamingo's Smile: Reflections in Natural History* (New York: W.W. Norton & Co, 1985), 291-305 [Gould (1985)].
[236] Upham (2007), *supra* note 223.
[237] Sharpe (2010), *supra* note 237; Weheliye (2014), *supra* note 33.
[238] Wynter (1992), *supra* note 169.
[239] Fanon (1967), *supra* note 153 at 93.

between self and world—was "attacked in several places, collapsed, giving way to an epidermal racial schema,"[240] or Spillers' flesh, where the Black person came to occupy a "zone of non-Being"[241] as the object of surveillance, exclusion and violence.[242]

> I am overdetermined from the outside. I am a slave not to the 'idea' others have of me, but to my appearance.
>
> I arrive slowly in the world; sudden emergences are no longer any habit. I crawl along. The white gaze, the only valid one, is already dissecting me. I am *fixed*. Once their microtomes are sharpened, the Whites objectively cut sections of my reality. I have been betrayed. I sense I see in this white gaze that it's the arrival not of a new man, but of a new type of man, a new species. A Negro, in fact![243]

Marked by this process of "thingification," the body was transformed into a flesh-object—whether by the mark of a literal brand or the appearance of Blackness—readying one for, as Christine Sharpe characterizes it, their violent transfer, their transit across the sea and their transubstantiation as not-human; a thing for others in a system of rationalization where subjects and objects, masters and properties are maintained, and being of all but white subjects negated.[244] For Fanon, he became inextricable from the construct of the "grinning *Y a bon Banania*."[245] Baartman became a freak, a sexual fetish and specimen representative of, as Cuvier wrote in his *Mémoires du Muséum d'Histoire Naturelle* (1817), a stage between Man and beast in her putative resemblance to an ape or monkey.[246]

Although the majority in *Doodeward* (1908) elided the question,[247] the invocation of slavery in Justice Higgins' dissent suggests the majority similarly constructed the "still-born baby" as an object among objects—not-human—a result of its alienation as property.[248] That suggestion is especially compelling since Higgins seemed, in his opening paragraph, amenable to the majority's suggestion that labour could transform the character of a

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[240] Ibid, 92.
[241] Ibid, xii.
[242] Ibid. Also see Brown (2015), *supra* note 210.
[243] Fanon (1967), *supra* note 153 at 95.
[244] Sharpe (2016), *supra* note 33.
[245] Fanon (1967), *supra* note 153 at 92.
[246] Gould (1985), *supra* note 238 at 295.
[247] *Doodeward* (1908), *supra* note 27.
[248] Ibid, 418.

substance (that requisite labour was just absent in the case).[249] By force, the human body was displaced and thus *enfleshed* in Donahoe's taking it, its preservation and its retention in his cabinet of curiosities. Those acts of force—an effect of his labour—changed the specimen's character as property. Its purchase, retention and exhibition by Doodeward continued its treatment as property, not as the remains of a prospective human life forcefully separated from kin on another island (who may have desired its dignified burial or equivalent disposal). As flesh, the still-born baby was no longer a human body; the specimen became suitable for property to be handled, stowed, displayed, worn and abused. Thereby the specimen occupied a similar conceptual position as the chattel slave in law—freely exchangeable, manipulable and disposable as merchandise, to which torts of detinue and trover (or conversion) could intelligibly respond in the event of their interference,[250] Of course, the consequences for the specimen were notably different from those experienced by the enslaved—the still-born specimen itself was neither capable of life, nor experiencing immiseration or violence—but the production of specimen for law relied on analogous processes of objectification and dehumanization. Further, the objectification and dehumanization of specimens need not be understood only by analogy to the subjugation of racialized peoples. As Spillers makes clear with reference to Goodell and the *Charleston Mercury*, the Black enslaved were also mutilated, dissected and exhibited as specimens.[251] There was a surfeit of medical specimens taken from the enslaved in the American South,

[249] Ibid, 417.
[250] See e.g., *Butts v Penny* (1677), 2 Lev 201, 3 Keble 785 (England). In this decision, the Court of King's Bench held that trover could lie in Black persons as "[Black people] being usually bought and sold among merchants, as merchandise, and also being infidels, there might be a property in them sufficient to maintain trover." Further, the Court held that "They are by usage *tanquam bona* [just like a good] and go to the Administrator untill [sic] they become Christians; and thereby they are Enfranchised." The final verdict would not be released for another year, only after Charles II issued an order in council confirming that "[Black people] were merchandize" whilst exempting the Royal African Company from taxation on slaves. See discussion in Holly Brewer, "Creating a Common Law of Slavery for England and the New World Empire" (2021) 39:4 *Law and History Review* 765, 799 [Brewer (2021)].
[251] Spillers (2003b), *supra* note 212.

which depended on their status as chattel slaves for their exploitation as medical specimens.[252] Baartman's life and death, too, shows the disjunction of subject and object necessary for the maintenance of the property relation owing to the racialisation (and sexualisation) of her morphological differences.[253]

Although a markedly different context in Australia,[254] the genealogical relation (as opposed to the merely conceptual relation) of dissection and race is likewise demonstrated in *Re Ramsay Smith* (1903).[255] Ramsay Smith's dissections were largely completed on Indigenous peoples from Australia, whose bones and tissues were sent "beyond the seas" to the University of Edinburgh owing to distinct qualities of their "race." Ramsay Smith was the principal donor to the University of Edinburgh's anatomical museum, especially of Indigenous remains from Australia, through which scholars sought to advance a science of racial inferiority.[256] As historian Paul Turnbull noted, the construct of "Australian Aboriginal" as an anterior species, the "oldest type of mankind" proximate to a savage animal, was indebted to the practices of anatomists like of Ramsay Smith (as well as some of those who testified at his inquiry, like Stirling), which had begun in the 1820s.[257] Anatomists and other medical men were—through the process of creating specimens and transmitting them to England—significantly involved in the hierarchization of Indigenous peoples, and "naturalization'" of that

[252] See discussion in Stephen C Kenney, "The Development of Medical Museums in the Antebellum American South: Slave Bodies in Networks of Anatomical Exchange" (2013) 87:1 *Bulletin of the History of Medicine* 32 [Kenney (2013)].
[253] Weheliye (2014), *supra* note 33.
[254] Having regard to race and racialization in Australia, see e.g., Kaiya Aboagye, "Australian Blackness, the African Diaspora and Afro/Indigenous Connections in the Global South" (2018) 126 *Transition* 72 [Aboagye (2018)].
[255] Of course, genealogical and conceptual analyses cannot meaningfully be severed. With social theorist Michel Foucault, for example, there was a certain circularity between practices constitutive of power and concepts as modes of rationality or discourse that contributed to the organization of those practices whilst themselves being the effect of practices. See in Colin Koopman, "Conceptual Analysis for Genealogical Philosophy: How to Study the History of Practices after Foucault and Wittgenstein" (2017) 55 *The Southern Journal of Philosophy* 103 [Koopman (2017)].
[256] See Fforde (2004), *supra* note 29.
[257] Paul Turnbull, "The 'Aboriginal' Australian Brain in the Scientific Imagination, c. 1820-1880" (2012) 2:2 *Somatechnics* 171 [Turnbull (2012)].

hierarchy, on the basis of racialized difference which informed settler formations of displacement, exclusion and control.[258] As the reasons and testimony from *Re Ramsay Smith* (1903) show, the remains of Indigenous peoples in Australia were, alongside medical specimens, vulnerable to the process of alienation as anthropological specimens. The objectification and dehumanization of these remains were entwined with the subjugation of racialized peoples, participating in the racialization of peoples near to home in Australia and farther afield along transnational transits of settler colonialism.[259] That relation also extended backward from a regime of racial politics to the body, as the status of remains readied anatomists to see themselves entitled to the personal collection, retention and use of flesh. That is why, from the perspective of the Ramsay Smith and the Board, the parts of an Indigenous man were lawfully authorized dissected by him, just like he was authorised to dissect, take from and export the bodies of a "Chinaman" and an "American Negro": as flesh.[260]

[258] Ibid. At 172, Turnbull notes that "Historians of racial thought in Australia have generally assumed that in scientific hands, bodily remains of Aboriginal people were transformed into objects sheared of human attributes and qualities. However, as is evidenced by the intellectual practices and findings of several anatomists discussed in this essay, studying the 'Aboriginal' brain could license imaginative reconstructions of Europeans and Aboriginal peoples' shared deep past." Regardless, these imaginaries nonetheless relied on the extraction of human remains to which anatomists invariably felt entitled.
[259] Ibid.
[260] Notes of Evidence Re Ramsay Smith (1903), *supra* note 48.

4.2.2. *Sympoiesis between Man and Flesh*[261]

The second element of property by which being at the King's disposal is fulfilled lies in the sympoiesis of Man and flesh, whereby being is constructed in contradistinction to property.[262] Importantly for this element, property in flesh is never a standalone object but always a part of some regime.[263] Furthermore, contrary to conventional jurisprudence, like that practiced by Wesley Newcomb Hohfield,[264] qualities of the "thing"—of the flesh[265]—facilitate the attribution of property (and its effects on Man).[266] Property is not, as Hohfield would have me believe, exclusively a relation between subjects (i.e. the relation between the subject of a right and subject of a duty) for whom the "stuff" of property is irrelevant.[267] Rather flesh accretes meaning, potently racialized and necessarily expressed in the formation of property.[268] It is in the semio-material relations that composite flesh, and the subjects oriented to that flesh[269] that property obtains.

Wynter describes Man as sociogenetic.[270] Man, or *Homo Sapiens*, was not biological.[271] Rather, Man formed, and continued to form, in a social process that

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[261] The constitutive, sympoeietic effects of scaling in the dissection and making of specimens is gainfully described with reference to regimes of human property and sale in slavery. But in drawing the analogy, I do not mean that scaling in dissection and the slave auction functioned equivalently. Dissection and slavery shared a historical context, as Spillers (2003b), *supra* note 212, showed, and that shared context may explain, genealogically, exchanges between practices. But, as McKittrick (2006), *supra* note 33, put it, "scales […] are relational, and not naturally hierarchical, [so] they are materially and discursively alterable, able to be reconfigured locally and therefore within wider social contexts." It is not necessary for scaling to have been identical between cases; all that matters for my argument was their conceptual similarity.
[262] Eudell (2015), *supra* note 144; Wynter (1999), *supra* note 144; Weheliye (2014), *supra* note 140.
[263] Eudell (2015), *supra* note 144; Wynter (1999), *supra* note 144; Weheliye (2014), *supra* note 140.
[264] Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26:8 *Yale Law Journal* 710.
[265] Wynter (1999), *supra* note 33.
[266] Weheliye (2014), *supra* note 33.
[267] Ibid.
[268] Ibid. Accordingly, flesh is not some mere lack like *zoe* in Giorgio Agamben's theorization of biopolitics, where flesh is denuded of cultural, political and legal life, see Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Redwood City, CA: Stanford University Press, 1995) [Agamben (1995)].
[269] Wynter (1999), *supra* note 33.
[270] Ibid.
[271] Ibid.

incorporated norms of cultural and political institutions, as well as the effects of Man's physical or material milieu.[272] Man was specifically an "auto-instituting" phenomenon (in the language of systems theory in sociology, one might describe it as autopoietic)[273] in that ideas of Man—in a self-referential kind of way—regulated the principle of sociogeny, tending to reproduce the ongoing performance of Man.[274] Further, in that auto-instituting movement, ideas of Man tended to separate him and close him off from that which was not Man, as a species of *sui generis* endowments, placing him above others (what has lately been characterized as anthropocentric).[275] It was in Man's separation that autopoiesis relied on concurrent exchanges of sympoiesis—moments of encounter with features of one's environment—to create and maintain the differentiation between Man and the non-human.[276]

Private property, at least in the common law, formed one of those sympoietic exchanges. First, as I described above, private property generally reinforced the separation, and hierarchical ordering, of the person-subject and property-object.[277] Second, following that separation, property functioned as the subject's antithesis, defining the subject by what it was not, and *vice versa*.[278] In a sense there was an irrationality to the object; it lacked volition, dependent on the subject to acquire a rational use as property.[279] Many objects were inert without the action of Man or, in the case of an animal, incapable of thoughtful activity.[280] Man, by contrast, was rational and intentional.[281] But for Wynter, the transatlantic slave trade was paradigmatic, in that Man needed the chattel slave; he needed property in the Black other to

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[272] Ibid.
[273] Niklas Luhmann, *An Introduction to Systems Theory* (Hoboken, NJ: Wiley, 2013); also see Bernard Keenan, "Niklas Luhman: What is Autopoiesis?" (2022) in *Critical Legal Thinking*, https://criticallegalthinking.com/2022/01/10/niklas-luhmann-what-is-autopoiesis/.
[274] Wynter (1999), *supra* note 33.
[275] Ibid.
[276] Ibid.
[277] Graham (2011), *supra* note 159.
[278] Wynter (1999), *supra* note 33.
[279] Gibson (2019), *supra* note 175.
[280] Ibid.
[281] Ibid.

be realized as Man.[282] Even with abolition, morphological difference between Man and the other continued to mediate the separation of subject and object, perpetuating the alienation of Black people through the deprivation of freedom and security expected of enfranchisement.[283] Often, as cultural theorist Christina Sharpe argued, this involved constructing the Black other as monstrous, bestial and predilected to inhuman violence; a part of a non-human nature that required domestication or, where that was not possible, eradication.[284] Saartje Baartman exemplified this.[285] Her dark skin and large buttocks marked her as an object to be studied and exhibited, not as a human, but as some link in between.[286]

Morphological difference also obtained notice and meaning inseparably from the relations of that difference with social and physical space. For example, Black feminist geographer Katherine McKittrick theorizes how morphological difference of Black bodies became objectified through the scaling effects of the slave auction block where that difference was isolated and exhibited, foregrounding qualities inextricable from use in forced labour and production and overdetermining their status as inhuman forms of property.[287] McKittrick writes:

> [T]he slave auction block reorients how space and place are communicated through the category of black femininity. The historical-contextual site not only adds to the complexities of paradoxical space, but also delineates how intimate physical attributes—skin, hair, arms, legs, feet, eyes, hands, muscles, corporeal sexual differences—can also shape external geographies, those scales that exist outside the body proper. By focusing on 'the moment of sale' […] [there are] three interconnected

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[282] Wynter (1999), *supra* note 33; also see G.W.F. Hegel, *Elements of the Philosophy of Right* (Cambridge: Cambridge University Press, 1991). Hegel advanced a related thesis with respect of property generally. Some conventional jurisprudents respond to Hegel's variation of the thesis to argue for the necessity of property as a natural right.
[283] Wynter (1999), *supra* note 33.
[284] Sharpe (2010), *supra* note 237.
[285] Ibid.
[286] Ibid. Sharpe, at 83, also draws attention to the "double status" of unfreedom in that: "the colonized and enslaved are considered to be human because they 'consent' to labor, and yet they are also not quite human because they 'consent' to it enough to survive within it. Not consenting to such subjectivity is an option that is not permitted and not to be acknowledged." Also see Rosemarie Garland Thomson, *Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature* (New York City: Columbia University Press, 1997), 71-72 [Garland Thomson (1997)].

[287] McKittrick (2006), *supra* note 33.

> ways the slave auction block simultaneously marks the unfree body and the spaces outside of it: through displaying and exhibiting difference and the seeable body in terms of human/inhuman; through marking the differences between *kinds* of places (such as the body, the auction block, the plantation, the region, the nation); and through demonstrating how differences between kinds of places are not enclosed but rather entwined, and arguably sustained, by the moment of sale (the body for sale on the auction block, for example, bolsters the local economy and expresses racial differences in place).[288]

More specifically, the slave auction block facilitated classification of the body through the display, measurement and documentation of the slave's body as parts integral to the performance of "human sale[s]."[289] That involved valuing chattel slaves for their "age, health and labor specialty," assessed through "intimate bodily examination and demonstration" and expressed through "pricing and bargaining."[290] The slave's body was cleaved from kin, for whom they were foremost human, and reduced by slaveowners as parts marketable, fungible, disposable as mere means of economic production.[291] She continues:

> […] if the moment of sale necessarily renders the black body abstract, this reifies the buyer's/master's embodied universality and subjectivity. And this economic exchange, both [Saidiya] Hartman and Frederick Douglass write, is "profitable as well as pleasurable" for slave buyers. So the moment of sale—the instant when a human nis to be purchased—affirms cross-regional racial binaries and dominant desires. In mapping the moment of sale, we can begin to understand how a local and fleeting act can disclose where and how objectification takes place in multiple contexts.[292]

As the subjectivity of seller and purchaser were reinforced, "the enslaved woman, man, child, or family [was] rendered an intelligible, transparent commodity," the body of whom "rendered an object" and inextricable from "the slave trade landscape, like other objects for sale."[293]

The mutilation of flesh was one way by which the scaling of the auction block was reproduced in contexts of slavery and scientific inquiry, acting sympoietically in both to

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[288] Ibid, xxix.
[289] Ibid, 67.
[290] Ibid, 73.
[291] Ibid.
[292] Ibid, 71. McKittrick cites Saidiya Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America* (Oxford: Oxford University Press, 1997); Frederick Douglass, *Narrative of the Life of Frederick. Douglass, an American Slave* (Boston: Anti-Slavery Office, 1847).
[293] McKittrick (2006), *supra* note 33 at 72.

reinforce the status of the slave—and of the specimen—as objects of property and the subject's negation.[294] Mutilation facilitated, what cultural theorist Alexander Weheliye describes as, "the hieroglyphics of the flesh;' a practice by which 'abstract forces of power [were etched] onto human physiology and flesh in order to create the appearance of a naturally expressive relationship between phenotype and sociopolitical status.'[295] Although some, like Wynter, suggested the cultural work of anatomy was displaced by discourses of physiognomy with chattel slavery; Weheliye argues, "in the sphere of racial and sexual difference, anatomy and physiognomy form a continuum in a larger modern assemblage that requires the physiognomic territorialization of anatomic qualities."[296] In the case of the *Hottentot Venus* (1810), that relationship is borne by Baartman's exhibition in life and dissection in death, where both modes of visual technology cut out and framed her body as objects against which the white subject was enfleshed.[297] Baartman, as the Hottentot Venus, was not being but monstrous and spectacular; her morphological differences not seen as falling within that of the human, but charged as some missing evolutionary link between beast and Man.[298] Baartman was also not a singular occurrence of exceptional deviation, but taken as representative of an inferior race against which evolutionary ideals of white physiology could be constructed.[299] Analogously, the remains in *Re Dr. Ramsay Smith* (1903) were anthropological specimens ('of dying races') or medical curiosities that indicated species (of monster, of disease) predilected to violence or annihilation, a non-human nature that required domestication or control, and where that was not possible, eradication.[300] The

[294] Weheliye (2014), *supra* note 33 at 40-41. Also see Sharpe (2016), *supra* note 33 at 48-49. Sharpe refers to the visual technique of branding the flesh of the enslaved, which denoted a slave's status as property (in both a general sense, and relative to a particular owner) and to facilitate marketability through identity.
[295] Weheliye (2014), *supra* note 33 at 50.
[296] Ibid, 40-41.
[297] Ibid.
[298] Sharpe (2010), *supra* note 237.
[299] Janell Hobson, "The 'Batty' Politic: Toward an Aesthetic of the Black Female Body" (2003) 18:4 *Hypatia* 87.
[300] Sharpe (2010), *supra* note 237.

act of dissection, and placement of specimens in jars, were not just physical occurrences but also fecund with cultural meaning of legal import which enframed tissues and bonestuff anew as rightfully belonging to another. Furthermore, the act of dissection effected the "profitable 'atomizing' of the captive body," which could repeatedly instantiate the sociogenic principle behind "creat[ing] and maint[aining] racializing assemblages."[301]

Returning to *Doodeward* (1908), property was facilitated by the morphology of the still-born baby, even as the majority advanced the work and skill doctrine.[302] For example, Chief Justice Griffiths wrote, "a *fortiori* such possession is not unlawful if the body possesses attributes of such a nature that its preservation may afford valuable or interesting information or instruction."[303] Justice Barton, concurring with Griffiths, elaborated on these attributes. He repeatedly contrasted the two-headed baby from the kind of corpse or body that ordinarily obtains a Christian burial.[304] The baby was "an aberration of nature, having two heads" which distinguished it from "the subject of decision in cases cited":[305]

> Can such a thing be, without shock to the mind, associated with the notion of the process that we know as Christian burial? Does it not almost seem indecent to associate that notion with such facts? Do not all these considerations lead us. To doubt whether such a thing as a dead-born foetal monster, preserved in spirits as a curiosity during four decades, can now be regarded as a corpse awaiting burial, the thing which judges have discussed in decisions and lawyers in textbooks? It would have been difficult to admit that this dead foetus answered that description at the time, almost immediately after its birth, when Dr. Donahoe was allowed to take it away and when he preserved it in spirits. The difficulty has increased since. If it were ever a corpse awaiting burial, was that a correct description of it when the plaintiff's possession of it was interfered with? It had then been in a state of preservation for thirty-nine years. It had acquired, as the evidence shows, a considerable monetary value, not at a corpse, but as something so unlike an ordinary corpse as to be a curiosity—a well-preserved specimen of nature's freaks. To take the simplest test, is it possible to affirm that the meaning conveyed by the term 'unburied corpse' to one who had never seen such an object as this, would include it? There can only be one answer to the question.[306]

[301] Weheliye (2014), *supra* note 33 at 43.
[302] *Doodeward* (1908), *supra* note 27.
[303] Ibid, 414.
[304] Ibid.
[305] Ibid, 416.
[306] Ibid.

The aberrant, "malformation"[307] stands apart from the human corpse.[308] Its monstrous appearance—its multiple heads, each never having taken in the "breath of life"[309] and preserved in a jar—make the still-born baby distinct.[310] The sociogenic principle obtains here, too, conceptually differentiating between the remains of those who were formerly human subjects and those that were, as indexed by their morphological difference, candidates for, if not already, property. The act of mutilating and jarring such remains—muted in the phrase "work and skill"—facilitated the sociogenic principle by foregrounding their qualities as scientific specimens over and above any other relations, allowing their grafting onto cultural regimes of knowledge. Dissecting and jarring specimens thereby functioned analogously to the auction block by scaling,[311] partitioning the body and distancing its parts from the obligations, meanings and other relations enacted in the body's former context.[312] Each interfaced in the use and disposal of human tissue, in the *doing* of dissection where, as medical anthropologist Annemarie Mol describes, "[e]vents [of lawful dissection, preservation, property, etc.] [were] made to happen by several people and lots of things."[313] These scales were enrolled in a "mode of ordering"[314] concerned with the aetiology and hierarchization of morphological difference, by which others (a white, male Law) could "consume," make sense and make use of the extracted part.[315]

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[307] Ibid, 414.
[308] Ibid.
[309] Ibid, 416.
[310] Marrett Leiboff, "A Beautiful Corpse" (2005) 19:2 *Continuum: Journal of Media and Cultural Studies* 221, 233 [Leiboff (2005)].
[311] McKittrick (2006), *supra* note 33.
[312] Marilyn Strathern, *Kinship, Law and the Unexpected* (Cambridge: Cambridge University Press, 2005) [Strathern (2005)].
[313] Annemarie Mol, *The Body Multiple Ontology in Medical Practice* (Durham: Duke University Press, 2002), 25 [Mol (2002)].
[314] Ibid, 68-69.
[315] Bruno Latour and Steve Woolgar, *Laboratory Life: The Construction of Scientific Facts* (Princeton: Princeton University Press, 1986), 35 [Latour and Woolgar (1986)].

4.3. The Heteronomy of the Blazon

The act-situation of mutilation (from the act itself to the surrounding milieu) discloses certain ontological qualities for law. Description of those qualities is aided by analogy to a related textual practice, the blazon, by which representations of the body were rendered into parts for literary and rhetorical effect.[316] The blazon was specifically a sixteenth-century mode of rhetoric through which writers selected, isolated and expounded the qualities of a part of the (often female) body.[317] I conclude by arguing that—like blazons—to orient to, obtain custody of and actually mutilate flesh effected a cultural form that re-constructed the body and its parts to legal effect.[318] To mutilate the human body was simultaneously a physical *and* textual (and thus normative) act, which created an isolate separated from and yet formative to other cultural forms.[319] Where changes in cultural forms corresponded to changes in law's structuration, it is possible for me to say there is an antinomic property to mutilation, or *antirrhesis* as Goodrich puts it, which was productive of a legality often to the obliteration of others.[320]

Blazons as rhetoric shared in fragmenting the body, rerouting the part so it related to a different semio-material structure or system than it occupied before;[321] in effect, a re-sorting, re-categorizing, and re-ordering the human body in its partition so to discover another (and ostensibly truer) meaning of its parts.[322] Generally, blazons functioned heretically, "de-sanctif[ying]" the body held up in Christian cultures—variably experienced in medieval notions of *Imago Dei*—and "sanctif[ying]" "secular" fragments in their adulatory

[316] Sawday (1995), *supra* note 41; Vickers (1997), *supra* note 41.
[317] Sawday (1995), *supra* note 41; Vickers (1997), *supra* note 41.
[318] Sawday (1995), *supra* note 41; Vickers (1997), *supra* note 41.
[319] Slaughter (1992), *supra* note 18.
[320] Goodrich (1992), *supra* note 18; Goodrich (1995), *supra* note 18; Slaughter (1992), *supra* note 18.
[321] Sawday (1995), *supra* note 41; Vickers (1997), *supra* note 41.
[322] Goodrich (1995), *supra* note 18.

presentation.[323] For example, in the French court of Francois I, blazons (often of the body parts of mistresses) were exchanged between male poets, mediating homosocial bonds in contests of mutual, sexual fetish of the female body, "disembodied, divided and conquered."[324] As the etymology of *blason* suggests (derived from "shield" in French),[325] women were implements in literary spars among courtly intellectuals, which Francois I favoured in the interest of expanding his court's influence.[326] Once adapted in England, blazons "developed poetic tropes which were peculiarly consonant with an emerging 'science' or knowledge of the body," often drawing from metaphors of geographic exploration and discovery which, as Jonathan Sawday characterized, were "charged […] [with] poetic language [that] seemed naturally embedded within a colonizing process of appropriation and exploitation."[327] In both contexts blazons objectified women as sexual objects to be explored, appropriated and traded, consumed by a mode of mastery reflected in literal dissections conducted by themselves or by anatomists with whom they fraternized.[328] Furthermore, blazons were, like anatomical specimens, collected and transited between enthusiasts, forming an economy of bodily fragments that, whilst done so representationally in the situation of the blazon, separated these parts from the individuals in which they were sourced and transplanted them into novel regimes.[329]

Contemporary writers suggest those novel regimes tended to differentiate women from men in historically specific terms of sexual and gender difference, where that difference obtained a specific biological quality.[330] Blazons then, alongside anatomy in renaissance Europe, co-constructed ideas of sexual difference, locating the principle of difference in the

[323] Sawday (1995), *supra* note 41; Vickers (1997), *supra* note 41.
[324] Vickers (1997), *supra* note 41.
[325] Ibid.
[326] Ibid.
[327] Sawday (1995), *supra* note 41.
[328] Ibid; Vickers (1997), *supra* note 41.
[329] Sawday (1995), *supra* note 41.
[330] Ibid.

specificity of the female body limiting women as objects of amour and sexual reproduction whilst extolling the distinctly male rationality that identified them.[331] But, as Nancy Vickers notes, whereas anatomical treatises of the time generally sought to re-inscribe bodily fragments within the unity of the body—reinforcing a unity inherited from Christianity—the writers of blazons generally undertook a "radical fragmentation."[332] That radical fragmentation was especially reflective, perhaps more so than renaissance anatomy, of a scientific paradigm that objectified parts, de-humanizing the corporeal form as mechanical biology, allowing its minute differentiation.[333]

By analogy, the act-situation of dissection for law, even into the modern era, may be understood as a mode of blazoning in that the act fragmented the previously "natural," united or whole body of the legal person (or, if no longer a person, the corpse to be left to the worms). Through the work and skill of dissection, the bodily fragment obtained a status different from the dignified human; it became an object separate from the human from whom it was taken, alternatively sanctified not as a continuation or extension of that human, but rather as a part newly imbued with another meaning by consequence of its extraction and preservation.[334] Bodily fragments were thereby transformed into property by dissection and the resulting custody of the fragment, where the person who "discovered" it obtained a right of control, irrespective of its origins, and meanings, in a body.[335] Dissection thereby removed the part from its origin in the "natural" body, allowing its fate to be determined by another (in this case the medical man) irrespective of the will or desire of the source individual, and irrespective of what the law provided in protection for the dignified human. The part was qualitatively changed in its production so that it became an object of adulation, as a

[331] Sawday (1995), *supra* note 41; Vickers (1997), *supra* note 41.
[332] Vickers (1997), *supra* note 41.
[333] Ibid.
[334] *Doodeward* (1908), *supra* note 27.
[335] Ibid.

specimen of curiosity or useful information, within a cultural repertoire similarly oriented to scientific mastery.[336] And as my reading of *Re Ramsay Smith* (1903) and the writings of Black scholars suggest, a mastery fed by the eugenicist desire to immiserate, if not exploit, "monstrous" difference in the purification of Man and the extraction of alienated value.[337]

Scientific and economic exploitation of human property thereby formed the master signifier of this new cultural regime,[338] for which specimens were put to special use.[339] Specimens as property, or at least as objects to which medical men had authority to take and transit, were sensible relative that new sign which displaced the order of things to which these parts formerly belonged.[340] In a sense, the mutilation necessary to produce specimens was combative, as blazons were, as it worked to displace and resist prior representations of the body (e.g., in the interests of science), which shares with the analogy Goodrich makes with respect of the early common law generally.[341] For Goodrich, the common law was not principally a law of rule, or even of command, but rather was "the law of 'blazoning,' of heraldry and arms," which for Goodrich denotes its thoroughly antirhettic nature: a law oriented to the rhetorical evisceration of that which was other so to construct an image of itself (the master signifier, the "Common Law") as ancient, from natural reason and totalizing.[342] In other words, the common law was a mode of norm-making—of jurisgenesis—directed to denunciation, to exclude what did not belong and to determine what did.[343] Goodrich considers this antinomic quality a haunting inherited from the fractal past of early English law, possessed by disparate courts and powers, not existing in harmony, but in

[336] Ibid.
[337] *Re Ramsay Smith* (1903), *supra* note 67; Weheliye (2014), *supra* note 33; Wynter (1999), *supra* note 33.
[338] Wynter (1992), *supra* note 169.
[339] Spillers (2003b), *supra* note 212.
[340] Slaughter (1992), *supra* note 18.
[341] Goodrich (1995), *supra* note 18.
[342] Ibid, 83.
[343] Ibid.

upheaval.[344] A haunting that, even in modernity, the common law could not exorcise.[345] The common law power to dissect can be thought of as sharing generally the structure of the early common law as Goodrich describes. But the power to dissect also materializes the antirrhetic form, so that mutilations of the human body, rending the body into parts, potentiates change or transformations that allow alternate laws to take place.[346] As Motha writes, "[s]ign, form, and the substance of bodies are all in play when examining how sovereign violence is mediated through legal categories."[347] Bodies—as created at the complex interstice of signs and matter—embody that violence, "storying" how law has ordered power in social and physical space.[348] In this instance there is an *antinomic* quality to cutting or fragmenting the body which unsettles a *nomos* readying its substitution; that is the story these parts embody and perform.[349]

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[344] Ibid.
[345] Goodrich (1992), *supra* note 18.
[346] Slaughter (1992), *supra* note 18.
[347] Stewart Motha, *Archiving Sovereignty: Law, History, Violence* (Ann Arbor: University of Michigan Press, 2018), 70 [Motha (2018)].
[348] Ibid.
[349] Ibid; Goodrich (1992), *supra* note 18. Goodrich argues the antirrhetic has included the composition of "bestiaries" of that which opposes the order of things, like the bestiaries of Pliny the Elder. Combining Goodrich's and Slaughter's insights with my reading of *Re Ramsay Smith* (1903), something analogous occurs with law's form as blazon. The process of mutilating, severing, relocating, displaying, etc. can be thought of the impulse to categorize, to blazon, to make a spectacle of the object, which renders it abject, especially where it is racialized and made monstrous. Its difference, enhanced in the state of blazonry, focusses on its transgression, its difference, wherein the morphological disunity and disorder of bodies perceived as belonging to another law are isolated and amplified under microscope so their "true" meaning as chaos is felt and known. In the disclosure of this true meaning behind the specimen the anatomist (in other words, the blasonneur or officer of Law) identifies that which must be corrected to repair the body for the Law, or exterminated where its difference marks a permanent disfigurement. Underlying this, the adulterations, hybridizations and impurities of dissected parts are identified having regard to an attachment to the unity of the human—the King's body, and the representational unity of a male, white and "strong" body with whom the King identifies—which stands as the embodiment of Law. But like the drawn-and-quartered remains of the King's executed subjects, or specimens of medical men, eventually the blazoned property reaches a point of disuse, where its fragmentation no longer draws an antinomic power and the part, wasted, puny, or perhaps at risk of decomposition, is discarded and forgotten. Temporally and spatially dislocated far from the lasting relations of care of family or community the part is cast away, often unclaimed, falling to the soil. Unless, of course, like Baartman, or the remains held at the University of Edinburgh, Indigenous communities identify them and force their return.

As I have noted in earlier chapters, Marty Slaughter describes that which "lies outside law," as "chaos, fragmentation, hybridisation, and decomposition" in contrast to "law belong[ing] to and creat[ing] an order of things" that connects, unifies *and* "survives the individual parts."[350] Slaughter looks to the cutting up, decomposition and admixture of bodies and bodily materials as evincing this point of "non-Law," that which the antirrhetic form is supposed to denounce and eliminate.[351] Conceptually, at its extreme, spacings of non-Law are expanses of nothingness; the absolute loss of structure and meaning as particles throw their singular "Law"—the law of autonomy—without communicating.[352] The duration of non-Law is accordingly antinomic in that it pulls down law's monuments in a gulf of chaos;[353] but historically, their frenetic movements remain relative, still in communication with something just beyond the duration of non-Law, opening space for another law.[354] Like with the decomposing dead, I see dissection as evincing Slaughter's arguments, which elaborates Goodrich's characterization of law as antirrhetic in the discursive production of an order in the elimination of others.[355] Spacings of non-Law are connective tissue between successive orders, and variations within, necessary for the dynamism of law as a living force appropriate for the dynamism of social and physical life. Spacings of non-Law in cases of mutilation rend prior unities, individuating new unities in the severing of one into two (or more). The event of incision and cutting of flesh occasion the disruption of legal unity so that another unity,[356] even if its difference is slight, may take its place. As Slaughter suggests, the antinomian is formative to law's antirrhetic force,[357] as action productive of that which lies outside law not

[350] Slaughter (1992), *supra* note 18 at 228.
[351] Ibid.
[352] Ibid.
[353] Ibid.
[354] Ibid.
[355] Ibid.
[356] Ibid.
[357] Ibid.

only as that which underlies change within Law, or its eventual end, but also the opposition of Law to all other laws.

The opposition of, and productive exchange between, autonomy and heteronomy thereby take form in, upon and through bodies, which, in turn, compose social and physical space.[358] Whilst their particular combination in the individual body transduces a singular performance, uniquely staged upon the specific qualities of that body, that is never done unto itself, but always in intercourse with others beyond it.[359] No body purely embodies their own law; rather, the body necessarily behaves discordantly, mediated by relations with others that inform its individuation.[360] Transactions of autonomy and heteronomy, provisionally settled in the metastable body of Law, are upended and given up to an ecology of relations in which "transcendental and immanent signification[s]" withdraw.[361] The withdrawal of the signifier—withdrawing in the superabundance of relation—creates the chaos of non-law.[362] Jurisgenesis then emerges in, what Jean-Luc Nancy referred to as, the "areal" or heteronomous opening of the body to its milieu, whose relations proliferate forms for life, "body to body, edge to edge, touched and spaced, *near in no longer having a common assumption, but having only the between-us of our tracings partes extra partes*."[363] In the duration of mutilation a resplendent field of cultural—and by *mutatis mutandis*, legal—creation is escribed in the body's "dislocation"'[364] frameless, chaotic yet endlessly productive.[365] However, the dislocating effects of mutilation can, if not brought to the limit of the body's total evisceration, differ from decomposition. The study of dissection shows the

[358] Motha (2018), *supra* note 354. Also see Stewart Motha, "My Story, Whose Memory: Notes on the Autonomy and Heteronomy of Law" (2022) 87B *Studies in Law, Politics and Society* 1 [Motha (2022)].
[359] Motha (2018), *supra* note 354 at 77-78.
[360] Ibid; also see Davies (2022), *supra* note 9; Shaw and Mykitiuk (2023), *supra* note 47.
[361] Nancy (2008), *supra* note 281 at 89.
[362] Slaughter (1992), *supra* note 18.
[363] Nancy (2008), *supra* note 281 at 91.
[364] Ibid, 105.
[365] Elizabeth Grosz, *Chaos, Territory, Art: Deleuze and the Framing of the Earth* (New York City: Columbia University Press, 2008).

areality or heteronomy of mutilation may be concerted by regimes of power, made to serve the categorization and hierarchization of life according to another principle: the proliferation, fixation and regulation of unities, as opposed to change within one.

Chapter 5 — Feelings of Corporeal Justice

Abstract

In this chapter, the author searches for a contemporary legal literature—in this case, an unwritten or oral literature, or orature—which demonstrates the relevance of corporeality to the constitution of lawful forms. Namely, the author considers how everyday people who have experienced body parts or tissues becoming, or that have risked becoming, detached from the body, and the consequences of their experience on legal meanings and statuses attributed to those matters. Having regard to interviews with nine individuals who experienced the disposal of human tissue or detached parts, some of whom completed creative works, the author describes the complex identifications formed in respect of those matters. How individuals respond to these experiences is specific to each of them. But each share in expressing a material idiom of belonging, where relations constitutive of legal meaning converge in what relations are held up in space and what are not, through unwanted violence or as intentional projects of relating. On that basis the author sketches a start to a theory of corporeal justice which subtends experience of bodily fragments and, potentially, the body more generally, suggesting affective or atmospheric processes by which the genesis and contestation of lawful uses and disposal can obtain. Although a theory of corporeal justice requires elaboration in Chapter 6, here it is presented as an alternative to conventional doctrines and theories that can correspond with experience, and is a vital supplement to an embodied, materialist critique of law and rights. This is not to suggest that conventional law is irrelevant to these feelings of corporeal justice; undoubtedly, doctrine filter into and mediate experience. But rather conventional law can only partially describe peoples' experience.

Conventional doctrines and theories in law have limited explanatory power for what is lawfully done to bodily fragments. Something more accretes beyond what those accounts explain. That has been a frequent refrain throughout my study. But in this chapter, I approach the argument from another vantage: from the perspective of those who experienced the use and disposal of detached parts. Legal anthropologists and sociolegal scholars have, since the late-twentieth century, often emphasized the contribution of experience to legal phenomena, in that legal consciousness—including what actors perceive, interpret and feel—matters to

law's actualization in a given situation.[1] Law "in the books," even when found on the lawyer's tongue, supplies an imperfect description; rather it depends on what is realized, messily, indeterminately, illogically, in everyday action often far from the court room.[2] Relatedly, as phenomenologists more generally argue, social forms including law cannot be sufficiently understood without reflecting on the contribution of the subject.[3] To extricate the subject from the object of study (e.g., law) conceals a fundamental cause to the structure of experience, creating an irremediable distance between explanation and actuality.[4] Earlier chapters (Chapters 3 and 4) relied on archives to approximate past experiences sedimented in the written record, but there are practical limits to the archive that, whilst tolerable for the questions pursued in those chapters (where those limits were arguably inconsequential), are unsatisfactory here.[5] Instead, this chapter draws on experience prior to the possibility of its sedimentation in an archive; experience in the shadow of formal systems of law; experience that is potentially fleeting as much as it is culturally fecund and productive.

Specifically, I ask about how people experience detached body parts with due attention to the presence of law in that experience. In other words, with reference to nine

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[1] For e.g., Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (Chicago: University of Chicago Press, 1990) [Merry (1990)]; Patricia Ewick and Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998) [Ewick and Silbey (1998)]. Also see Luke Bennett, "Towards a Legal Psychogeography: Pragmatism, Affective-Materialism and the Spatio-Legal" (2018) 58:1 *Revue Géographique de l'Est* 1 [Bennett (2018)].

[2] Dave Cowan, "Legal Consciousness: Some Observations" (2004) 67:6 *The Modern Law Review* 928 [Cowan (2004)].

[3] For e.g., Sara Ahmed, *Queer Phenomenology: Orientations, Objects, Others* (Durham: Duke University Press, 2006) [Ahmed (2006)]; Rosalyn Diprose, *Corporeal Generosity: On Giving with Nietzsche, Merleau-Ponty and Levinas* (Albany, NY: SUNY Press, 2002) [Diprose (2002)]; Maurice Merleau-Ponty, *Phenomenology of Perception* (Abingdon: Routledge, 2002) [Merleau-Ponty (2002)]. Also see David Schiff, "Phenomenology and Jurisprudence" (1982) 4:1 *Liverpool Law Review* 5 [Schiff (1982)].

[4] Schiff (1982), *supra* note 3.

[5] Interviews were an important element of my research design to the extent that it was anticipated that archival materials would largely be authored by state actors or those otherwise proximate to the formal sites of lawmaking, including lawyers, judges or jurisprudents. This chapter is especially interested in the "living law," to borrow from the sociological jurisprudence of Eugen Ehrlich, among everyday people. See e.g., Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Piscataway, NJ: Transaction Publishers 2001).

interviews, I start with a "juristic phenomenology" of the relations that comprise experience of detached parts.[6] Like my earlier chapters, that analysis foregrounds materialities—namely of the human body—which factor in the experience of what law does.[7] Experience of those materialities rely, like experience generally, on the intercorporeal relations that subtend embodiment, including the schemas that take part in the experience of subjectivity and the spaces beyond an individual's awareness that hold up the body (and its component parts) in place.[8] With respect of that which exceeds awareness, my start with phenomenology then necessarily reaches a limit, which requires me to critically emplace—and de-centre—experience as *an* expression of existence.[9] The heteronomy of corporeal matter again resurfaces as the object of jurisprudential inquiry—as with my earlier chapters—by speculating about law's form in itself,[10] this time in the ways bodies and parts mix, adulterate, and thus proliferate relations.

The chapter relies on nine interviews completed between July 2021 and January 2022, as well as creative works (i.e. two photographs, one photograph of a found-object, four collages) completed by seven of the nine interview participants in preparation for the interview.[11] Participants were asked about their experiences with the disposal of bodily

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[6] Ibid.
[7] David Delaney, *The Spatial, the Legal and the Pragmatics of World-Making: Nomospheric Investigations* (Abingdon: Routledge, 2010) [Delaney (2010)]. Also see Bennett (2018), *supra* note 1; Sarah Blandy and David Sibley, "Law, Boundaries and the Production of Space" (2010) 19:3 *Social and Legal Studies* 275.
[8] Margrit Shildrick, *Visceral Prostheses: Somatechnics and Posthuman Embodiment* (London: Bloomsbury, 2022) [Shildrick (2022)]. Also see Stacy Alaimo, *Bodily Natures: Science, Environment and the Material Self* (Bloomington: Indiana University Press, 2010); Gail Weiss, *Body Images: Embodiment as Intercorporeality* (Abingdon: Routledge, 1999) [Weiss (1999)].
[9] Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Bodies, Lawscape, Atmospheres* (Abingdon: Routledge, 2014) [Philippopoulos-Mihalopoulos (2014)].
[10] Regarding speculative theory, see Robert S Lehman, "Toward a Speculative Realism" (2008) 11:1 *Theory and Event*, https://muse.jhu.edu/article/233870 [Lehman (2008)].
[11] Interviews were completed with individuals in English-speaking common law jurisdictions. Those jurisdictions included Canada (n = 8), England and Wales (n = 1). My focus is on the common law in Canada, but reference is made to an interviewee from England and Wales where relevant due to shared legal traditions. Six of seven creative works are referenced and reproduced in this chapter; the seventh (a collage) was omitted as it included identifiable personal information.

tissues, including their experience of any laws or procedures. Participants were invited prior to the interview to produce a creative work for the interview, which could help them express these experiences; if the participant agreed to produce a creative work it was provided to me in advance of the interview, so that we could discuss it together. These creative works helped discussion by providing a concrete reference around which we could discuss their experiences, eliciting further recollections, feelings and their interpretations. I asked the participants to walk me through the process of composing the creative work, the meaning they attached to different choices, and their interpretations of the work relative to their experience. Both sets of materials were used to reflect on the adequacy of legal doctrines and theories to explain, and also to see how they form part of their experience of the lawful use and disposal of bodily fragments. I also sought to describe other relations formed in, and formative to, experience of the lawful use and disposal.

The chapter leads with "thick description" of individuals' experience, beginning with the subversive embodiments that form in contexts of disposing parts formerly part of an individual removed during surgery; and reproductive tissues that relate not only to an individual but often to others. Thick description is, borrowing from anthropologist Clifford Geertz, a mode of encountering phenomena whilst deeply imbedded in context where, through the interpretive act of writing, one "sort[s] out the structures of signification" which exist not tidily in the appearance of a given object or even experience, but rather as a "multiplicity of complex conceptual structures many of them superimposed upon or knotted into one another."[12] That thick description relies on "exceedingly extended acquaintances with extremely small matters," and, through writing, enlarges them—their referents, determinants and lines of flight—so as to arrive at an interpretation of how phenomena come

[12] Clifford Geertz, "Thick Description: Toward an Interpretive Theory of Culture" in *The Interpretation of Culture: Selected Essays* (New York: Basic Books, 1973), 314 [Geertz (1973)].

together, and apart, in experience.[13] Theorizing then is "unseverable from the immediacies thick description presents;"[14] theorizing forms part of the act of thickly writing from the particular, of presenting the experiences of interview participants (which is not discordant with my approach in earlier chapters, but demands a reminder given the shift from archive to interview here). However, my interest is in the form of law itself which, as that involves norms generated through the action of corporeal matter, can exceed what experience describes.[15] That requires me to, as I mentioned above, speculate as to law's form in the situation shared with my research participants, by considering how *the law* experiences the separation of a bodily part from the participant and the difference that introduces to a situation of normative existence.[16]

The interviews suggest complex relations underlie the experience of parts detached from the human body. These complex relations may be affected by conventional doctrines and theories in law, in the sense that concepts from those accounts variably "loop" into and shape experience as a form of "human kind."[17] But their contribution appears partial, often metabolized, if not overtaken, by alternate modes of relating to the detached part. Notably the separation of bodily tissues is variably experienced, exceeding what analytical jurisprudence can explain. Yet despite variance there are patterns in how individuals relate to tissues, which make possible an alternative account of their legal embodiment. These patterns also allow a sketch of a theory of corporeal justice which subtends experience of bodily fragments and, potentially, the body more generally, suggesting affective processes by which the genesis and contestation of lawful uses and disposal can obtain.

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[13] Ibid, 318.
[14] Ibid, 320.
[15] Margaret Davies, *EcoLaw: Legality, Life, and the Normativity of Nature* (Abingdon: Routledge, 2022) [Davies (2022)].
[16] N. Katherine Hayles, "Speculative Aesthetics and Object-Oriented Inquiry (OOI)" in Ridvan Askin, Paul J. Ennis, Andreas Hägler and Philipp Schweighauser, eds, *Speculations: Aesthetics in the 21st Century* (Goleta, CA: Punctum Books, 2014), 158-179 [Hayles (2014].
[17] Ian Hacking, "How 'Natural' are 'Kinds' of Sexual Orientation?" (2002) 21:1 *Law and Philosophy* 95, 103-105.

I conclude the chapter by describing the patterns found in these interviews as a kind of minor literature, in that they cohere, despite their variability, as stories of self and other, relations and belonging. These literatures give expression to feelings of justice, by which a law may take root, or another law may be challenged. In this way, the interviews gesture to the possibility of a minor legal literature—the enunciation of an alternate law—like those literatures raised in Chapters 3 and 4.[18]

5.1. A Note on Legal Embodiment

Categories of personality and property have been formative to doctrinal and jurisprudential understandings of the human body and parts thereof.[19] But as I have suggested at various junctures, these categories have limits.[20] There are human bodies, parts or tissues that fall out of view. As fundamental as these categories may be to the operation of doctrinal orthodoxy, and the jurisprudence supplying a principled basis for that orthodoxy, there are human matters that become neither person nor property, or that move between *and beyond* such categories, with nary a comment from the law or jurisprudent. The existence of such matters suggests the need to obviate such categories, including contests over the location of their boundaries. Although, in doing so, I do not mean to jettison those categories—persons and property play an obvious part in the structure of legal relations.[21] Rather, to obviate conventional categories is to deconstruct; to identify that the conceptual structure that persons and property assumes, and reproduces, may be underwritten by forces, meanings or materials which that structure relies upon to exist and do work but does not or cannot

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[18] See e.g., Lisa A. Mazzei, "Following the Contours of Concepts Toward a *Minor Inquiry*" (2017) 23:9 *Qualitative Inquiry* 675 [Mazzei (2017)]. Mazzei notes (p. 681) it is possible to approach interview "data" as a minor literature, in that the voice of an interviewee is always "emanat[ing]" "from the milieu in which it exists." The individual interviewee cannot "[speak] with a singular enunciative authority," rather they are always already expressive of collectivities with and to whom the individual relates.
[19] Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property and Personality* (Farnham: Ashgate, 2001) [Davies and Naffine (2001)].
[20] Ibid.
[21] Ibid.

acknowledge.[22] Drawing from critical legal theorists Ngaire Naffine and Margaret Davies, the "stuff" of dead bodies and human parts—the physical or morphological composition of the body or bodily thing, of corporeal relation—appear to do important, yet unacknowledged work for doctrinal orthodoxies and conventional jurisprudence, open me to the possibility of accounting for that which these orthodoxies elide.[23] That is most apparent where bodies or their parts act contrary to convention, but subversive embodiments even subtend bodies that appear "conventional."[24]

Scholars from body studies, and phenomenology more generally, have long advanced theories of the body and embodiment counter to (what has become) conventional thought.[25] Against the mind-body divisions of Rene Descartes and Immanuel Kant, for example, such theories situate the human mind within the body, so that perception and reason are understood as embodied processes.[26] Further, as bodies take form in a social and physical environments, perception and reason are also emplaced processes enabled by the body's relations with its milieu.[27] Perception, for example, is constructed in the experience of gestalts—shapes or forms irreducible to a quantity of objects in the perceptual field.[28] Those gestalts appear immediate, as reality, but are unwitting constructs of the body in encounter with the world.[29] As Sara Ahmed explains, gestalts have "histories" of varied durations (of

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[22] Peter Fitzpatrick, "The Abstracts and Brief Chronicles of the Time: Supplementing Jurisprudence" in *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Durham: Duke University Press, 1991), 1-28.
[23] Davies and Naffine (2001), *supra* note 19; also see Ngaire Naffine, "'But a Lump of Earth'? The Legal Status of the Corpse" in Desmond Manderson, ed, *Courting Death: The Law of Mortality* (London: Pluto Press, 1999) [Naffine (1999)].
[24] Elizabeth Grosz, "Bodies-Cities" in *Space, Time, and Perversion* (Abingdon: Routledge, 1995) [Grosz (1995a)]; Elizabeth Grosz, "Space, Time, and Bodies" in *Space, Time, and Perversion* (Abingdon: Routledge, 1995) [Grosz (1995b)]; also see Joshua DM Shaw, "The Spatio-Legal Production of Bodies Through the Legal Fiction of Death" (2021) 32:1 *Law and Critique* 69 [Shaw (2021)].
[25] See discussion in Shildrick (2022), *supra* note 8.
[26] Ibid; also see Weiss (1999), *supra* note 8.
[27] Alaimo (2010), *supra* note 8; Shildrick (2022), *supra* note 8.
[28] Merleau-Ponty (2002), *supra* note 3; also see Wolfgang Köhler, *Gestalt Psychology: The Definitive Statement of the Gestalt Theory* (New York: Liveright Publishing Corporation, 1992).
[29] Merleau-Ponty (2002), *supra* note 3.

psychic, cultural and physical processes) that factor in how they "arrive" to individual consciousness (just as there are histories that shape the "arrival" of reason and action for the individual).[30] Phenomenologists, and phenomenologically inspired body studies, thus pursue these gestalts in experience and their histories of arrival, so to interrogate the conditions of existence against rationalist fictions that pervade conventional thought.[31] Such pursuits have also been taken up by legal scholars, for whom corporeal experience concurrently reflects the operation of, and is itself constitutive of, law's forms (including forms that are merely prefigured, or suggested, in experience and not yet sedimented in recognized institutions).[32] Sometimes those formative relations between the body and law are conceptualized as "legal embodiment," a conceptualization which I share.[33]

Legal embodiment attunes specifically to the contribution of law to experience, and *vice versa*. With respect of the first part of that formulation, sociolegal scholars Fae Garland and Mitchell Travis define legal embodiment as "encompass[ing] the material experience of the body and its relationships with both discourse and institutions" which factors in how "law, medicine, culture and society conceive of, construct and create [human] bodies."[34] Ruth Fletcher, Marie Fox and Julie McCandless also describe it as "the myriad ways in which law values or denigrates bodies and the choices we make about our bodies," which have "subjective, intersubjective, material and symbolic" dimensions.[35] Michael Thomson refers to

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[30] Ahmed (2006), *supra* note 3.
[31] Ibid.
[32] See e.g., Chris Dietz, "Governing Legal Embodiment: On the Limits of Self-Declaration" (2018) 26 *Feminist Legal Studies* 185 [Dietz (2018)]; Imogen Jones, "Objects of Crime: Bodies, Embodiment and Forensic Pathology" (2020) 29:5 *Social and Legal Studies* 679 [Jones (2020)]; Michael Thomson, "The Foetal Subject: Law, Gender and Embodiment" in Stéphanie Hennette Vauchez and Ruth Rubio-Marin, eds, *The Cambridge Companion to Gender and the Law* (Cambridge: Cambridge University Press, 2023), 61-97 [Thomson (2023)].
[33] Dietz (2018), *supra* note 32 at 194; Jones (2020), *supra* note 32 at 680; Thomson (2023), *supra* note 32.
[34] Fae Garland and Mitchell Travis, *Intersex Embodiment: Legal Frameworks Beyond Identity and Disorder* (Bristol: Bristol University Press, 2022), 11 [Garland and Travis (2022)].
[35] Ruth Fletcher, Marie Fox and Julie McCandless, "Legal Embodiment: Analysing the Body of Healthcare Law" (2008) 16 *Medical Law Review* 321, 321-322 [Fletcher et al. (2008)].

legal embodiment as an effect of legal discourses and practices, in that "discourses that address the body," "co-produce" with the body "complex legal subjects, hierarchies, and identities."[36] And Chris Dietz describes "how governing processes saturate bodies with meaning."[37] Across accounts, law's contribution to embodiment is understood to go beyond categorization, although that is often a feature of it.[38] Instead law forms an inextricable part in the production of embodiment,[39] by joining an unending and dynamic process where the body encounters, and takes shape within, the organization of social and physical space.[40] Law acts as a concerting and mediating force in the production of social and physical space which can, as bioethicist Rosemarie Garland-Thomson writes, accrete as misfit embodiments, "where the environment does not sustain the shape and function of the body that enters it."[41] The ontological condition of becoming misfit then involves "institutional regulations [of formal law] [that] coalesce, […] significantly affect[ing] the 'dynamic encounter between flesh and world' which grounds practices of embodiment."[42] Legal embodiment also includes normative repertoires at remove from formal legal systems, including the "living" or "informal" laws of family and healthcare settings, which are relatedly "involved in permitting or prohibiting various modes of conduct."[43]

Significant to embodiment generally, and—as will be shown below—legal embodiment specifically, is the body image or schema. Body image or schema is the psychic construct of a body relative to what surrounds that body, which may factor in conscious thought in the formation of identities ("I am fat," "I am a man," "I am uneasy on my feet") as well as materializing subconsciously in how the body is carried, feels and moves in the world (the

[36] Thomson (2023), *supra* note 32 at 62.
[37] Dietz (2018), *supra* note 32 at 194.
[38] Garland and Travis (2022), *supra* note 34.
[39] Ibid.
[40] Rosemarie Garland-Thomson, "Misfits: A Feminist Materialist Disability Concept" (2011) 26:3 *Hypatia* 591 [Garland-Thomson (2011)].
[41] Ibid, 594.
[42] Dietz (2018), *supra* note 32 at 186.
[43] Ibid, 194.

comportment and kinetics of the body).[44] Maurice Merleau-Ponty described body image as "actively integrat[ing] parts of the body 'only in proportion to their value to the organism's projects,'"[45] which, as phenomenologist Gail Weiss clarifies, depends on not only "an individual's intentions, but from the situation out of which they have emerged and within which they are expressed."[46] Frantz Fanon referred to the body image as "sociogenic" in character, in that the schemas structuring behaviour took form in one's *umwelt* (socialzing, racializing, etc.).[47] Weiss likewise describes body image as always mediated in intercourse with what is extrinsic to the individual, and, in actually, a fluid composite of multiple images that arise situationally, whose ongoing availability relies on the consistency and regulation of conditions external to one's ego (including that inside one's body).[48] A "stable" body image relies on the regulation, and is in turn itself regulating, of a contingent environment, facilitating (and often coordinating) the performance of one's ego relative to systems of physical and social existence.[49] But, like existence generally, that body image is never stable in actuality; stability is only ever illusory as, Weiss says, "through […] processes of introjection, projection, and identification, the body image continually incorporates and expels its own body (parts), other bodies and other body images."[50] Body images are "intercorporeal," composed, decomposed and recomposed anew in the encounter between fleshy selves and the imaginaries and materialities of the worlds people inhabit (in actuality and fantasy).[51] And, as some scholars have observed, law often forms an integral part of that

[44] Weiss (1999), *supra* note 8.
[45] Ibid, 1. Weiss briefly quotes Maurice Merleau-Ponty, *Phenomenology of Perception* (London: Routledge, 1962), 100.
[46] Weiss (1999), *supra* note 8 at 1.
[47] Frantz Fanon, *Black Skin, White Masks* (New York: Grove Press, 1967).
[48] Weiss (1999), *supra* note 8.
[49] Ibid.
[50] Ibid, 33.
[51] Ibid.

intercourse, 'contribut[ing] to the creation of an environment' in which body images take form, and may effectively authorize some images over others.[52]

The second half of the formulation—that attention to bodily experience may also enable a fuller description of law—is less developed in legal theory.[53] In a sense, interrogating embodiment can enable, what sociolegal scholar David Schiff suggests is the sociolegal potential of, juristic phenomenology.[54] Relations subtending embodiment form a constitutive part of law, just as relations subtending law are constitutive of the body. Instead of using a phenomenological method—or phenomenologically inspired method—to study the construction of the body alone, the method also works in the inverse direction, interrogating the (juris)genesis of the lawful in the habits authorized by the body in the world.[55] Experience—including that excavated from interviews—may assist in analyzing how, as Peter Goodrich put it, "the law is staged through the body;"[56] not as a passive site for law's inscription but also as an actant for law.[57] Doing so adapts the insights of corporeal and new materialist feminists developed in the late-twentieth and early twenty-first centuries, such as of Jane Bennett, Elizabeth Grosz, Erin Manning and Margrit Shildrick.[58] For corporeal and new materialist feminists, the body is not a closed, unchanging entity that merely moves in or through preformed space. Rather the body is the effect of many individuations, which create

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[52] Reena N Glazer, "Women's Body Image and the Law" (1993) 43:1 *Duke Law Journal* 113, 115; also see Stacey S Baron, "(Un)Lawfully Beautiful: The Legal (De)Construction of Female Beauty" (2005) 46:2 *Boston College Law Review* 359.
[53] See discussion in Joshua Shaw, "Book Review: A Jurisprudence of the Body" (2022) 31:1 *Social and Legal Studies* 165. Also see Roxanne Mykitiuk, "Fragmenting the Body" (1994) 2 *Australian Feminist Law Journal* 63 [Mykitiuk (1994)].
[54] Schiff (1982), *supra* note 3.
[55] Ibid.
[56] Peter Goodrich, "Rhetoric and Somatics: Training the Body to do the Work of Law" (2001) 5 *Law Text Culture* 241, 242.
[57] Joshua DM Shaw and Roxanne Mykitiuk, "Jurisgenerative Tissues: Sociotechnical Imaginaries and the Legal Secretions of 3D Bioprinting" (2023) 34 *Law and Critique* 105 [Shaw and Mykitiuk (2023)].
[58] Ibid. Also see Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Durham: Duke University Press, 2010) [Bennett (2010)]; Elizabeth Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (Bloomington: Indiana University Press, 1994) [Grosz (1994)]; Erin Manning, *Always More than One: Individuation's Dance* (Durham: Duke University Press, 2013) [Manning (2013)]; Shildrick (2022), *supra* note 8.

a place and duration of the body in the world, held up in relations extending from 'the body's' milieu. This speaks to the contingency of the body, but also the capacity of its individuations to constitute other forms, including law, which share this processual nature.[59] Holding close this conceptualization of legal embodiment, one can better encounter the subversive embodiments experienced by those who I interviewed.

The thick description of interviews below draws out these plural senses of legal embodiment, as they are formed particularly in the exposure to and experience of bodily fragments. In the next section, I describe the tendency (although certainly by no means the only way) to experience fragments from within the structure of a part-whole dyad, a sociomaterial complex that returns the detached part (if it is not to be forgotten, disappeared and discarded) to the subject as the whole body (the origin of the part, for whom the part is a property). Despite the phenomenological disruption of the bodily fragment (what, relying on phenomenologist of technology Gilbert Simondon, I call "ontogenetic"),[60] often challenging presumptions in law regarding the intactness of one's body, individuals tended to reconcile experience in ways not altogether unfamiliar to the common law. Even as bodily fragments mediated subversive embodiments, often in transgression of legal doctrine, the persistence of the part-whole complex as a cultural repertoire constrained ("in-formationally") their effects.[61] However, I suggest, and show in greater detail in the section that follows, that the part-whole dyad is a contingent formation and that alternate embodiments for law are possible. The part-whole dyad is incomplete and other relations do take form.

[59] Shaw and Mykitiuk (2023), *supra* note 57.
[60] Gilbert Simondon, *Individuation in Light of Notions of Form and Information* (Minneapolis: University of Minnesota Press, 2020) [Simondon (2020)].
[61] Ibid.

5.2. Embodying the Incidentals of Surgery

One night after work, "Andrew" was crossing the street when he was struck by a motorcycle.[62] Andrew's wounds were great, having lost a significant portion of his leg in the accident, and he required surgery. He was rushed to hospital by paramedics along with his detached leg where he obtained further medical care. That care was successful. Andrew survived the incident, although without the leg he had known. But as he convalesced in hospital, a question repeatedly nagged him: could the leg be returned? "Wendy," a trans person, considered a similar question, desiring the return of their testicles following bottom surgery (a genital reconstructive procedure).[63] But prior to the procedure Wendy had learned, through information shared online amongst trans communities, that it would not be possible. In fact, Wendy was concerned that, if the request was made prior to the procedure (as would be necessary to ensure the testicles were not disposed of as waste), the surgeon might rely on it to deny gender-affirming care; that the request might disclose an ongoing identification with their sex assigned at birth troubling the medical model of gender identity. "Zelda," on the other hand, was curious as to where tissues went following surgery, but did not take an interest in their return.[64] Nonetheless she noted that her surgery report, whilst going into extensive detail including her pleasant demeanor ("they're like, 'this lovely […] soft spoken young woman came to me with complaints of sternum pain'"), did not record her questions about the tissue.[65] She was surprised upon reflection, yet surmised the query was classified by the medical staff as an administrative matter or hospital policy irrelevant to surgery and the patient; something to be backgrounded and forgotten in their relations with a patient.[66] "Penelope," having fondled a cyst underneath her scalp for years ("a hair follicle gone

[62] Interview with "Andrew" (23 July 2021) [Andrew Interview (2021)].
[63] Interview with "Wendy" (6 August 2021) [Wendy Interview (2021)].
[64] Interview with "Zelda" (15 December 2021) [Zelda Interview (2021)].
[65] Ibid.
[66] Ibid.

wrong"), was delighted when her doctor offered to show her the pearl-like substance upon its removal.[67] The cyst had grown 'with' her and had been of some use in that it supplied a convenient object to play with when nervous, so Penelope felt a continuing attachment despite its physical removal ("it's just like a small piece of my body").[68] Nonetheless, her attachment did not extend to its retention ("good riddance!"), and she did not feel compelled to look at the other cysts removed from her ("I was fine to see one;" "I wasn't attached enough"). Andrew, Wendy, Zelda and Penelope, among others whom I interviewed, each demonstrate the challenge of bodily fragments or parts, including their cultural significance, and the invitation to reconfigure how one relates to the body (of oneself, and of others).

Hegemonic cultures in "the West" ordinarily assume the boundedness, functionality, and resourcefulness (if not the sanctity) of the human body.[69] Even as medicine and biotechnology enable extraordinary changes to the body's physical form, in therapeutic contexts and otherwise, the paradigm of the body remains undisturbed: a whole body which invariably corresponds to a person to whom obligations are owed.[70] Bodily fragments may be increasingly produced through surgery and exposed to humankind, but those fragments are captured and returned to the paradigmatic body; fragments are mere parts, whose use (as spare parts) or disposal (as spent parts) guarantees ongoing functionality, and restores the putative wholeness of the body for the benefit of the subject to whom the body is ultimately subordinated.[71] From within this paradigm the bodily fragment is, as Roxanne Mykitiuk writes, sorted through scripts of contract and property, or personality and property, which leave hegemonic constructions of the body intact.[72] Indeed, such scripts (or concepts or notions,

[67] Interview with "Penelope" (11 January 2022) [Penelope Interview (2022)].
[68] Ibid.
[69] See discussions in Grosz (1994), *supra* note 58; Shildrick (2022), *supra* note 8.
[70] Ian Hacking, "Our Neo-Cartesian Bodies in Parts" (2007) 34 *Critical Inquiry* 78 [Hacking (2007)].
[71] Ibid; also see Eugene Thacker, "The Thickness of Tissue Engineering: Biopolitics, Biotech and the Regenerative Body" (1999) 3 *Theory and Event,* https://muse.jhu.edu/article/32555 [Thacker (1999)].
[72] Mykitiuk (1994), *supra* note 53.

whatever we call them) appear to facilitate the paradigmatic body.[73] Through them the fragment, juxtaposed with the patient's body, is assumed to be separable from the human, at least once the part is futile, no longer of use, or a danger to the human; not only physically separable in rather obvious ways, but also conceptually in how the notion of a fragment reinforces a body-proper (a subject for rights, duties, etc.) distinct from the separable part (an object to be rid of). The separable part is generally without use, without desire, a mere thing to be discarded (unless, exceptionally, another finds potential to appropriate, enclose and render it or its byproducts their property); whereas the body-proper is the substrate of a subject that can be mended and made whole again.[74]

But interviews with Andrew and others show that the paradigmatic body, held up the in relation between the body-proper and the separable fragment, is mediated, and in a context made increasingly fragile as advances in medical procedure proliferate contemporary experiences of the body.[75] Technology makes possible the detachment of experience from convention, and other authoritative inheritances, unmoored from the same cultural sediment

[73] Ibid. Also see Davies and Naffine (2001), *supra* note 19. Regarding paradigms and law, see Nicole Graham, *Lawscape: Property, Environment, Law* (Abingdon: Routledge, 2010).
[74] Aspects of this are raised in Shaw and Mykitiuk (2023), *supra* note 57.
[75] Myktiuk (1994), *supra* note 53.

from which legal doctrine and theory of the body extend.[76] For example, Andrew experienced the leg as his own despite the physical separation sustained by advances in amputation and preservation of his part. It was his "own body part," which was "taken from" him in the accident, apparently relying on notions of self-ownership to imagine the bodily fragment as still part of him.[77] In doing so, Andrew appears to draw on cultural repertoires to reconcile experience of the bodily fragment, apparently informed by traditions, exemplified by John Locke, wherein the body was the principal appropriation of "man" through which one laboured, as well as Georg Hegel for whom the appropriation of objects separate from the person was necessary for the fulfillment of the human subject (see more in Chapter 2).[78] At its extreme, Andrew initially, somewhat deliriously, requested the leg's reattachment whilst he was brought to hospital,[79] still experiencing the devastation wrought upon the leg as part of a mere injury which, through medical correction, could be returned to the body again.[80] The

[76] Shaw and Mykitiuk (2023), *supra* note 57. This is, as social theorist Gilbert Simondon might have referred to it, a consequence of the "ontogenesis" of technology which potentiates novel social formations including those corresponding with experience of the body. Simondon (2020), *supra* note 66. Also see Elizabeth Grosz, "Identity and Individuation: Some Feminist Reflections" in Arne de Boever et al., eds, *Gilbert Simondon: Being and Technology* (Edinburgh: Edinburgh University Press, 2012), 37-56 [Grosz (2012)]; Elizabeth Grosz, *The Incorporeal: Ontology, Ethics and the Limits of Materialism* (New York City: Columbia University Press, 2017) [Grosz (2017)]; Andrew Lapworth, "Theorising Bioart Encounters after Gilbert Simondon" (2016) 33 *Theory, Culture and Society* 123 [Lapworth (2016)]; Andrew Lapworth, "Gilbert Simondon and the Technical Mentalities and Transindividual Affects of Art-Science" (2020) 26 *Body and Society* 107 [Lapworth (2020)]. Ontogenesis is the re-iterative generation of existence upon which life and law depends—a processual feature of all matter whose individuation is only ever a provisional effect, a performance or a duration which harbour the possibility of new forms, especially when confronted by technology. As I have said with Roxanne Mykitiuk, in Shaw and Mykitiuk (2023), *supra* note 57 at 116, encounters with technology potentially "rend the fabric of extant sociolegal relations, allowing new legal orders and meanings to show through" and "[d]epending on the extent of the tear and how the emergent orders and meanings are taken up in their social and physical milieu, sociolegal relations may be mended over to look much as they did before or patched like a technicolour quilt drawing on the myriad of […] forces that subtend, exceed and proliferate living forms."[76]

[77] Andrew Interview (2021), *supra* note 62.

[78] See e.g., John Locke, *Second Treatise of Government* (Cambridge, MA: Hackett, 1980) [Locke (1690)]; G.W.F. Hegel, *Elements of the Philosophy of Right* (Cambridge: Cambridge University Press, 1991) [Hegel (1821)].

[79] Andrew Interview (2021), *supra* note 62.

[80] See generally on this image of the body in Céline Lafontaine, "Regenerative Medicine's Immortal Body: From the Fight Against Ageing to the Extension of Longevity" (2009) 15:4 *Body and Society* 53; Thacker (1999), *supra* note 71.

fragment then remained fully subordinated to a related script endemic to medicine and surgery, where corporeal harm was understood through the prism of engineering, a problem of repair for technologists (i.e. surgeons) for whom the integrity of the body, as the material substrate for the individuated patient, was presumed and the object of medical arts.[81] But even when it was explained to him that the problem exceeded the limits of repair and that reattachment would not result in a functional limb, its lack of functionality did not evacuate its importance to him.[82] Rather effecting control over the limb in its disposal allowed him to regain a sense of becoming whole again, and of obtaining closure over the totalizing feeling of loss following his injuries.[83] Even where the promise of repair failed to bring back his body as it was, the detached fragment was no less important to him flourishing:

> **Interviewer:** And so for you… this leg… it's still part of you. Is that right? It's still something that's important to you—it's something that you want to have near you?
>
> **Andrew:** Yeah, well, obviously not physically anymore. And you know, you never look at any of your parts that are on you and just think about how much attachment you have to them. You know? You don't look at your hand and be like, "Wow, I love—I will miss this hand so much." You know… this is… you know, you don't think of all the feelings and emotions that your hand or your foot brings you. But once it's off of you, you know, I was about that closure, and that feeling kind of whole—that not wanting to let go like… I let go when I want to. It's not like, I guess it's sentimental in a way because it's, you know, it's a symbol of this whole journey in this accident. But the leg itself was, you know, it's not like that was a million-dollar piece to me, right? It was just, it was just mine. And I don't… I don't… why should I just let people tell me what to do with it? You know, I've already… you know… like I said… I've [this] taken away from me, and then I had to take more away from me. And now they're like, 'Well, that's all gone.' Yeah, it was… it was mainly that I think. More so than like this emotional connection, it was more of this… that not wanting to let… to let it go.[84]

That feeling of not wanting to lose control was challenged, and thus heightened, by his having to decide to have more tissue removed.[85] Whilst the leg itself was "taken from" him by

[81] Drew Leder, "Medicine and Paradigms of Embodiment" (1984) 9:1 *The Journal of Medicine and Philosophy* 29 [Leder (1984)].
[82] Andrew Interview (2021), *supra* note 62.
[83] Ibid. Likewise, see discussions in Esmée Hanna, "Disposalscapes: 'Estranged' Limbs after Amputation" (2021) 27:1 *Body and Society* 27 [Hanna (2021)].
[84] Andrew Interview (2021), *supra* note 62.
[85] Ibid.

the motorcyclist, he was forced to decide whether to have further tissue removed in an amputation procedure so that he could be fitted with a prosthetic that allowed greater movement.[86] It was a fraught decision, which defied his expectations of how the body ought to be treated, and was made with the facility of medical staff "nudging" him, which deprived in him a sense of autonomy:

> **Andrew:** No one would ever make a decision to lose any part of their body, right? So the first, the first one [the leg] wasn't my decision. It wasn't up to me. It was just it was taken from me, and I had to just deal with it. But now I was asked… I was being *asked* to remove more [the remaining portion of the knee]. And basically, they were pushing towards… you know… they weren't really giving me like, you know, 'This is up to you do whatever you want.' They were kind of leaning, like, 'Listen, you should *probably* do this.' You know. And so… that… that's just… it was so… that was a really hard one. Just being already in this state of trauma.
>
> **Interviewer:** Right.
>
> **Andrew:** Just so all over the place. And then having to make this major decision to remove more of myself was not a decision I wanted to make. And honestly, I was very close to going the other way, and just saying, 'Listen, just do the graphs. Do whatever you have to do. I'm not taking any more away.' But like I said, I was… I was kind of nudged into it. So… I… that's… that's the decision I ended up making. And I don't really regret it now. But it was incredibly hard.[87]

Andrew's response appears as a recombination of pre-existing scripts, enacted in precious moments immediately following the fragment's detachment; not altogether different from what hitherto and generally informed one's experience of their body in his milieu, but nonetheless different in a sense as he groped, feelingly, toward re-incorporating the fragment in his body schema.[88] Despite others extrinsic to Andrew deciding the leg no longer belonged to his body or him, his milieu availed him familiar scripts to personally draw on and adapt, wherein it was possible to restore the fragment—the part—to the wholeness of his body image. Put differently, the re-individuation of his body image involved imagining the possibility of returning to a somatic whole, represented and effected through him controlling his leg even if

[86] Ibid.
[87] Ibid.
[88] Regarding body schemas and body images, see e.g., Weiss (1999), *supra* note 8.

through others and despite a loss of function.[89] Andrew's body image was not so distant from what sociotechnical imaginaries of the body allowed generally—there would otherwise not be resonances with the theories of Locke and Hegel, for example—but nonetheless his demands transgressed what was hegemonically held up in the law as it required treating an object, totally separable from his body, as uniquely his (and ideally part of him as a legal subject). As critical legal theorist Flora Renz recently put it in contexts of prosthetics, "law […] recognizes that objects can form an extension of the body in certain circumstances, but only where such objects are clearly connected to the body.'[90]

That desire for control does not seem unique to Andrew, which suggests his body image is imbedded in a pattern of intercorporeality not unfamiliar to others even if it is not itself hegemonic.[91] For example, sociologist of health Esmée Hanna explores the complex embodiments of amputees formed around the use and disposal of limbs and bodily fragments removed by amputation (amputates).[92] In a recent study of hers, amputees report experiencing their bodies as disrupted by the loss of limb or part—"transformed into something *it has to be*," following an unpreventable trauma, "moving further away from a previous identity;"[93] a feeling that could be amplified where the amputate was disposed without the individual's input or direction.[94] Likewise, Andrew sought to control the disposition of his leg so to reconcile with what *had to be*, including decisions (to lose additional tissue) he felt did not authentically make, to construct himself as whole again despite the physical

[89] Ibid, 22. Here, Weiss describes how the body-ideal incorporated so often in the body image relies on constructing the putative wholeness, completeness and perfection of the body as the corollary to the individual "ego," distinguished from other perceptual objects that lack these qualities. This is only ever an ideal or illusory, as our bodies just like our egos are never actually whole, complete or perfect.
[90] Flora Renz, "The Boundaries of Legal Personhood: Disability, Gender and the Cyborg" (2023) *Law and Critique*, https://doi.org/10.1007/s10978-023-09350-9, 2 [Renz (2023)].
[91] Weiss (1999), *supra* note 8.
[92] Hanna (2021), *supra* note 83.
[93] Ibid, 35.
[94] Ibid. That disruption appears, in clinical literature, associated with continued experiences of phantom limb, see e.g., A.M. Blood, "Psychotherapy of Phantom Limb Pain in Two Patients" (1956) 30:1 *Psychiatric Quarterly* 114; John K Bradway et al., "Psychological Adaptation to Amputation: An Overview" (1984) 38:3 *Orthotics and Prosthetics* 46.

loss.[95] Control of separated parts—whether conceived purely as property, or self-ownership as personality—thereby enlarged and stabilized his sense of self, despite its unrelatedness to actual functioning; it helped Andrew with "grieving" himself. By contrast, interference with that control appeared to reduce and destabilize his sense of self. Importantly, in Hanna's recounting of her interviews and my own with Andrew, this embodiment is formed where the destabilizing experience of a bodily fragment is captured with readily accessible scripts, including those pertaining to the legal meaning ascribed to (and performed with) the use and disposal of the bodily fragment.

But importantly control does not necessarily reproduce, or restore, an identity lost in a prior body, which affirms that ontogenesis relative to a fragment need not merely embody the familiar in an unfamiliar place. For example, another interviewee, Wendy, recounted the disposal of their testicles as a trans person.[96] Although Wendy did not request the return of their testicles following bottom surgery, they did consider making the request and had discussed it with other trans persons.[97] When asked why they might have wanted the return of their testicles, Wendy explained it in two senses: personally and more open-endedly, as a means of relating with what was formerly part of their body and accreting new identities (perhaps as a way of, as "[metaphorical] biorg witch with flowers in their hair", jurist and bioethicist Florence Ashley refers to it: "genderfucking");[98] and politically, by challenging normatively medico-legal constructions of a proper trans body that anticipated the strict

[95] Andrew Interview (2021), *supra* note 62.
[96] Wendy Interview (2021), *supra* note 63.
[97] Ibid.
[98] Florence Ashley, "Genderfucking Non-Disclosure: Sexual Fraud, Transgender Bodies, and Messy Identities" (2018) 41 *Dalhousie Law Journal* 339; also see Roxanne Mykitiuk and Joshua DM Shaw, "Law and Gender" in Jan M Smits, Jaakko Husa, Catherine Valcke and Madalena Narciso, eds, *Elgar Encyclopedia of Comparative Law — Third Edition* (London: Elgar, 2023), https://doi.org/10.4337/9781839105609.gender [Mykitiuk and Shaw (2023)]. Ashley has identified as a "transfeminine jurist and bioethicist," but lately identifies "metaphorically [as] a biorg witch with flowers in their hair."

disavowal of prior morphologies, and affirming the vitality of complex embodiments of gender.[99] For example, Wendy said:

> **Wendy:** [I would have liked to] put them in the… a little like mason jar, add a few fairy lights inside—them LED lights—and just like pop them in formaldehyde and just like have that be like a… you know… discussion piece at your parties… house parties.
>
> **Interview:** Is that what you would have wanted to do to them?
>
> **Wendy:** I don't know that specifically, but like something in that general idea. I like… I think it's… it's kind of funny. Plus, like all the castration jokes. Reminds me one time […] my mom was like, "Oh, no"—we were saying some… we're just… like kind of joking around—and she was like, "of course, [I'm] such a castrating mother," and then I was just like, "I mean, literally."
>
> **Interview:** So I guess the testicles would be helpful for enjoying those jokes even more often, perhaps?
>
> **Wendy:** Yes, there's… there's something… you know… that… I don't know… there's something about how you're supposed to have a particular kind of self-effacing discomfort. And I'm just like, "Nah, like, let's make everybody clutch their pearls."
>
> **Interview:** And is that potentially what then the testicles would be for you? That the treatment of the testicles in that way…
>
> **Wendy:** Yeah. I mean, there is a count—like a sort of, like counter trans normativity element to it. But also it was like a bit… I don't know… It's still a piece of my body. Like, why don't I get to get the piece of my body, you know? It's like when kids collect… their, like, fallen teeth, you know? I want to just like, yeah, but I don't know. There's something… the little collector element to it… I don't know. So yeah, but in terms of like, apart from the general kind of emotional attachment that comes with just like, owning it, like possessing them, I think there's like the more concrete uses of like, I don't know, then serving as sort of like, starting points for discussions and also disturbing a bit of… of this idea that like you're trans you must be a particular way and have a particular relationship to your body that has essentially been defined by cis people and you're just like, "Fuck you."[100]

Control thereby could facilitate—at least as Wendy imagined it—alternatives to extant narratives of the body. It could offer the chance to resist hegemonic constructions of the body, to develop novel identities and to play with body image toward uncertain, experimental

[99] Regarding discussion of medico-legal constructions of the trans body, see Florence Ashley, "The Constitutive In/Visibility of the Trans Legal Subject: A Case Study" (2021) 28 *UCLA Women's Law Journal* 423; Florence Ashley, "L'In/Visibilité Constitutive du Sujet Trans: L'Exemple du Droit Québécois" (2020) 35:2 *Canadian Journal of Law and Society* 317.
[100] Wendy Interview (2021), *supra* note 63.

horizons.[101] Ontogenesis could then take place relative to a bodily fragment with less, or at least different, unconventional sources of, in-formation, proliferating forms of relating with one's body and others in the composition of new modes of existence.[102] Although, as Wendy reminds me, the difference engendered by ontogenesis might also provoke violence, coming with material costs that crush, devastatingly and completely, the individual for whom ontogenesis materializes as acts of resistance. These novel identities also still related to the individual—in Wendy's case, the diffraction of gender through the locus of one's self—although I will later show with some of my interviews about reproductive tissues, that need not be the case.

Even as Andrew and Wendy suggest the prevalence of one's self informing what relations individuate with bodily fragments, the status of these fragments relative to oneself was not secure. Hanna observes that bodily fragments occupied an ambiguous place relative to those who underwent an amputation procedure: at times an amputate was coterminous with, different from but nonetheless specially belonging to, or just another object that by accident of biography was formerly of one's self.[103] The ambiguity of relation meant the fragment could be experienced as "part of" and "part from" the body, if and when noticed, "contest[ing]" a discrete, singular "I" separate from others and its environment.[104] Margrit Shildrick and colleagues recount similarly from contexts of heart donation and transplantation;[105] in interviews, transplant recipients reported discomfort over the

[101] Ibid.
[102] Shaw and Mykitiuk (2023), *supra* note 57.
[103] Hanna (2021), *supra* note 83.
[104] Ibid, 31.
[105] See summary in Tammer El-Sheikh, ed, *Entangled Bodies: Art, Identity and Intercorporeality* (Malagna, ES: Vernon Press 2020) [El-Sheikh (2020)]; Joshua Shaw, "'Entangled Bodies: Art, Identity and Intercorporeality': Book Review" (2021) *The Polyphony*, https://thepolyphony.org/2021/01/25/entangled-bodies-art-identity-and-intercorporeality-book-review/. Also see Margrit Shildrick, Andrew Carnie, Alexa Wright, Patricia McKeever, Emily Huan-Ching Jan, Enza De Luca, Ingrid Bachmann, Susan Abbey, Dana Dal Bo, Jennifer Poole, Tammer El-Sheikh and Heather Ross, "Messy Entanglements: Research Assemblages in Heart Transplantation Discourses and Practices" (2018) 44 *Medical Humanities* 46 [Shildrick et al. (2018)].

incorporated parts, feeling a heightened awareness of their body and its putative limits, and the strangeness of having the bodily matter of another inside them.[106] Some interviewees reported new interests or senses after the transplant (e.g., an otherwise unexplained urge for orange soda),[107] attributed to the donor's essence retrieved through the fragment's incorporation.[108] Here too those who experienced a fragment could simultaneously experience it as part of them, yet apart from them—both self and other—which could evoke discomfort (often expressed through laughter, gaps in speech and an abundance of verbal ticks) and imprecision in language.[109] Likewise in my interview with Andrew, especially as he talked about his plans for the amputate's use, he considered his leg simultaneously part of ("it was just mine"), and apart from ("I don't even think I would want to display […] [the] skin and all hair and all that"), him:

> There was a few things that we—like me and the taxidermist, the guys at the museum, there was a couple of them that I was talking to. […] But yeah, we were kind of bouncing around with… with… you know… "Do you want to preserve it?" Like, you know, "Do you want to keep the skin on even though it's probably rotten now?" Because now like three weeks, I only got it like, four weeks after my accident. Five weeks, something like that. Like way, way later. While this thing was just kept in a cooler, you know, not even like on ice, I don't think. So… so, we decided maybe we shouldn't do that. That won't be a pretty sight. I don't think—as much as I want[ed] it back—I don't even think I would want to display like a… my whole foot on my table or something. Skin and all hair and all that. Weird.[110]

Wendy also considered bodily fragments part of them ("it's still a piece of my body") yet apart ("like the broken parts [it] is just [thrown] away").[111] As did another interviewee, Zelda, who had tissue removed during surgery.[112] Zelda distinguished between garbage and biomedical

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[106] El-Sheikh (2020), *supra* note 105.
[107] See e.g., Joshua David Michael Shaw, "Confronting Jurisdiction with Antinomian Bodies" (2020) *Law, Culture and the Humanities*, https://doi.org/10.1177/1743872120942770.
[108] El-Sheikh (2020), *supra* note 105.
[109] Shildrick et al. (2018), *supra* note 105.
[110] Andrew Interview (2021), *supra* note 62.
[111] Wendy Interview (2021), *supra* note 63.
[112] Zelda Interview (2021), *supra* note 64.

waste; for her the difference lied in the need for care which seemed to be associated with its proximity to the human, although she also noted its differentiation from the patient:

> **Interviewer:** Do you think of this cartilage as waste at all?
>
> **Zelda:** Maybe not. So yeah… so I mean… like the word, "biomedical"… The term biomedical waste is certainly what healthcare professionals... I clearly picked up on that language. I don't know if I think of [cartilage] as waste in the garbage sense, but I think of it as something that had to be dealt with. Like […] a part of that is quite pragmatic, right? Like, clearly, anything you're taking out of the human body, like you have to, like you have to do something with it. And so I guess I wouldn't even classify it as waste but rather, it was like it was categorized or classified in a certain way and it was classified as something that needed to be incinerated because that's how it needed to be dealt with. But I don't think of it as actual waste.
>
> **Interviewer:** What is the distinction if I… if I may prod a bit more? Sorry and I hope I'm not keeping you.
>
> **Zelda:** No, not at all. No, no.
>
> **Interviewer:** When you say that it's something that has to be categorized and dealt with almost out of necessity there seems to be some need to do away with it in some form. But what for you prevents it from becoming waste in the sense—
>
> **Zelda:** I mean, yeah… I don't know. I guess part of it… waste in the sense… it's not waste in the sense that it's chucked away without care, if that makes sense. Like, I feel that because it was like this specific process that had to happen to it, it was… there was care work involved in that process. And someone had to do that. And that's someone's job. And I thought about all these things… and I feel like that's far more intentional than just like literally throwing something in the bin, where you'd put, you know, the mask you wore during the surgery, or the gloves you wore during the surgery. So it felt like it had to be sort of like categorized differently or classified differently. And I think that's part of why [my inquiry into what would happen to the tissue] doesn't appear in the surgery report, too, because it's like a separate thing. It's like, it's not part of the patient, it's something else.[113]

Notably, across interviews, the materiality of fragments mattered in how one related to their disposal, although not always in the same way for every individual. For some and in some situations, the fragment's materiality factored in whether the fragment was experienced as a part of, or apart from, the person. In other words, the security of one's identification with a fragment (as exemplary of one's self or otherwise co-extensive with the projects of one's self) could be affected by the fragment's materiality, especially the extent changes in its

[113] Ibid.

morphology rendered the fragment increasingly less human. That distinction reminds me of the concept of the "less than human" which, as geographer Chris Philo describes, is what "*subtracts* from the human in the picture, what disenchants, repels, repulses—what takes away, chips away, physically and psychologically, to leave the rags-and-bones (and quite likely broken hearts, minds, souls, spirits) of 'bare life.'"[114] That which appeared farther from the human thereby invited less care, arriving to perception as that to be discarded, evacuated or otherwise forgotten.[115] Physical distortion by injury, disease or decomposition could reduce a part's human qualities and subtract connection, producing a gulf of relation between one's self and a fragment wherein the care expected for a fragment was disappeared. For example, Zelda accepted the need to dispose her cartilage as medical waste (although with some hesitation), finding her relation with the insignificant and unrecognizable tissues, without use or value, and prone to decomposition, diminished.[116] As Figure 5 below suggests, her absence of relation to the tissues removed during surgery appeared to manifest in her efforts to represent it visually.[117]

[114] Chris Philo, "Less-than-Human Geographies" (2017) 60 *Political Geography* 256, 258 [Philo (2017)].
[115] Mette N Svendsen, *Near Human: Border Zones of Species, Life and Belonging* (New Brunswick, NJ: Rutgers University Press, 2021) [Svendsen (2021)].
[116] Zelda Interview (2021), *supra* note 64.
[117] Ibid.

Figure 5. *Zelda's swimsuit.* The photograph, taken by Zelda, is composed of a two-piece swimsuit laid over a surgery report. The swimsuit is a style that covers her scar; its use in the image references a nurse's assurance that Zelda would have a swimsuit body after the procedure (that same nurse also noted that the medical residents would be pleased to have someone so young on the surgical table). The summary report is placed behind the swimsuit since it represents, for Zelda, an experience that cannot be changed, standing in for the body one has and is, consequently, stuck with. She "cannot change the fact that the cartilage isn't there;" she "can't change the scar." But she can change the swimsuit (an observation, she reflected, that might have been conveyed more clearly had she composed the collage with multiple swimsuits). Notably, like the report, the extracted tissue itself or its disposal does not figure in the photograph. Rather it is alluded to, incidental to, expressed metonymically in the representation of a body complete yet forever marked by a medical procedure.

The effects of materiality were also demonstrated with Wendy, Penelope and Andrew, with different emphasis. Wendy, for example, differentiated between their testicles (which they wanted to retain) and their face-bone shavings (which they did not), having no interest in the latter even as they were also produced through gender-affirming procedures.[118] Wendy described the face-shavings as mere dust ("like shavings or dust of it"), indistinguishable from other undefined materials (of the body, and also not of the body).[119] Meanwhile the testicles retained a more recognizable form and, in their fleshy substance, evoked a clearer association with past gender identifications.[120] The testicles might have warranted care for Wendy because, owing to their relative size and significance, they reflected something more human than the face-shavings (where the face-shavings might appear like cartilage to Zelda). But it also seems possible that the testicles were desired because they were not quite human; Wendy delighted in the possibility of placing them in a jar, wrapped in fairy lights, playing head on with the discomfort of holding onto some old, "castrat[ed]" balls.[121] As Shildrick observes, Western societies tend to respond to that which appears less than human, strange and abnormal—what is culturally constructed as monsters or monstrous—with control, exclusion or extermination so to restore and maintain the putative bounds of human categories that the monster, straddling categories, threatens.[122] But monsters and the

[118] Wendy Interview (2021), *supra* note 63.
[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Margrit Shildrick, *Embodying the Monster: Encounters with the Vulnerable Self* (London: Sage, 2002) [Shildrick (2002)]; Margrit Shildrick, "Visual Rhetorics and the Seductions of the Monstrous: Some Precautionary Observation" (2018) 8:2 *Somatechnics* 163 [Shildrick (2018)]; also see A. Sharpe, "Foucault's Monsters, the Abnormal Individual and the Challenge of English Law" (2007) 20:3 *Journal of Historical Sociology* 384 [Sharpe (2007)]; Alex Sharpe, "Scary Monsters: The Hopeful Undecidability of David Bowie (1947-2016)" (2017) 11:2 *Law and Humanities* 228 [Sharpe (2017)]. In a related sense, that was demonstrated when Wendy decided against requesting their testicles because they were concerned the physician would interpret the request as abnormal, indicating instability in their gender identification, and cancel the gender-affirming procedure. As Alex Sharpe notes, the image of the monster pervades medico-legal institutions tasked with policing the existence of transgender peoples, A. Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Abingdon: Routledge, 2006) [Shape (2006)].

monstrous also engender desire precisely because of their strange undecidability, their transgression of the norm, and their resistance to complete understanding—qualities that often index to "excessive and anomalous" bodies.[123]

In a different sense size and substance also mattered to Penelope, in part because of the regular interaction these features promoted. Penelope had multiple growths extracted from under her scalp, but was only interested in seeing and holding the more substantive of them, with which she felt she had developed a stronger connection after repeatedly touching it.[124] Penelope also speculated that her interest in the smaller fragments might have been stronger had those fragments been otherwise noticeable, or materially distinct from other tissues.[125] Nonetheless, her account suggests that a fragment's materiality played a part in relating to it:

> **Penelope:** So I assume they look the same. It's a weird way to say it, but I wasn't as attached to the other one, though they were both attached to me. That one had… I've had it longer and it was bigger. So you know, seemed to me, "Like okay, I've seen one, I've seen them both."
>
> **Interviewer:** What is it about the one that you did see, the one that was larger, the one that you can think back to it still being there 10 years ago? What is it about that one that you felt you had a stronger connection to?
>
> **Penelope:** I think just the time, yeah, and having like… I like just even subconsciously it… I played with it a lot. Yeah, right. If I was nervous or stressed, you know, sitting at my desk scratching my head like my fingers would always find it. And so it was that one because it's like very easy to find those… it's right above my ear where the other one, it only got big enough to even really notice like maybe a couple years ago and it was harder to find the back of my head. Of course, like, when I'm sitting here talking to you I'm like feeling my head to where they had been located. And there's you know… still a little bit of a scab from the… from the removal.[126]

[123] Shildrick (2018), *supra* note 122. The ethics of desire may differ. For e.g., desire can be hospitable to the strange by making space for difference, or objectifying and violent in that difference is returned to the category of the abnormal. But I do not need to worry about that here.
[124] Penelope Interview (2022), *supra* note 67.
[125] Ibid.
[126] Ibid.

Likewise, Andrew requested the return of his leg, although not all its parts mattered equivalently. At first, though, Andrew simply requested the entirety of his amputated leg not yet differentiating between the skin, hair and bone which composed it; treating it as a more general entity or object, just like the hospital did.[127] Whilst many medical staff were simply incredulous when asked by Andrew and brushed him off ("they're […] like thinking 'Oh man, this guy is on drugs'"), or deferred to the authority of others ("it was out of their jurisdiction"),[128] the hospital's counsel raised the institution's responsibility over the leg's disposal as a bulwark against Andrew's claims.[129] Andrew was led to believe he had no legitimate claim to his leg at all, which dismayed him.[130] But finding the hospital's decision inhumane, Andrew did not relent and continued to search for a way to effect the leg's return:

> I had to go through a huge battle… a huge battle to get it back. It was not easy. I think I was potentially the first one at that hospital because I got to cuss and labour for it. But yeah… it's just something that kind of… you know… I wasn't going to let them take it from me and not… and then the fact that I was being told no, for my own body part, like didn't even feel humane? Like it… this… it… it boggled my mind. I was at a loss for words of how this was even… you know… a real thing that they could do. So it felt so unethical that you could just take someone's limb and they'd be like, "No, you can't. You don't have a choice anymore." You know, "Even though we have it right here, it's not… it's no longer yours." It was classified like biohazardous waste, right? So it's not even my property anymore! And I was just like, "No, I can't—I won't stand for this."[131]

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[127] Andrew Interview (2021), *supra* note 62.
[128] As Charles Foster and José Miola argue, it is pervasive within the common law, at least, for decision-making in healthcare settings to suffer the circular deferral of authority (e.g., from court to healthcare professional, healthcare professional to court), with consequences on the autonomy and dignity of patients. See Charles Foster and José Miola, "Who's in Charge? The Relationship Between Medical Law, Medical Ethics, and Morality?" (2015) 23:4 *Medical Law Review* 505.
[129] Andrew Interview (2021), *supra* note 62.
[130] Ibid. Challenges to hegemonic ordering of one's relation to a fragment could evoke the citation of many excuses, as demonstrated by Andrew. Andrew pressed the hospital staff for an answer, who initially, summarily dismissed his queries as unserious, yet he persisted. Eventually he received answers that he could not leave the hospital with his leg, including a reply from the hospital's legal counsel, which set out varied excuses: the leg was the hospital's property, and not owned by Andrew; the leg was biohazardous and needed to be incinerated as medical waste; release of the leg to Andrew posed reputational risks for the hospital, especially if, as Andrew remembered them saying, he used the leg in social media content. Andrew also understood the hospital to be concerned with whether he would do something illegal with the leg—like sending it in the mail to threaten the Prime Minister—which the hospital intimated risked liability.
[131] Ibid.

The hospital eventually agreed to release the leg to him, albeit through a funeral director who would process and handle the leg so to contain any risks to public health before effecting Andrew's preferred disposal.[132] Andrew had, however, already decided against disposal, and wanted to retain the leg in some form, so he convinced the funeral director to transfer the leg to a taxidermist who agreed to prepare it as a bone specimen (involving the removal of flesh from the leg, and the "articulation" or the assembly of bones as a single piece).[133] The preparation of the specimen produced many pieces of flesh once detached from the bone, some of which Andrew retained, but, being too voluminous, the excess was gifted to the taxidermist and their friends.[134] There were also smaller fragments of bone that could not be re-articulated, which were returned to Andrew.[135] Remarking on why he accepted some of these materials, yet gifted others, Andrew referenced their appearance, quantity and, in the case of "slabs of skin," tendency to rot.[136] The bone fragments, whilst without special meaning to him, were easy to retain and so he did.[137] By contrast, the excess skin slabs were indistinguishable from one another, looked disgusting and took up space as each required suspension in a glass container filled with preserving liquid ("I obviously didn't want it all").[138]

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[132] Ibid.

[133] Ibid. Andrew said, regarding the decision to strip the leg of his flesh and re-articulate the bones, that he was wary of the flesh now being "rotten," having sat in waiting in a cooler for three to five weeks. Andrew was also not keen on seeing his hair on the leg:

> "The taxidermist, the guys at the museum, [and I] […] we were kind of bouncing around with… with.. you know, do you want to preserve [the leg]? Like, you know, do you want to keep the skin on, even though it's probably rotten now? Because now, like three weeks, I only got it like, four weeks after my accident, five weeks, something like that. Like, way, way later. While this thing was just kept in a cooler, you know, not even like on ice—I don't think so. So we decided maybe we shouldn't do that. That won't be a pretty sight. I don't think as much as I want it back I don't think I would want to display like a… my whole foot on my table or something: skin and all hair and all that. Weird. So then we thought that you know, well, what else can you do with it? Well, you can… this is… process of articulation, where we strip it all down and get rid of all the muscle and clean the bone and put it back together to re-articulate it."

[134] Ibid.

[135] Ibid.

[136] Ibid.

[137] Ibid.

[138] Ibid.

But irrespective of whether Andrew or others kept the fragments, Andrew preferred this outcome to incineration as it formed part of his struggle to control the leg's use:

> **Interviewer:** You can always say no to a gift, so why? What was special about having that skin and holding onto the skin, too?
>
> **Andrew:** It was… it was another branch of [why I kept the articulated bones]. This same kind of vein, the same, like, theme that I was already kind of playing with that was… that this is now mine, and I can do whatever I want with it. You know… this all would have been ash, right? This would have been just disposed of, who knows even what they do with the ash because I don't even think they give you the ash back. So it just would have been just gone in some dumpster or something. And I've now turned it into like, three or four different pieces. And it's just so unique. And so like, bizarre. I'm into the world of like oddities and exotic freaky things as well. So like, it was right up my alley. I think the uniqueness was a big one… is like this can't be replicated. And, the heart [tattooed onto one of the pieces of flesh] was a very adequate symbol. It was, it was a good choice of… it's a real tattoo. Like it was something, it wasn't markered [sic] in Sharpie. That was a tattoo artist that came here and, and did that. And, I like to tell people, I got my first tattoo and I didn't even feel a thing.[139]

When pressed, though, Andrew nonetheless said that the slabs of skin held more meaning to him than the fragment bones that could not be articulated:

> **Interviewer:** Do you find that you have a similar kind of experience when it comes to the skin in the jar? Or the fragments that don't fit into the… Or as it's been re-articulated? Do you find that they also have a lot of different types of meaning to you and bring you pleasure as well?
>
> **Andrew:** Think a little less so than the… than the main piece. Just because they were kind of like add-ons. Yeah, like the skin was kind of a really cool, unique piece. The bones were kind of just like, "Hey, we don't know where these go, just take them—we don't want them." I don't feel that they, I mean, it's part of it. It's still part of the setup. It's just in its own, its own, you know, setup. But yeah, I don't look at it the same way. It's kind of just there. But yeah, the skin… the skin more. So, for sure. The skin I look at and I'm like wow. Like I was saying earlier, like none of this would be possible if it wasn't for me getting this leg back. Like there would be no skin. And then there's another… there's another piece of skin. I think it's like my toe that they have in [the taxidermist's] museum now. And I'm like, this is just… this is crazy! Like, you know? Or yeah, like I think some collectors have… might have some other pieces of my skin.[140]

[139] Ibid.
[140] Ibid.

Figure 6. *Andrew's slab of skin.* Retaining this slab "gave [a] sense of empowerment," which he characterized as love: "There's loving your body, and then there's loving what no longer your body. And then there's also loving what's inside what's no longer your body." Importantly, he said the slab did not "give one feeling;" "it has many different meanings," some of which are new or have changed since the slab of skin was first prepared for him. What remained the same, however, was the heart (of him, of others) that went into returning the leg, depicted by the large tattoo borne on the slab's surface. Andrew also explained that the photograph is off-centre, in part, to convey that it is not the focus of his life ("it's literally a fraction of what I've gone through and what I have […] dealt with").

Accordingly, not all of Andrew's leg mattered the same to him. Some felt special to him owing to the uniqueness of its form which invited aesthetic judgements or expressions of desire in the strange ("it's that beautiful, beautiful piece, the uniqueness, the bizarreness," "it can't be

replicated") (see Figure 6).[141] The re-articulated bone specimen, in particular, invited continuing identifications ("it's a piece of art, it's… it's a piece of my history… it's a scientific piece—it represents so many things in this journey that I've been through").[142] Other parts were superfluous, indistinguishable from the next ("it's kind of just there") but nonetheless held onto because their production depended on his broader claim to the leg ("none of this would be possible if it wasn't for me getting this leg back").[143] Here, too, the materiality of the fragment—namely its size and substance—indexed qualities that invited identifications (large and substantial as near human if not human, which seemed to attract aesthetic judgements as objects of beauty or other values; small and insignificant as less than human, materials to be forgotten, discarded or unburdened), although the context of production could amplify, reduce or otherwise mediate their meaning. Like with Wendy and Penelope, those mediations show that materiality did not determinately structure the relationships formed between person and fragment; rather, materiality was always informed by the cultural meanings carried by or ascribed to the fragment in its arrival to experience.

5.3. Disposal of Reproductive Tissues

Reproductive tissues similarly appear complicatedly in experience, "troubl[iing] the categories of self, other, and object,"[144] although the context of experience is markedly gendered. That gendered context is in part comprised of the cultural expectation of reproduction, which associates women and the relevant tissues with gestation and motherhood: as principally for, conducive of, or otherwise a participant in the capacity to create and nurture human life.[145] That context also remains charged as a site of women's abjection, through both overt and

[141] Ibid.
[142] Ibid.
[143] Ibid.
[144] Brittany R Leach, "Abjection and Mourning in the Struggle over Fetal Remains" (2021) 20:1 *Contemporary Political Theory* 141, 142 [Leach (2021)].
[145] Ibid; also see Mykitiuk and Shaw (2023), *supra* note 98.

discreet forms of oppression and regulation that severely limit women's autonomy and expand men's control over their lives.[146] That has included, as feminist legal scholar Isabel Karpin describes, the convergence of legal, scientific and popular discourses in the reconstruction of women as "mere procreative flesh," as passive containers, dangerous environments or exchangeable hosts that must be controlled through law to deliver the healthy child.[147] That reconstruction has relied on the "exterioriz[ation] of the fetus," treating the fetus as a possessor of rights and vulnerabilities separate from and in conflict with the woman upon whom it depends, which authorize limits to her autonomy.[148] Limits to autonomy have included scrutinizing, and requiring certain forms of, disposal of reproductive tissues, which included prohibiting (certain, if not all) abortive procedures and concealing the disposal of infant bodies, requiring death certifications for the stillborn so to monitor abortion and infanticide, and requiring decent burial or cremation.[149] Against that expectation, some feminists have identified opportunities to resist patriarchal forms in the very occurrence of reproductive tissues, as well as through their use and disposal.[150] That has included abortion and birth control as means to terminate or prevent unwanted or medically indicated pregnancies, thereby asserting autonomy over one's own body and life.[151] It has also included, from the vantage of gestating bodies' morphological difference, attending to the fundamental connectivity of social and physical life (i.e. of the importance of relation) as an ontological fact and a substrate for ethics.[152] That relationality—as feminists have theorized—

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[146] Leach (2021), *supra* note 144; Mykitiuk and Shaw (2023), *supra* note 98.
[147] Isabel Karpin, "Legislating the Female Body: Reproductive Technology and the Reconstructed Woman" (1992) 3:1 *Columbia Journal of Gender and Law* 325, 345 [Karpin (1992)].
[148] Ibid, 329.
[149] See discussion in, for e.g., Nadja Durbach, "Dead or Alive? Stillbirth Registration, Premature Babies, and the Definition of Life in England and Wales, 1836-1960" (2020) 94 *Bulletin of the History of Medicine* 64; Shelley Gavigan, "The Criminal Sanction as it Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion" (1984) 5:1 *The Journal of Legal History* 20; Emma Milne, "Concealment of Birth: Time to Repeal a 200-Year-Old 'Convenient Stop-Gap'" (2019) 27 *Feminist Legal Studies* 139.
[150] Karpin (1992), *supra* note 147.
[151] Ibid.
[152] Ibid.

foregrounds the ubiquity of dependence, the inescapability of affection and the limits of autonomy, against masculinist notions of independence, rationality and autonomy.[153] These summary observations are not exhaustive; but suggest the broader context in which reproductive tissues are experienced, upon which I expand where relevant to my interviews.

Reproductive tissues could appear as the remains of persons (or the potential of desired lives) whose loss was mourned through rituals of memorialization, or which became medical discard that had to undergo swift, clinical and often invisible disposal.[154] Such tissues could materialize "'as a baby, mother's tissue, waste tissue, a cadaver, an organ donor, a scientific object and a source of stem cells,' depending on [the tissue's] relation to the maternal body and varied discursive contexts."[155] For example, an interviewee, "Sara," complained that the hospital she attended *cremated* foetal tissues removed during her surgical abortion.[156] In addition, the hospital provided a funeral service for the "lost life." To Sara, the tissues were not human remains (even though she was attempting to conceive a child), but rather clinical waste that ought to have been incinerated without a funeral service. As Sara put it, "to receive the letter down the line, as a card telling me about this ceremony for my bodily tissues and fluid… that was so appalling."[157] It was not like anyone held "a funeral when you have your cancerous tumor removed from your lungs."[158] But, to Sara, that was precisely what they did; they elevated mere tissue to the status of human life:

> I haven't had a death I've suffered. The loss of a pregnancy… it's different. It arises, it arouses different emotions. It's not… I didn't lose a child. I lost an embryo. And my emotions are very complex about what's happened. It's not like, 'Oh, my baby died.' I'm struggling to get pregnant, there's a history or, like, there were a lot of other issues. And, again, they were making it about a baby dying, and that's not what it was. And it was really, really hard for me.[159]

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[153] Ibid.
[154] Leach (2021), *supra* note 144.
[155] Ibid at 145, quoting Julie Kent, "The Fetal Tissue Economy: From the Abortion Clinic to the Stem Cell Laboratory" (2008) 67 *Social Science & Medicine* 1747, 1748.
[156] Interview with "Sara" (7 December 2021) [Sara Interview (2021)].
[157] Ibid.
[158] Ibid.
[159] Ibid.

Materially, cremation and incineration are similar (both involve fire), but the provision of a service without Sara's consent, publicized to her by letter, treated the disposal differently from how she understood it. The aborted tissues were not a stillbirth; had it been a stillbirth, a statute in her jurisdiction would require the certification of death, and the tissue's burial or cremation by a funeral professional.[160] Instead, the hospital chose to treat the tissues as if they were a person, or a potential human life, and disposed them accordingly; contrary to how abortion clinics and hospitals, in another interviewee's experience ("Beatrix"), "whisked away" and discarded as medical waste, the expulsed or extracted tissues following surgical abortions.[161]

By contrast, another interviewee named "Adele," had her foetus cremated after receiving a dilation-and-evacuation abortion in the twenty-third week of pregnancy.[162] Adele referred to the foetus as her baby—a baby she has since named—observing that she wanted the pregnancy but that it was ultimately terminated out of an abundance of caution when tests indicated the foetus was developing "abnormally."[163] The foetus was legally classified as a stillbirth (and so, pursuant to legislation, was registered as a stillbirth and was issued a

[160] *The Vital Statistics Act,* CCSM c V60, s 9 (Manitoba) [*Vital Statistics Act* (Manitoba)]. Also see e.g., *Vital Statistics Act,* SA 2007, c V-4.1, s 19 (Alberta) [*Vital Statistics Act* (Alberta)]; *Vital Statistics Act,* RSBC 1996 c 479, s 11 (British Columbia); RRO 1990, Reg 1094, enacted under *Vital Statistics Act,* RSO 1990, c V.4, ss 19-25 (Ontario); *The Vital Statistics Act, 2009,* SS 2009 V-7.21, ss 43-56 (Saskatchewan).
[161] Interview with "Beatrix" (27 July 2021) [Beatrix Interview (2021)].
[162] Interview with "Adele" (7 September 2021) [Adele Interview (2021)].
[163] Ibid.

certificate of death),[164] but Adele recalled being given the choice between discarding the tissue as medical waste or having it decently and finally disposed.[165]

> I think it was many [reasons] for us. The term like medical waste… to me I see that as like the placenta [and] all the other parts that came out except for the… foetus… the baby. For us, it was like, this is our baby. We wanted this baby. She was not—I'm saying she because that's how we referred to her as—I recognize that legally [she was] not a person but she was our baby. And so she was not waste to us. And so we wanted there— We didn't know what we were going to do with the cremated remains to be honest at that time. We just knew that we didn't— To me, but like, when I picture medical waste, I picture it like going into like a giant like, like bucket and like I have no idea what happens to… it goes into an incinerator or something like that. And just like… with like… other body parts and other gross stuff in the hospital. That's what I picture in my head as medical waste. And I just was like that… it just… did not seem like the appropriate sort of like, end place for our baby.[166]

[164] *Vital Statistics Act* (Alberta), *supra* note 160 at s 1(1)(u). The *Act* defines a stillbirth as 'the complete expulsion or extraction from its birth mother […] after at least 20 weeks of pregnancy, or after having attained a weight of at least 500 grams, of a product of conception in which, after the expulsion or extraction, there is (i) no breathing, (ii) no beating of the heart, (iii) no pulsation of the umbilical cord, and (iv) no unmistakable movement of voluntary muscle.'

[165] Adele Interview (2021), *supra* note 162. Also see *Vital Statistics Act* (Alberta), *supra* note 160 at ss 19(4) and 39; Alta Reg 106/2018, s s 29. Section 19(4) of the *Act* states that section 39 of the *Act* applies to a stillbirth with 'necessary modifications.' Section 39 pertains to the mode of disposal, requiring the responsible person to obtain a 'burial and disposition' permit. The permit is necessary for a burial, cremation or other disposal. In light of the experience reported by Adele, it is possible that the hospital interpreted "necessary modifications," along with "other disposal," to include disposal as medical waste.

[166] Adele Interview (2021), *supra* note 162.

Figure 7. *Adele's abortion.* Adele described the collage as 'a visual representation of [her] abortion experience.' Despite being able to dispose the remains in a manner consistent with her expectations of the tissue as of a human child, the collage suggests how the abortion experience was nonetheless replete with meaning. For example, at the core of Adele's experience was the encounter with death (the death of her child, the promise of life, etc.), which happened suddenly and was followed up by, what she described as, a 'little post-mortem.' That death was obliterating to her, a fathomless pain surrounded and unaided by shame, the fear of public opprobrium and the experience of being a naked spectacle for residents (given the rarity of the condition). It involved the isolation of bedrest, where she was compelled to process this loss alone with her partner. As the fringes of the collage also show, she could not escape feelings of heartbreak, of immense sadness for the loss of life, that something like this had happened to her. Yet she expressed gratitude that the abortion was possible in Canada, expressing alarm at legislative changes in the US that restricted abortion and the creeping return of criminality. Adele also, in conversation with me about this collage, noted that she refused to look at the remains once aborted. At the time, she did not want to see the 'defects,' although that was a decision over which she expressed regret. Conspicuously representations of the child are also absent from the collage, although their absence was not addressed by Adele; instead, the process, the stigma and, most centrally, death overtake the representation of her experience.

The cremated remains were then placed in an urn and displayed in Adele's home, beside a framed imprint of the baby's footprint.[167] Unlike Sara, the hospital procedures were compatible with Adele's understanding of the tissue and, so, satisfied more or less her expectations of a proper, lawful disposal.[168] Adele and Sara both wanted their pregnancies, but the tissues and their disposal mattered differently to both: Adele sought to memorialize a child, and resisted options that would reduce or diminish that child's dignity (throwing the tissue away as if garbage, allowing the tissue to come into contact with waste products, etc.) (see Figure 7);[169] Sara sought to disappear the extracted tissues, to forget them as one forgets medical waste generally as mere products of her body with no further use.[170] The cremation and service made Sara feel as though her body had been used toward the ends of another's "agenda," discordant with her sense of bodily integrity.[171]

[167] Ibid.
[168] Ibid.
[169] Ibid.
[170] Sara Interview (2021), *supra* note 156.
[171] Ibid.

Beatrix, mentioned above, also wished to rid herself of tissues expulsed through an abortive procedure, although the prolonged disposal of tissues entailed by a medical abortion (taking as long as a week to pass the tissues completely after taking the required medicines) involved an especially embodied reminder of something intimate happening to her.[172] That intimacy was felt acutely as the disposal of tissues extended "into the public sphere," in toilets or, as she repeatedly recalled during the interview, in her pants whilst bartending.[173] That intimacy also appeared to be produced, or reinforced, by medical surveillance: the clinic scheduled Beatrix for four routine follow-up appointments with medical professionals (although she ultimately refused the fourth appointment, feeling she did not need it), and was instructed to monitor the quantity of tissue in case there were complications.[174] As a result, Beatrix felt that the case for self-administered abortion was "stronger every day" for her, instead of the "paternalistic" and "gatekeep[ing]" process where doctors demanded an ultrasound to date the pregnancy and repeatedly reminded her the pregnancy was not her fault.[175] As Beatrix put it, "like no shit" and "also what a shitty [thing to say]."[176] For Beatrix, the tissue was waste (waste that often, by consequence of medicine making her ill, found itself in the toilet), which she had no continuing interest in and the feelings of intimacy were imposed or culturally mediated rather than a genuine expression of her relationship to them.[177] Beatrix instead desired to hold, and potentially bring home, the intrauterine device (IUD) removed during one of her appointments, which had, over time and until this pregnancy, facilitated her autonomy:

> **Beatrix:** Yeah, no, they totally just toss it out. It's so funny. So I've had, like I said, I have had several. And it's so funny every time. I'm like, 'I want to see it, get put into my hand,' because they feel very intimate, right? Like they're very much like in you and you… but you also… you have like sort of a relationship with it in terms of you're gonna

[172] Beatrix Interview (2021), *supra* note 161.
[173] Ibid.
[174] Ibid.
[175] Ibid.
[176] Ibid.
[177] Ibid.

> check on it, you were like relying on this device. That's very basic. But I think these are sort of magical. I think they're… no form of birth control every really worked for me properly until I started getting IUDs. And so I'm very attached to them and sort of like, technological objects. And so the first time I had one changed out she… the woman that—I believe it was a woman—removed it… and she just did this like in one action, you know, cuz you're, it's, it's not uncomfortable, it's very quick to have them removed, they basically just pull string, and she pulled the string and whipped it over her shoulder into the garbage in like one swift motion. I just laughed. Like, it's funny, because you sorta want to like, keep it? Oh, I'm sure it's like covered in uterus gunk or whatever. But yeah, no. So the copper one, also, they all just get sort of thrown out in the regular garbage. They're not treating them as special in any way.
>
> **Interviewer:** Okay. And you haven't asked for it, despite wanting to hold it?
>
> **Beatrix:** I haven't. Maybe I will next time, because I think I would like to keep them like, maybe I don't actually want to keep them. But it is sort of funny to have this thing that you know, can stay in your body for up to 10 years sort of be disposed as this piece of garbage at the end in a really non-ceremonious way, right? Like you sort of want to at least say goodbye to it, like, 'Thanks.' But yeah, no, it's very sort of, yeah, they just trash it.[178]

Beatrix had a stronger attachment, and an attachment she desired, to the IUD owing to its importance to her autonomy, and the duration of its presence in her body.[179] By contrast, any feeling she had to her reproductive tissues was, whilst present, conflicted and unwilled:

> [E]ven if you wanted to think hard about what to do with the tissue, quite frankly, you're probably going to be sitting on the toilet. And so it's going to end up in the toilet. In the subsequent days, [the medical team] shift to talking about it much more as a period, right? So in terms of dealing with… you're dealing with… you're wearing a pad, and then, you know, they don't say what to do with the pad, but most people would just be, 'You're throwing out that tissue in the garbage,' right, essentially over the subsequent days, which feels a bit weird. I'll say that, like, I'm not like, I was never thinking about this pregnancy as a baby. But all, you know, all pregnancies have a potential reality to become a baby. And I'm not again, like I'm not particularly… I think there's… I think abortion advocates, we can sometimes run into trouble when we sort of say that, you know, 'everyone should disavow their emotional connection too that tissue,' right? And even though I very much resented that… the existence of that potential, it still did feel occasionally kind of weird to be like flushing, you know, this pregnancy down the toilet or tossing it in the garbage, especially when I wasn't actually in my home. Like when I was at work and stuff. Like, this sucks. I don't want to be dealing with this sort of like, strangely intimate experience in the public bathroom. It's not fun. So yeah, it's complicated.[180]

[178] Ibid.
[179] Ibid.
[180] Ibid.

Figure 8. *Beatrix's favourite comic.* Beatrix brought to our interview a photograph of a comic, "The Emotion Room," drawn and written by Neal Adams. The comic resonated with Beatrix, who could not escape the feeling that the messiness of abortion (including the disposal of tissues expelled from the body in the course of medical abortion) was ideally processed in containment, alone, without others present and affected.

Political theorist Brittany Leach attributes such diverse experiences to the ambiguity of relation, of the "instability of boundaries" across the foetal-maternal assemblage, enacted through or by the separable or expelled tissue.[181] The foetal-material assemblage refers to the network of relations, social and physical, which subtend experience of the pregnant body and its products.[182] The instability of boundaries begins with pregnancy itself, in that, as feminists recount, the foetus' presence can be simultaneously experienced as a limit to, and a part of, the mother's body (or of the person gestating irrespective of gender identity).[183] The

[181] Leach (2021), *supra* note 144 at 146. Also see Deborah Lupton, "'Precious Cargo': Foetal Subjects, Risk and Reproductive Citizenship" (2012) 22:3 *Critical Public Health* 329 at 332-333 [Lupton (2012)].
[182] Leach (2021), *supra* note 144.
[183] Iris Marion Young, "Pregnant Embodiment: Subjectivity and Alienation" (1984) 9:1 *Journal of Medicine and Philosophy* 45 [Young (1984)].

foetus transgresses and intrudes on (or occupies) the gestating body,[184] even as the foetus originates in and depends on the body for its development, and creates, in relation with the mother, a new qualitative presence.[185] The effects of that presence—and meanings ascribed to it—are variable, given the contingency of relations that form part of or otherwise contribute to the foetal-maternal assemblage. The new presence is also existentially irruptive; a feeling that can exceed the gestating person's prior identity as something other than or unlike the individual's prior experience, and inadequately grasped by popular cultural scripts. That new presence can disrupt one's embodiment—in the sense of a complicating, indeterminate experience of the body—traces of which may persist after a miscarriage, abortion or stillbirth (although often felt differently with the foetal body now outside the woman's), affecting the meaning attributed to particular modes of disposal even where those modes are materially similar (e.g., buried or discarded? cremated or incinerated?).

Diverse identifications also form with the use and disposal of supernumerary embryos (cryopreserved for *in vitro* fertilization), emergent in much the same foetal-maternal assemblage although also with added and often distinct considerations.[186] In Canada, some of those added and distinct considerations are the result of the *Assisted Human Reproduction Act*, which requires the consent of "donors" (typically those who provided gametes for the creation of the embryo) to authorize the use or disposal of supernumerary embryos.[187] In my interview with Penelope, for example, she and her wife decided to discard an unneeded embryo.[188] This embryo was produced from the ovum of her wife which

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[184] Lupton (2012), *supra* note 181 at 333; also see Virginia Schmied and Deborah Lupton, "The Externality of the Inside: Body Images of Pregnancy" (2001) 8 *Nursing Inquiry* 32 [Schmied and Lupton (2001)]; Samantha Warren and Joanna Brewis, "Matter over Mind?: Examining the Experience of Pregnancy" (2004) 38:2 *Sociology* 219 [Warren and Brewis (2004)].
[185] Lupton (2012), *supra* note 181.
[186] David A. Ellison and Isabel Karpin, "Death without Life: Grievability and IVF" (2011) 110:4 *The South Atlantic Quarterly* 795 [Ellison and Karpin (2011)]; also see Leach (2021), *supra* note 144.
[187] *Assisted Human Reproduction Act*, SC 2004 c 2, s 8(3) (Canada) [*AHRA*]; SOR/2007-137, Part 3 (Canada) [*AHRA Regulation*].
[188] Penelope Interview (2022), *supra* note 67.

Penelope felt was hers, too, in a sense, since the decision to cryopreserve the embryo was made together.[189] At the time, prior to 2019, regulations enacted under the *Assisted Human Reproduction Act* would not have recognized Penelope as a donor since neither gametes came from her;[190] although recent amendments would now require her consent unless they were no longer a spouse or common law partner.[191] After having multiple children, this particular embryo was no longer needed because their family was complete.[192] Penelope repeatedly said that, even though the embryo was not prepared from her tissue, the decision to discard was fraught for her for two reasons: she was uncomfortable with treating the embryo as mere waste (akin to the reproductive tissues discussed above), and she had concerns about its use by unintended recipients of the discarded embryo since it, as reproductive matter, held the exceptional capacity to generate useful material (e.g., tissues in contexts of research, access to and manipulation of genetic information).[193] With respect of the latter, Penelope made multiple references to the situation of Henrietta Lacks—a destitute African American woman whose tissues were used, unbeknownst to her and her family, to create the profitable HeLa cell line for medical research—to describe the kind of outcome she wished to avoid.[194] Penelope initially raised Lacks when describing the disposal of her cysts:

> I mean, I generally support research. I mean, that's part of why I'm having this call with you. But you know, given that it is my own, something from my body, there's my, you know, my DNA in it. I do think a lot about, you know, the story of what happened with Henrietta Lacks. So, you know, I guess there's that always that feeling at the back of

[189] Ibid. Penelope was careful in describing the nature of her interest in the embryos. She, for example, attempted to refuse to sign the contract with the clinic as it was, in her view, ultimately her wife's decision. When discussing the embryo she repeatedly noted that it was her wife's embryo, but attempted to characterize her interest in the embryo in a manner complementary to her wife's putative ownership. She said: 'On principle, you know, we're not going to put my signature on this [form], because it's not my DNA, like, they're technically not my embryo at all. But I did have, I did have some feelings about it, though, because I felt like, well, this is an embryo that my wife and I created, you know, it made a decision to create together, even though it's not genetically mine.'
[190] *AHRA Regulation*, *supra* note 187 at s 5(2), in effect between 2007-12-1 to 2019-12-25.
[191] Ibid, ss 10(1)(b) and 10(3).
[192] Penelope Interview (2022), *supra* note 67.
[193] Ibid.
[194] Ibid. Also see Rebecca Skloot, *The Immortal Life of Henrietta Lacks* (Danvers, MA: Crown, 2011); Alexander Weheliye, *Habeas Viscus: Racializing Assemblages, Biopolitics, and Black Feminist Theories of the Human* (Durham: Duke University Press, 2014).

> my mind of like, I really don't know. And, like, you know, I think I'm okay with that. But, you know, there's a part oof me that, like, you know, has a small fear that something could be done with these tissues that I would not be okay with if I had been made fully aware.[195]

Penelope raised Lacks again when describing the disposal of the embryo:

> When I know that they do research, you know, some of the… that… you know, a couple of the images that I use [in my collage — see Figure 9 below], they kind of refer back to that… of like… you know, as I brought up Henrietta Lacks before of, like… you know, even though we've instructed them to destroy it, someone might use it for research and think, you know, no one will be the wiser.[196]

These concerns were similar those regarding her cysts, discussed above, but "almost worse" given "there's so many possibilities with [what could be done with] an embryo." As Penelope said: "It can become a whole life, right?"[197]

Penelope considered, but ultimately did not push for, a "compassionate transfer" as a way of reconciling with those concerns.[198] A compassionate transfer would involve emplacing the embryo into one's body at a point in the menstrual cycle when, or a place within the body where, the embryo would not further develop and would be expelled "naturally" by the body:

> You know, it is… was one of those things that like, I almost feel like I, I would have liked someone to follow it up and to talk… have talked to us. Like, my wife was never interested in it. But one thing I had, I had read. About and I just was really drawn to, was this idea of, what did they call it… Compassionate… compassionate transfer. I think it's what they call it. A compassionate transfer, where you put an embryo in, at absolutely not the right time of the month. So you know, it's not going to work, but it's a way that you can, you know: (a) ensure that the embryo is disposed of, I suppose. And (b) it's done in a way—I hate this expression but—sort of [how] nature intended, you know. Like, like, it's, like, you know, you bring it back into the body, and let the body deal with it. Like, let the body absorb it and whatever. And I just, I was always drawn to that idea. My wife was just like, 'No,' like. I just… she just didn't want another clinical procedure, right? And which I completely respected and understood. That I felt like if we had been offered that I would have really been interested in it just also just in that knowledge, like, 'Okay, we're done. The embryos are gone. I know where they are.' That sort of sense.[199]

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[195] Penelope Interview (2022), *supra* note 67.
[196] Ibid.
[197] Ibid.
[198] Ibid.
[199] Ibid.

When asked to clarify whether, by contrast, merely providing instructions for the embryo's destruction entailed more uncertainty, Penelope agreed and referred to Lacks as evidence of that ("Yeah [...] You know, as I brought up Henrietta Lacks […]").[200]

In this way the embryo, much like the foetus, was replete with meaning. In one instance it was disposable as discard. The embryo was no longer needed and so could be destroyed. In another instance the embryo represented, if it was not in fact, a possible child to Penelope or the trace of filiation.[201] Although Penelope was not the source of the embryo, she attached notions of family, of kinship, to the tissue, which evoked for her a need to care for it even in its disposal.[202] Ultimately Penelope did not push for any additional steps in its disposal, such as compassionate transfer, but her reflections (e.g., on her desire to see it finally and decently disposed and to guard against the risk of its abuse, yet to rid oneself of a thing no longer desired) expose the Janus-faced qualities of the tissue: concurrently subject and object, kin and stranger, human and non-human. These plural qualities were generally informed by the reproductive context of their generation and intended use, seemingly mediating a need to care for the tissue in its disposal.[203] However, the presence of a contract, as the authorizing document for the embryo's preservation and disposal, also rendered the embryo like any other chattel at the heart of a transaction: something to be discarded as waste when no longer of use to the transaction.[204] As Penelope noted, the embryo became a mere thing whose disposal was handled by marking a checkbox (see Figure 9).[205]

[200] Ibid.
[201] Ibid.
[202] Ibid.
[203] Ibid.
[204] Ibid. The *AHRA*, *supra* note 186 at s 8, requires decisions about the use (including disposal) of reproductive materials and *in vitro* embryos to be completed with the written consent of the donor.
[205] Penelope Interview (2022), *supra* note 67.

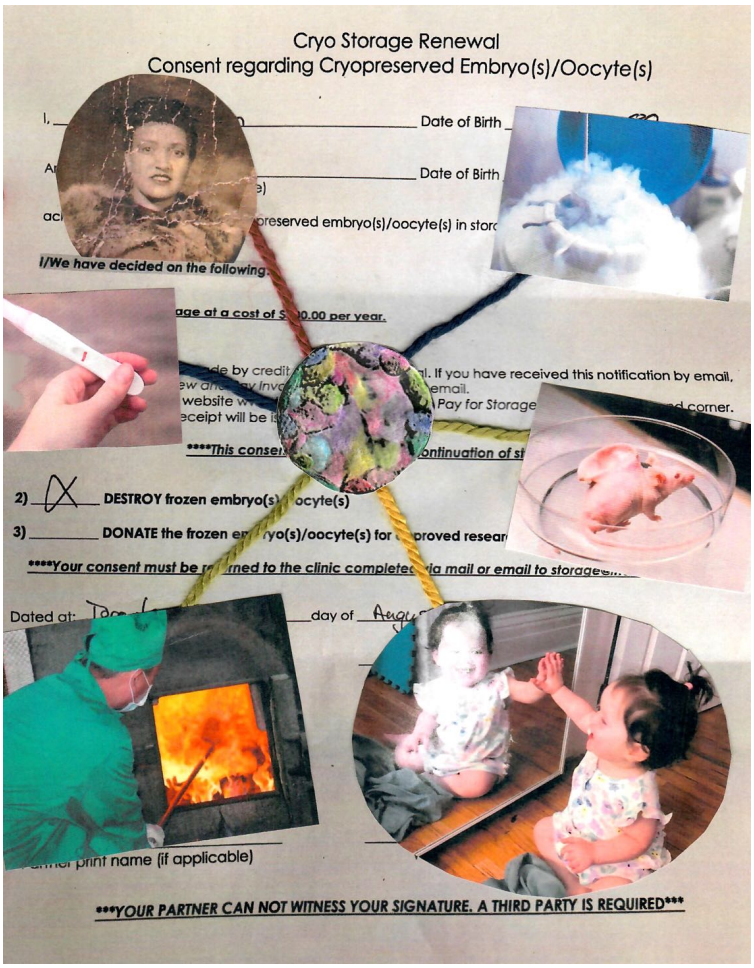

Figure 9. *Penelope's cryo storage renewal form.* Penelope created a collage using the cryo storage renewal consent form. She remarked that the form is really about preservation and that disposal felt like an afterthought, only addressed by two check-boxes to indicate whether the embryo should be 'destroy[ed]' or 'donate[d],' with no other information provided. The collage thereby transformed the form so it foregrounded disposal in place of preservation. The collage is composed of a colourful image of an 'imperfect' embryo (graded 3AB) at the centre, and radiating from the embryo were images of different uses (or disposals) of embryo. At the top-left of the image is a portrait of Henrietta Lacks, with whom Penelope identified. Penelope feared that her (or, more accurately, her wife's) genetic material might be mishandled and exploited, and that the form might not guard against such harms. Her apprehension carried through in the presentation of multiple images, radiating at equivalent distances from the embryo, demonstrating the abundance of uncertainty that persisted despite the ostensible certainty the form was meant to guarantee. As Penelope said, 'You know, it's not like there's a certificate of destruction that's ever provided to us, or any sort of assurance that they've actually followed through with what they've done.' The radical possibilities of secondary use are suggested in the image of the ear synthetically induced on the mouse, which suggest inhuman, hybrid or chimeric outgrowths that Penelope personally did not desire.

Reproductive tissues thereby could be experienced as human and non-human, subject and object, kin and stranger—and sometimes all concurrently in the complexity of being "not one but not two."[206] That complexity was patently borne by the placenta as well.[207] Sara, for example, considered the placenta as just another tissue removed during a dilation and evacuation abortion.[208] Accordingly, Sara—who described the abortion as "a health care procedure that was required" due to the risk of sepsis—considered it surgical waste.[209] Adele, who also received a dilation and evacuation abortion, differentiated between the foetus (which she wanted cremated) and placenta:

> They're trying to remove the foetus as in… as intact as possible. If you want an autopsy, they're trying to do that more carefully, I think. If you want an autopsy, because they kind of are hoping to have some sort of a body to like, do an autopsy on and that everything else is kind of like being sectioned out. And I understand that like, all of like, placenta, other stuff in there is going to medical waste.[210]

But it was also possible for the placenta to have other meanings. For example, Isabella, an interviewee in England, described her experiences as a mother and as a midwife.[211] Isabella contested use of the term, "disposal." The term was "not the right word," as it suggested one was "disposing [the placenta] in a bin or you're disposing something that doesn't have a meaning."[212] The placenta had "special meaning" to her as it helped her during pregnancy, so she did not want to merely discard and forget it.[213] But the placenta's meaning went beyond embodying a person or the potential for one. Isabella contrasted the placenta with a kidney, for whom the latter can properly be said to belong to one person.[214] The placenta instead

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[206] Karpin (1992), *supra* note 147 at 329.
[207] Rachel Colls and Maria Fannin, "Placental Surfaces and the Geographies of Bodily Interiors" (2013) 45 *Environment and Planning A* 1087 [Colls and Fannin (2013)]; Eva-Maria Simms, "Eating One's Mother: Female Embodiment in a Toxic World" (2009) 31:3 *Environmental Ethics* 263 [Simms (2009)].
[208] Sara Interview (2021), *supra* note 156.
[209] Ibid.
[210] Adele Interview (2021), *supra* note 162.
[211] Interview with "Isabella" (16 December 2021) [Isabella Interview (2021)].
[212] Ibid.
[213] Ibid.
[214] Ibid.

was more-than-one, a combination of her and her child's genetic material, which storied a specific bond between mother and child despite being expelled from her body.[215] Knowing of that bond compelled her to arrange for repeated encounters with the tissue, in this instance by using it to fertilize a potted tree which she could carry with her until she had a permanent garden (see Figure 6).[216] The tissue, and now by extension the tree, stood apart from her and her child as a third being.[217] Isabella explained that, in addition to the tree allowing the placenta to live on, "it feels like the tree is still connected… somehow with me… is connected with my son because it's [growing] at the same height, but it's also connected with me in a sense."[218] The tree functioned in the "dual sense" of the placenta, mediating between Isabella and son whilst also standing on its own as a source of vitality.[219] Although, the placenta's existence was hard to name or fix even whilst re-materialized in the tree; as she described the tree in the photograph to me she wondered aloud, "Is it still there?"[220]

[215] Ibid.
[216] Ibid.
[217] Ibid.
[218] Ibid.
[219] Ibid.
[220] Ibid.

Figure 10. *Isabella's fig tree.* The fig tree was first potted as a mere seed, in soil that contained the placenta she birthed alongside the birth of her first son. The photograph appears almost as a portrait, with the fig tree centred, unobscured in the foreground of the image. Isabella associated the fig tree's growth with the health of her child, observing that the tree "bloomed so hugely with so many leaves" and that it had "actually given […] figs this same year." Isabella also observed that there was a period in which refrained from potting the placenta, choosing instead to freeze it until she was ready to process the traumatic birth. But she clarified that freezing the placenta was not a matter of "holding off," rather "more like as a… I [was] actually in the middle of this hurricane of emotion so I just [couldn't] worry about the placenta [at the time]." When she was ready to 'close' her "postpartum period," and transition fully into motherhood, she buried the placenta in the pot but that did not mean to her that the placenta was held off, suspended away from her. It was always present as she processed the changes brought by the birth of her child. She also noted that, once she had a garden of her own, she would plant the tree; the pot guaranteed ease of transport between rental properties, but she planned for it to have a more permanent home when she did, too.

The placenta was not exclusively of a person, nor a person itself, although Isabella noted it "almost [felt] like another baby."[221] Isabella noted that with a laugh, in between also referring to the placenta as "a piece of meat."[222] Laughter—by Isabella and others discussing reproductive tissues—seemed to punctuate their descriptions (of these tissues, of modes of disposal that defied what they perceived as the norm or were otherwise discrepant with their expectations). With the placenta, Isabella considered it a strange piece of meat stuffed with meaning.[223] The placenta evoked new senses of relating, which compelled certain forms of care, and facilitated cultural and personal transitions especially in the performance of social roles:

> It's quite difficult to put it into words because it's something that is, as I say, is half you, is in contact with you, and it's half your baby and it's something that is a temporary organ, so it's an organ just for nine months… actually ten. Your body has an extra organ, that actually if you take a sample it's not one hundred per cent you. And it's…. it's weird because I always thought that you will feel a little bit like an alien but it's also a really nice connection that there's not something that is strange to your body. It's you and at the same time it's not you, which is I guess goes a little bit with that feeling that goes once you kind of like transition to motherhood and that thing of like used to being yourself and you become another person? I think the placenta is almost… actually never thought about that before talking about this with you… but it almost like it represent that transition that… I don't know… like the middle like a boat that is taking you from one side to the river when you define yourself in a way. And then you come out in the other side in that transition to motherhood. I think the placenta represents that transition itself. Which is not an always an easy transition. But that's… that's why it's also lovely. And that's why I think buried… I didn't feel I wanted to bury [the placenta] really early with my son, because there was, because it was a traumatic birth, there was a lot of things I had to process. And I still feel that… I buried one year later, just because we were moving out or not because I was really ready to do that? So it's almost like when I buried I always felt like it was going to feel like that closure. Like that's it: I transition. I'm finally at that stage. And I left my previous… myself behind… I… it feels like it was nice to bury and I cried [laughs] the whole time. At the same time, at the right time. That's why I'm also not rushing right now with my [second] son, although I wouldn't mind you this time, because this time was a much better experience. I'm also not in a rush to do that, because I feel like buying the plant is almost like closing this stage of becoming a new mom and transitioning to a new person and like accepting your new role. It is funny that a piece of meat represents all that.[224]

[221] Ibid.
[222] Ibid.
[223] Ibid.
[224] Ibid.

Like tissues outside reproductive care, these embodiments were not formed apart from the law. Interviewees who discussed reproductive tissues all reported the relevance of law to their decision-making. For example, cremating the remains of her aborted child was not especially meaningful to Adele.[225] The most important consideration for Adele was that the remains were not disposed of as waste, and cremation was just the better of two options provided.[226] Legislation applicable to stillbirths, such as Alberta's *Vital Statistics Act* for Adele,[227] constrained those choices:

> I do remember having a discussion about like during the options of like, 'Okay, so like these are the only options' and my… I'm going off of like, I'm going off of grief, brain-grief fog, because those… that time was so… is such a blur for me those two weeks. But my recollection is that because it's considered a stillbirth, it's recorded as, as a like… Okay, I'll backtrack. If you have a miscarriage before and it's before the like twelve- or thirteen-week mark, it's like, you might pass it in the toilet. Like you might pass it when you go to the washroom. And then some people decide to like, bury it in their backyard, for example, or flush it down the toilet. So because it was so far… it was further along and it's considered a stillbirth, my understanding is that then it's like… it's considered… like a… like a body. And sort of like how, my understanding is that, I can't just like take a body and like bury it in my backyard. Like, it's considered to be like no different at that point. And because they do register a certificate of life, like a birth. So it was like, it's like, I'm guessing, going back that it was like 'Oh well, you're actually like, not permitted by law to like, take the body yourself.'
>
> Not that I wanted to. I just remember like, having a discussion about like, 'Okay, so those are the only two options and how come,' and 'Are there any other options?' And it was, that's what I recall is like, 'Well, actually it's like illegal' or like, 'you're not allowed to take the body yourself, only a funeral home can.' That's what I recall.[228]

Cremation then "was just the only other alternative to garbage."[229] Legislation structured decision-making, often narrowing options for disposal, which led some to inventive solutions within legal constraints to ensure the disposal coincided with their understanding of the tissue. Legislation could also promote (and legitimate) the relations of non-biological kin in disposal decisions, such as with *in vitro* embryos; amendments to a regulation under

[225] Adele Interview (2021), *supra* note 162.
[226] Ibid.
[227] *Vital Statistics Act* (Alberta), *supra* note 160.
[228] Adele Interview (2021), *supra* note 162.
[229] Ibid.

Canada's *AHRA* in 2019 require the written consent of the individual or the couple "for whose reproductive use [the] embryo [was] created" before any use or disposal.[230] To act otherwise is a contravention of the *AHRA* for which one is guilty of an offence.[231]

For other tissues there was an absence of legislation or it was construed as non-binding, giving way to the common law or personal forms of ethics. For example, Isabella reported, in her experience as a mother and a midwife, that the disposal of placentas was not as guarded as the disposal of stillbirths, surgical waste, organs and amputates.[232] Whilst the placenta would ordinarily be treated as medical waste, the placenta was—as she put it again—"just a piece of meat," not a person, so one was entitled to "do whatever [they] want[ed] to with it."[233] It was also "more culturally accepted" to dispose of it as one wished, because of historical antecedents (there were traditions of secondary uses of placentas, which midwives were often aware of) and the absence of risk to public health.[234] With an amputate, for example, Isabella felt that there was the possibility of undesired, harmful and discomfiting use, which the law sought to prevent (and certainly the discussion of Andrew, above, confirms that concern from the perspective of the hospital).[235] Owing to the absence of risk, and cultural acceptance, the placenta was more like a miscarriage or non-surgical abortion in that its disposal did not require any particular form (although its context often determined the mode of disposal).[236] By convenience the placenta's disposal was often medical waste because it was left behind within a hospital or clinic setting, just as the tissues

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[230] *AHRA Regulation*, *supra* note 187 at s 10.
[231] *AHRA*, *supra* note 187 at s 61.
[232] Isabella Interview (2021), *supra* note 211.
[233] Ibid.
[234] Ibid. Regarding traditions of secondary uses of placentas, see generally Nané Jordan, "Introduction" in *Placenta Wit: Mother Stories: Rituals and Research* (Coe Hill, Canada: Demeter Press, 2017); also see Emily Burns, "More Than Clinical Waste? Placenta Rituals Among Australian Home-Birthing Women" (2014) 23:1 *Journal of Perinatal Education* 41; E. Croft Long, "The Placenta in Lore and Legend" (1963) 51:2 *Bulletin of the Medical Library Association* 233.
[235] Ibid; Andrew Interview (2021), *supra* note 62.
[236] Beatrix Interview (2021), *supra* note 161; Isabella Interview (2021), *supra* note 211.

from a miscarriage tended to end up in the toilet;[237] however, one might certainly claim ownership over or control it in some way approximating ownership, if they wanted.[238]

Another interviewee, "Michelle," reflected that she might have liked to have specifically directed the disposal of her placentas—in her presumed capacities as their owner—had she been given the opportunity to consent or had the wherewithal to ask; she had some concerns regarding the risk of it being used for a secondary purpose.[239] But during the births of both her children she observed that medical staff did not explain what would happen to the placentas (a pamphlet only referred to preserving the umbilical cords, but for a prohibitive cost).[240] It was only after the fact that she considered she might have had an interest in those tissues.[241] Relatedly with Sara, whose aborted tissues were cremated and provided a funeral service without her consent, she was also never told as to what would happen with the tissues until—as she put it—it was too late.[242] The hospital was not required by Manitoba's *Vital Statistics Act* to cremate the tissues as they were not of a stillbirth.[243] Nonetheless, Sara said there was effectively no chance to opt out of the hospital's plan for the tissue's disposition:

> I believe it was… it was "Here's the date and time—you are welcome to attend." I think there was a card in it like [of] sympathy. Something. I really didn't… I have to say I really didn't read it too carefully. Very upset. But as far as I know, there was the… I'm sure if I had called. But at that point it… it was weeks down the line, if not months. I can't quite recall. Was a bit of a blur to me. And as far as I understood, cremations happened on site, all mixed together. What are they going to do? They're going to… take out… take out a cup of ashes to represent, you know? It's all like… it's been done.[244]

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[237] Beatrix Interview (2021), *supra* note 161; Isabella Interview (2021), *supra* note 211.
[238] Isabella Interview (2021), *supra* note 211; also see Interview with "Michelle" (29 December 2021) [Michelle Interview (2021)].
[239] Michelle Interview (2021), *supra* note 238.
[240] Ibid.
[241] Ibid.
[242] Sara Interview (2021), *supra* note 156.
[243] *Vital Statistics Act* (Manitoba), *supra* note 160.
[244] Sara Interview (2021), *supra* note 156.

Sara's control of the disposition was thereby denied by the hospital suppressing information—holding back information that would have, from Sara's perspective, countenanced her right to direct the disposal of the tissues, to ensure its disposal abided by her as person.[245]

The disposal of reproductive tissues thereby relied on multiple factors, with divergent effects, not unlike tissues in non-reproductive contexts. Like Andrew, Wendy, Zelda and Penelope (regarding her cysts), exposure to and experience of tissues could challenge how they felt about and encountered their bodies (often individual, bounded and self-sufficient). Some of that challenge lied in the simultaneity of the tissue as subject and object, seemingly adulterating the supposed individuality of the human body. There was also an unreality or strangeness to tissues that escaped understanding but compelled interest, like the placenta being just "a slab of meat" yet replete with significance;[246] the articulated bone being "that beautiful, beautiful piece, the uniqueness, the bizarreness," a "piece of art" that is "exotic," "freaky," and "can't be replicated";[247] the cyst experienced as a kind of human pearl in both appearance and genesis; [248] or the embryo harbouring fantastic uses.[249] That challenge tended to invite different ways of relating to themselves, to the part and to others, with which some interviewees expressed surprise. And like Andrew, Wendy, Zelda and Penelope (again, regarding her cysts), some ways of relating could be opposed by institutional actors (namely hospitals, clinics) whose preferred modes of disposal reflected paradigmatic approaches to the body, and whose imposition on disposal outcomes could be experienced as an injustice. But interviews with Sara, Adele, Beatrix, Isabella, Michelle and Penelope (regarding her partner's embryos) also draw attention to the context of production—generally, here

[245] Ibid.
[246] Isabella Interview (2021), *supra* note 211.
[247] Andrew Interview (2021), *supra* note 62.
[248] Penelope Interview (2021), *supra* note 67.
[249] Ibid.

emplaced in the maternal-foetal assemblage—where scripts regarding sex, gender, gestation and reproduction regulated experience of the tissue.[250] Any such regulation was only ever incomplete, but it nonetheless informed a range of possible identifications affecting whether a given use or disposal was experienced as proper and just. These interviews (especially with Isabella but also in Penelope's and Michelle's concern for what could be generated from the tissues) suggest how the tissue's materiality could already embody the other (the foetus, the child, the placenta, or whatever else an embryo potentially becomes) in ways that exceeded the part-whole dyad prevalent among surgical tissues. Other relations could form relative to tissue, potentially radicalizing what the tissue could come to mean and support.

The part-whole dyad may circumscribe experience of disposal, but this effect is always incomplete. The dyad might be thought of as a schema, in that the relation of part to whole forms a pattern of bodily movement that is generative of meaning.[251] The dyad is not a necessary feature of one's relation to tissue, but Western paradigms of the body have reliably entrenched the schema in philosophical and popular thought, constructing tissues as fragments of a whole whose value is lost upon detachment—a mere mechanical implement to the human ego—becoming an object to be discarded unless it can be used in some way.[252] Importantly, the dyad assumes the dependence of the part on the whole for its animation as either an extension of the subject or an object for the subject's use, each suited to laws of personality and property, and transitions in between.[253] However, tissues can have

[250] Karpin (1992), *supra* note 147; Leach (2021), *supra* note 144.
[251] Mark Johnson, *The Meaning of the Body: Aesthetics of Human Understanding* (Chicago: University of Chicago Press, 2007) [Johnson (2007)].
[252] Hacking (2007), *supra* note 70.
[253] Mykitiuk (1994), *supra* note 53. Note that the removal of surgical tissue may cause existential reflection for some, and inspire a desire for the tissue's retention as one's property, but the part's dependence on the whole tends to constrain the tissue's meaning so that notions of personality and property remain felicitous.

qualities unrelated to the whole, in excess of the part-whole dyad.[254] With an amputated leg, for example, the tissue has the capacity to change in form (by decomposition), create noxious qualities (smells, disease) and become unreal distortions of the familiar (if not totally unfamiliar), which can, especially with the help of human imagination, stage the appearance of something estranging.[255] Alternatively, the tissue can: embody a memory of trauma, becoming an unwanted reminder of fear, guilt or anguish;[256] evidence divine intervention as a trace of a miracle borne by flesh;[257] or, in the context of human reproduction, embody the presence of something other than oneself.[258] Regardless of cause, tissues can overflow with meaning in ways discordant with the part-whole dyad, inviting other identifications: an object of regulation or elimination (such as in public health or criminal law), an object of beauty or desire, a sacred relic for prayer, the presence of a stranger, etc. Some of these other identifications may be amenable to extant categories of the common law, particularly that of property, even if identifications of the strange, monstrous, noxious, sacred, etc. modify what can be done or is done with an object (including in the object's abandonment). Some may already be part of the legal system more generally, especially in legislation, such as powers to secure the population from the risk of harm (public health law and criminal law). However other identifications may inspire care, responsibility or affection in addition to extant legal categories or powers relative to the body, or may require the law's alteration altogether.

[254] This may be especially true in situations of synthetic tissues, like human embryos cultivated from stem cells as opposed to from human gametes, where the schema of the part-whole dyad does not directly pertain. See e.g., BBC Woman's Hour, "Synthetic Embryos" (15 June 2023), https://www.bbc.co.uk/sounds/play/m001mt6z (32:17 – 45:00).
[255] Andrew Interview (2021), *supra* note 62.
[256] See discussion of amputates in Hanna (2021), *supra* note 83.
[257] See discussion of religious relics in Patrick J Geary, *Living with the Dead in the Middle Ages* (Ithica, NY: Cornell University Press, 1994).
[258] See e.g., discussion of "not-one-but-not-two" in Karpin (1992), *supra* note 147.

5.4. Corporeal Justice Felt in Rupture and Relation

There is no single way to relate to human tissue falling away from the subject. People's relationships to tissue are manifold, in ways that can belie legal classification. Some tissue may appear to form part of the person, or become their or another's property, before disappearing as waste, as conventional law and jurisprudence describe.[259] But from Andrew to Zelda, people's experience of a tissue's disposal can also differ from the conventional stories of law especially as those are often narrated by jurisprudents. Something else tends to accrete in the middle of one's relation to tissue, making law's usual narratives of the body an awkward fit. The *something else* could be the intercession of another kind of regulation: concern for public health (such as with clinical waste), the exploitation of women (such as with embryos), or the control of women and reproduction (such as with stillbirths and abortion). Attending to the influence of regulation may invite the jurisprudent to revise law's story so to include the contributions of public law to experience; reframing the relationship between a person and tissue as a matter of concern to more than rights and duties at private law. Indeed, the jurisprudent ought to do that since medical law is much more than private law.[260] But the *something else* also relates to how people feel and act in their bodies—how people are embodied.[261] More than pointing out the presence of other kinds of posited law taking the human body and parts as *objects for* law, people's experience in the situation of disposal also suggest how tissues obtain legal meaning *in themselves*. Some may suggest these embodiments are extra-legal, in the sense of being beyond the concern of posited laws. But posited laws only form a part of normative existence. Rather normative existence

[259] See e.g., discussion of human body parts in J.E. Penner, *The Idea of Property in Law* (Oxford: Clarendon Press, 1997) [Penner (1997)].
[260] See generally discussion of the notion of medical law in Kenneth Veitch, *The Jurisdiction of Medical Law* (Abingdon: Routledge, 2007) [Veitch (2007)].
[261] Fletcher et al. (2008), *supra* note 35; Garland and Travis (2022), *supra* note 34.

merits an expanded sense of the lawful, in what a situation authorizes in terms of relations that are held up and those that are dropped or extinguished.[262]

There may not be a single way of relating to human tissue, lawfully or otherwise; however, the experience described above discloses patterns in how those relations form. The normative kernel of those patterns lies in how relations with tissues sustain feelings of "belonging" and "non-belonging." Belonging is a mode of being with or toward another.[263] Part of being with another involves holding separate entities together (what can map onto a relationship between "subject-object," but also other notions of co-existence).[264] Belonging can also involve "the constitutive relationship of part to whole whereby attributes, qualities or characteristics [are said to] belong to a thing or a subject" (what maps onto a relationship between "part-whole").[265] Both senses of belonging, as Sarah Keenan argues, "implicate social relations and networks that extend beyond the immediate" set of entities in relation, which "must also be structured in such a way that that relation is recognized and respected, or 'held up' by the surrounding space."[266] Belonging further suggests a quality to the relation in the sense that, as Keenan adds, "[t]o belong is to fit smoothly, or without trouble, into either a conceptual category or a material position."[267] Non-belonging by contrast suggests

[262] See discussion in Olivia Barr, *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place* (Abingdon: Routledge, 2016) [Barr (2016)].
[263] Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Abingdon: Routledge, 2015) [Keenan (2015)].
[264] Sarah Keenan, "Subversive Property: Reshaping Malleable Spaces of Belonging" (2010) 19:4 *Social and Legal Studies* 423, 426 [Keenan (2010)]. Regarding belonging outside "subject-object" relations, consider Davies (2022), *supra* note 15; Anna Grear, "Foregrounding Vulnerability: Materiality's Porous Affectabililty as Methodological Platform" in Victoria Brooks and Andreas Philippopoulos-Mihalopoulos, eds, *Research Methods in Environmental Law* (London: Edward Elgar, 2017), 3-28.
[265] Keenan (2010), *supra* note 264 at 426.
[266] Ibid.
[267] Sarah Keenan, "Space and Belonging" in Mariana Valverde, Kamari M Clarke, Eve Darian Smith and Prabha Kotiswaran, eds, *The Routledge Handbook of Law and Society* (Abingdon: Routledge, 2021), 177-179, 177 [Keenan (2021)].

the absence, withdrawal or suppression of a relation of being with another.[268] Following Rosemarie Garland-Thomson, non-belonging may be characterized as a condition of being "misfits," existing "in disjunction" with another when compelled to "come together."[269] Non-belonging does not denote a necessary incompatibility between entities—the disjunction does not "[inhere] […] in either of the two" or more forced into relation—but rather the misfitting arises from the "juxtaposition" of entities in a context which disallows their harmony.[270] Belonging and non-belonging do not belong to the law alone.[271] Law is among many relations that produce situations of belonging and non-belonging.[272] But, importantly for my analysis here, each supply principles for law's expression and the experience of justice.[273]

Situations of belonging and non-belonging are exemplified in the experience of Andrew, for example, who fought for custody of his amputated leg despite the hospital's plan to dispose of it as waste.[274] The leg belonged to Andrew in a few different senses: as part of him ("my own body part," "make this major decision to remove more of myself"), what was formerly part of him ("[my] remains," "obviously not physically [part of me] anymore"), and what was his ("my property," "mine").[275] Despite variable descriptions, underlying each was an "emotional connection" to the tissue, experienced as "not wanting to let go" until he was ready.[276] The hospital denied the existence of that connection, and acted as if "everything was just on their terms," which Andrew encountered as unjust.[277] Put differently, Andrew

[268] See discussion of belonging being predicated on non-belonging, in Cristy Clark and John Page, "Of Protest, the Commons, and Customary Public Rights: An Ancient Tale of the Lawful Forest" (2019) 42:1 *University of New South Wales Law Journal* 26, 54.
[269] Garland-Thomson (2011), *supra* note 40 at 592.
[270] Ibid, 593.
[271] Keenan (2010), *supra* note 264.
[272] Ibid.
[273] Davies (2022), *supra* note 15.
[274] Andrew Interview (2021), *supra* note 62.
[275] Ibid.
[276] Ibid.
[277] Ibid.

sought control over the circumstances of his leg's parting—he wanted his relation of belonging with the leg to persist, for a time at least, into the future—but, instead, the hospital's denial imposed a situation of unbelonging between him and his leg discrepant with his expectations. Andrew experienced the integrity of his bodily situation as violated, made misfit, causing disjunction between him and his surroundings.[278] Experience of that integrity informed his judgement of the situation's lawfulness, including his critique of the laws upon which the hospital relied (such as the no-property rule, environmental health regulations).[279] Likewise, the discomfort, pain or injustice felt by Wendy, Sara, Penelope, Isabela, among others,[280] posed by the actual or possible use of body parts by others, appears to rely on relations of belonging, variably expressed across their experiences, but nonetheless factoring in the evaluation of whether what was done was lawful.

Experience of the integrity to a bodily situation is possible because of relations of belonging. Attuning to belonging expands the conventional notion of bodily integrity by reaching beyond the body "proper" to incorporate that which is "outside" the body yet experienced as belonging to it. What relations of belonging form part of this broader *corporeal* integrity is neither delimited nor determined by the body proper; an observation that applies to the body generally but is apparent in ruptures to the body (e.g., the loss of a leg and the possibility of its preservation and retention).[281] Feminist phenomenologist Rosalyn

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[278] Garland-Thomson (2011), *supra* note 40.
[279] Andrew Interview (2021), *supra* note 62.
[280] Adele Interview (2021), *supra* note 162; Beatrix Interview (2021), *supra* note 161; Isabela Interview (2021), *supra* note 211; Michelle Interview (2021), *supra* note 238; Penelope Interview (2022), *supra* note 67; Sara Interview (2021), *supra* note 156; Wendy Interview (2021), *supra* note 63; Zelda Interview (2021), *supra* note 64.
[281] "Corporeal" is used here in the expanded sense used by Pamela Moss and Isabel Dyck. As I write elsewhere, "Pamela Moss and Isabel Dyck extend [Henri] Lefebvre's body-space and [Peter] Freund's labilitous body beyond the fleshy boundary of the individual to include broader material and discursive spatialities that the body inhabits. This corporeal space—as opposed to the narrower, body-space—'consists of the context, discursive inscriptions, material inscriptions, the biological and the physiological.'" See Shaw (2021), *supra* note 24 at 84. Also see Pamela Moss and Isabell Dyck, "Body, Corporeal Space, and Legitimating Chronic Illness: Women Diagnosed with M.E." (1999) 31:4 *Antipode* 372 [Moss and Dyck (1999)]; Shildrick (2022), *supra* note 8.

Diprose—writing on the experience of organ and tissue transplants—characterizes the body as "constituted in relation to others."[282] Against the body's enclosure as a bounded, independent biological unit, Diprose describes the body as "ambiguous, opened to the world and to others."[283] That ambiguity "arises through the organization of the body given to and by the corporeality of others […] [which] occurs not by conscious intervention but by mimesis and 'transitivism': by identification with other bodies and by imitation and projection of gestures."[284] The intercorporeality within which the body takes form is always, already fragile, a product of the contingent relations that take place, temporarily, in duration, given to and appropriated in the performance or "exscription" of the body.[285] The body is always *exscribed* or brought forth in the "dwelling-with others in the world,"[286] in our movements that "incorporate objects and others within the situation and resolve it according to the project at hand" and through performances that involve "opening of the body onto the world of the other."[287]

If the body is "constituted in relation to others," as Diprose suggests,[288] the borders of bodily integrity diffuse; instead, becoming the relations of belonging that hold up the broader "corporeal space"[289] in which the body is situated. That may raise concerns that the correlative duty of non-interference would weaken or, alternatively, become unworkable as

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[282] Diprose (2002), *supra* note 3 at 69.
[283] Ibid.
[284] Ibid.
[285] Ibid. Regarding "exscription," see Jean-Luc Nancy, "Exscription" (1990) 78 *Yale French Studies* 47, 64 [Nancy (1990)]. As I shall explain in greater detail in Chapter 6, exscription refers to an outside, but:

> "[…] this 'outside' is not that of a referent to which signification would refer (thus the 'real' life of Bataille, signified by the words 'my life') the referent does not present itself as such except by signification. But this 'outside'—entirely exscribed into the text—is the infinite retreat of meaning by which existence exists. Not the brute datum, material, concrete, reputed, to be outside meaning and which meaning represents but the 'empty freedom' through which the living being comes to presence—and absence."

[286] Diprose (2002), *supra* note 3 at 71.
[287] Ibid, 70.
[288] Ibid, 69.
[289] Moss and Dyck (1999), *supra* note 281.

corporeal spaces (and corporeal integrities) of multiple bodies overlap. But neither outcome is necessary if the right is reconceptualized from something *of the* body (wholeness of the body) to a relation *from and with* the body (wholeness in a situation). For example, writing on experiences of hand transplants and bodily integrity, philosophers Jenny Slatman and Guy Widdershoven argue that "bodily integrity should be understood as a 'differential' rather than a 'substantial' wholeness."[290] As a differential, Slatman and Widdershoven mean to revise the concept of bodily integrity, in recognition that "one's own body is *always already* intruded upon by something foreign or strange […] or strangeness" so it never exists, purely as a whole.[291] Rather bodily integrity can at best denote an enactment of preferred relations, as an "(ongoing) process of integrating experience" into oneself or "ownness," which defies the paradigmatic body as closed, bounded and complete, and insists upon the body's reliance on that outside for its very performance as a body.[292] Incorporating a hand transplant then is not different in kind from other performances of the body, rather a difference in degree.[293] And the question for ethics and law then becomes what, in the world, is tolerated in our performances of the body; what situations of corporeal integrity can we dwell with.[294]

One may thereby form expectations about how the tissue ought to be used or disposed where the tissue forms part of one's corporeal integrity. The violation of that expectation by some contrary use or disposal could elicit a feeling of injustice; an injustice

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[290] Jenny Slatman and Guy Widdershoven, 'Hand Transplants and Bodily Integrity' (2010) 16:3 *Body and Society* 69, 77 [Slatman and Widdershoven (2010)].
[291] Ibid, 78.
[292] Ibid, 81-82.
[293] Ibid.
[294] Slatman and Widdershoven's integrity as differential resonates with Diprose's dwelling-with as always already demanding an ethics of tolerance, see Diprose (2002), *supra* note 3. For Diprose, the body dwelling-with is a pattern of existence that can sediment, forming some habits over others, or it can proliferate, depending on with whom and what a body dwells. Our bodies always already dwell with, or tolerate, interferences of others, which do not necessarily intrude on the body, but whose presence mediate what our bodies tend to do and become. "Intrusion" requires an *ex post facto* valuation, initiated by the withdrawal of tolerance. Furthermore, as Diprose notes at p. 268, the tolerance exhibited by bodily integrity is "not temporally prior to or separate from the process of socio-legal determination," but instead arises inextricably in the flux of law and life.

caused in one's experience of their corporeality becoming misfit.[295] However, those expectations are always a matter of degree and depend contextually in the situation of one's experience. Andrew, for example, wanted to retain the articulated bone from his leg, and a portion of the leg's skin, but his relations to the "extra" bits of bone and skin were comparatively weaker.[296] When he challenged the hospital's decision, he did not differentiate between them as all the tissues formed part of a project of belonging; but once the leg was released to him those differentiations began to matter as he considered *how* to be with them, with some belonging more than others in his life. Some uses were unsightly ("[i]t's probably rotten now […] That won't be a pretty sight […] skin and […] hair and all that… weird") or risked illness ("We talked about [cooking and eating it] […] but it was… it was way too far gone that we didn't") and so were not done, whilst others could be "turned into art" because of their "bizarre," "freaky" or "odd" appearance.[297] The relation of these tissues to him then depended on their incorporation in a project at hand.[298]

The incorporation of separated tissues into corporeal integrity also need not consist of the self, such as with self-ownership or personhood. Rather the use of tissues may enable relations of belonging that exceed oneself. Andrew's example suggests that some relations of belonging were, for him, about desire, pleasure, or augmenting or enlarging experience in the making of meaning out of tissues formerly of him.[299] They were about playing with the bodily appearance of a separated part, so to make something "beautiful," "special" or "one of a kind," to which he could continue to relate. Sometimes those qualities came not from its

[295] This corporeal justice may be thought of as an expression of spatial justice in the sense of Philippopoulos-Mihalopoulos (2014), *supra* note 9, where two or more "bodies" cannot occupy the same place. Bodies always affect one another, and in jostling to take place at a particular spot they necessarily displace one another, enabling the question of spatial justice. "Bodies" here is understood in the sense from Gilles Deleuze of anything capable of affecting another, and being affected, see Gilles Deleuze, *Foucault* (Minnesota: University of Minneapolis Press, 1988).
[296] Andrew Interview (2021), *supra* note 62.
[297] Ibid.
[298] Diprose (2002), *supra* note 3.
[299] Ibid.

bodily appearance alone, but rather from the unreality of its existence, which depended on its origin in him, in a sense, but also exceeded him in that they stood as meaningful "piece[s] of art" on their own; something significant was created in what the tissue could do without him (e.g., in its preservation, in its "articulation".) As philosophers Elizabeth Grosz and Mark Johnson separately argue, bodies' corporeality is fundamentally oriented to making meaning in the environment.[300] The body's composition with its surroundings is grounded in aesthetics in that perceiving, creating and transmitting senses and meanings can be significant, ensuring survival or otherwise enlarging an organism's existence.[301] Scaling up from "lower order" organisms to the human, for Johnson, all concepts and action relate back to the meanings produced by bodies.[302] Relatedly, for Grosz, art and aesthetics can be understood as an effect of all organic bodies orienting within, framing and acting relative to their milieu, creating worlds they then inhabit.[303] Adapting either sense, Andrew's experience of what uses of the tissue were *corporeally just* may have relied on what uses could create meanings he wanted to be with—what meanings with which he wanted to belong. These meanings did not need to be coterminous with the self. All that mattered was that he formed relations of belonging with those meanings, and that at least some aspect of them formed part of the integrity of his corporeal space.

Jean-Luc Nancy wrote of bodies as a "prof-fering," a "thrusting […] outside the self so that there might be a 'self,'"[304] but that "corpus *is never properly me*" but always a reconstruction done afterward.[305] The "thrusting […] outside the self" is an enactment, a doing, an exscription, which does not originate in the autonomy of oneself, but instead forms

[300] Elizabeth Grosz, *Chaos, Territory, Art: Deleuze and the Framing of the Earth* (New York City: Columbia University Press, 2008) [Grosz (2008)]; Johnson (2007), *supra* note 251.
[301] Grosz (2008), *supra* note 300; Johnson (2007), *supra* note 251. Grosz is critical of the Darwinian thesis which ties animal behaviour to survival of the species.
[302] Johnson (2007), *supra* note 251.
[303] Grosz (2008), *supra* note 300.
[304] Jean-Luc Nancy, *Corpus* (New York: Fordham University Press, 2008), 27.
[305] Ibid, 29.

heteronomously as others adjoin, abut, touch, perforate, enter, dwell with the body.[306] Likewise the feeling of corporeal justice is a proffering, an enactment that draws from outside oneself for its expression, forming heteronomously from the relations of others that dwell with a corporeality. Accordingly, as heteronomy, the law of the body expressed in corporeal justice is not the property of oneself. The law "grounded in the body" is not, as Peter Goodrich describes with reference to Sir John Fortescue's *De Natura Legis Naturae*, "instituted according to laws of descent from the wholeness, integrity or truth of a sovereign body."[307] The law grounded in the body is rather a law grounded in *bodies* who belong to each other, held together in a corporeal integrity so to form an order of things that supplies a principle of normativity. However, this corporeal integrity is always at risk of rupture.[308] The separated tissue can form part of integrity, as one of those heteronomous parts. But the tissue belonging to the body also risks falling away, no longer belonging, or belonging differently than before, which potentiate the loss of a prior integrity and assumption of another in its wake. The assumption of another integrity may form, on the grounds of one's relations, something unfamiliar to what was before, proffering a different law.[309]

Tissue falling away from the body can thereby condition the retrenchment, alteration or displacement of corporeal integrity. As Andrew observed, he never thought of his body parts in the way he did now.[310] But upon his leg's detachment from his body he suddenly took notice.[311] His leg's separation pulled his corporeal integrity toward something different: multiplications, adulterations and admixtures in his experience of corporeal integrity, which exceeded the body he knew before and challenged, for a moment, what he experienced as

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[306] Ibid.
[307] Peter Goodrich, "The Continuance of the Antirrhetic" (1992) 4:2 *Law and Literature* 207, 209 [Goodrich (1992)]; John Fortescue, *De Natura Legis Naturae* (1463).
[308] MM Slaughter, "Sacred Kingship and Antinomianism: Antirrhesis and the Order of Things" (1992) 4:2 *Law and Literature* 227 [Slaughter (1992)].
[309] Ibid.
[310] Andrew Interview (2021), *supra* note 62.
[311] Ibid.

belonging to it.[312] The presence of these multiplications, adulterations and admixtures are only ever suggested in the situation of corporeal integrity, surfacing in experience as ambiguities which compel action, variably expressed, to make sense of the tissue now separate. Conventionally sourced, posited forms of law can lend to the reduction of this ambiguity, as Diprose notes.[313] But in other situations, posited law can accentuate the uncertainty exhibited by tissues, especially, as Andrew's conflict with the hospital suggests, where those legal forms diverge from overriding feelings of corporeal justice and exaggerate the estrangement from which those feelings result.

5.5. An Orature

The testimony drawn from conversation with participants demonstrates experience *prior to* sedimentation in an archive; *prior to* its composition as writing. Yet that testimony is no less suggestive of a legal literature. Each account draws on feelings of justice relative to what is done in the name of law. Each suggests their satisfaction, or dissatisfaction, with the relations held up, dropped or extinguished in the lawful disposal of human tissue. Each offers their understanding of what is lawful, of how their lives take place among norms about their body. The aurality of these literatures might imply a temporariness and malleability to their expression; a short and varied existence as sound unsuitable for the name of literature or law. But even if it were true that their aurality rendered them irremediably brief and unstable, their exclusion from the category of legal literature would reflect bias for the written word.

[312] Slaughter (1992), *supra* note 308.
[313] Rosalyn Diprose, "Giving Corporeality Against the Law" (1996) 24 *Australian Feminist Studies* 253 [Diprose (1996)].

Law can also exist aurally, conveyed by oral traditions.[314] As Bernard Hibbitts helpfully reminds me, "[t]he classical Greek word for law, *nomos*, was itself derived from the verb *nemein*, meaning 'to cite' or 'to read aloud'" and so "it should not be surprising that Greek law was long understood as having intimate ties to oral poetry, and, via an alternative rendering of *nomos* as 'tune,' even music."[315] Likewise late mediaeval law, even as it increasingly incorporated the visual medium of writing, "continued to echo venerable aural habits" which it previously depended on completely.[316] Further, as Deborah Cheney notes—drawing on the postcolonial concept of "orature"[317] from Ugandan linguist Pio Zirimu—"using other forms of 'texts' […] reinforces the call for a 're-reading' and thereby re-interpretation of the experiences" the written, posited law otherwise so authoritatively represents.[318] It recognizes that written text can never completely represent the law, even as the printing-press dominates, and the value of experience conveyed outside the text's parameters.[319] There can be an "orature-as-law," which "facilitate[s] imagining new, or renewed forms of […] law."[320]

The orature of participants is thereby not mere opinion. It supplies the principle for law's expression; it could, if conditions favour it, speak a law into existence, taking shape

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[314] Legal scholars have for decades used interviews to study the experience of law. This is perhaps best represented by scholars of legal consciousness, see e.g., Ewick and Silbey (1998), *supra* note 1; Merry (1990), *supra* note 1. The aurality of law need not depend on its transformation into an oral literature to be recognised as a relevant datum for legal scholarship. But my interest is in how this aurality may relate to minor legal literatures, like those explored in Chapters 3 and 4. As noted earlier with Mazzei (2017), *supra* note 18, interviews can be studied as if they were a minor literature which entails certain claims about the nature of the information collected by interviews. My observations here on the matter of oral literature are intended to reinforce the claim that interviews can be expressive of literature, which support certain theoretical conclusions I wish to draw.

[315] Bernard J Hibbitts, "Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of the American Legal Discourse" (1994) 16:2 *Cardozo Law Review* 229, 247-248 [Hibbitts (1994)].

[316] Ibid, 253.

[317] Ngũgĩ wa Thiong'o, "Oral Power and Europhone Glory: Orature, Literature, and Stolen Legacies" in *Penpoints, Gunpoints, and Dreams: Towards a Critical Theory of the Arts and the State in Africa* (Oxford: Clarendon Press, 1998). Zirimu coined "orature" to avoid the paradox some saw in the term "oral literature."

[318] Deborah Cheney, "Daughters of the Danaides: An Orature on Women on the Operation of UK Immigration Control". PhD Dissertation, University of Kent, 1994, xvi.

[319] Ibid; Hibbitts (1994), *supra* note 314.

[320] Peter Leman, "Nelson Mandela and Civic Myths: A Law and Literature Approach to Rivonia" in Awol Allo, ed, *The Courtroom as a Space of Resistance: Reflections on the Legacy of the Rivonia Trial* (Abingdon: Routledge, 2016), 63-80, 68-69.

from the feelings of corporeal justice that subtend experience. Likely such a law would be different from the common law. The everyday oratures of law suggest a more complicated set of relations can form part of lawful existence; relations which form from and relative to a broader sense of corporeality than the common law presently admits. But, as the accounts of participants already suggest, the posited law does not hear their oratures. Their legal literatures are discordant with the official stories of the common law, for whom the law can only cognize the body and its parts as of the person or property. Thus, the polyphony of corporeal justice sounded in participants' oratures cannot communicate with a law that refuses to hear. It is meaningless unless others force the law to listen. A law that listens requires a law that goes outside the text; a law that does not limit itself to *seeing*, especially seeing "law as [a] geometry" between freedom and intrusion, subject and other, autonomy and heteronomy.[321]

[321] Hibbitts (1994), *supra* note 314 at 260.

Chapter 6 — Conclusion: Heteronomous Flesh

Abstract

The concluding chapter allows the author to clarify the dissertation's contributions to jurisprudence, namely in excavating modes of legal thought from the historical and contemporary record that have failed or been made absent relative to the use and disposal of the human body and its parts. These legal literatures suggest a materialist theory of law in how human corporeality engenders differences in the lawful use and disposal of the human body and its parts, and sustain feelings of justice relative to them. Human corporeality as generative of legal meaning, and feelings of justice, challenges conventional jurisprudence in the embrace of heteronomy over autonomy. That requires the jurisprudent's office to attune to the heteronomy of flesh, which concepts of "lawscape," "biogenesis" and "antinomian" facilitate.

In earlier chapters I excavated modes of legal thought which hold, or assume, that human corporeality is generative of legal meaning and feelings of justice. These are modes of legal thought found in the historical and contemporary record but generally as failures not as successes.[1] Failures in that these modes are not received, taken up and represented as "Law" by conventional law or jurisprudence in the present; these modes lie outside convention, as ideas made absent or disappeared, or which presently strain for legitimacy.[2] But as Peter Goodrich notes, "[t]hat a text is forgotten does not and cannot mean that it thereby loses its history; its history is precisely contained in the modes of its disappearance."[3] Goodrich continues, "[n]o text […] vanishes objectively, without residue, without trace."[4] By their failure, these legal literatures live on within and make a difference to the law. And if noticed, these literatures can help expose what the law, as it is conventionally written, refuses or ignores—what is not represented in law's authorized stories—but which nonetheless forms part of "the lives and practices that surrounded [the law], that formed its culture."[5] Their trace functions as a spectre, as Jacques Derrida might name it, in the sense

[1] Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld and Nicolson, 1990) [Goodrich (1990)].
[2] Ibid.
[3] Ibid, 44.
[4] Ibid.
[5] Ibid.

of "what is not present"[6] and yet makes a difference in what appears in experience including that of law.[7] A spectre which haunts the present—that which is present—and can impart to those who perceive traces of its defeat how else lives may take place.[8] Accordingly, the desire to "re-read" a literature that has failed "is coincident with the desire to understand legal science from a different frame," which for Goodrich means understanding law by what traditions make absent:

> […] by the strategies of forgetting that accompany any tradition, that create its underside, its positive unconscious: "that level of knowledge that eludes the scientist and yet is part of scientific discourse."
>
> It remains to trace that positive unconscious, that negative structure of legal science, and to specify in this particular instance, in relation to this one text, what it might mean both then and now, in terms of criticism and law, in terms of the institution and of the lives that it institutes. We will trace, in other words, the trajectory of success to read the failures left in its wake; we will trace success precisely in terms of, and from the perspective of, its failures, a tradition understood in terms not of its monuments but of its ruins.[9]

Re-reading failed legal literatures, once buried and forgotten but returned to the jurisprudent, may succour alternate forms of law, alternate lives through law. A re-reading affords the jurisprudent with an encounter with the trace, where a prior struggle to authoritatively present the law as "Law" is evoked, made present to play with and relate to one's current situation. It is a method of rupture, open to the "disquietude" made present through re-readings, "in the instability of forms and evocative nature of traces" they expose.[10]

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[6] Alecia Y Jackson and Lisa A Mazzei, *Thinking with Theory in Qualitative Research: Viewing Data Across Multiple Perspectives* (Abingdon: Routledge, 2012), 22.

[7] Peter Fitzpatrick, "The Abstracts and Brief Chronicles of the Time: Supplementing Jurisprudence" in *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Durham: Duke University Press 1991), 1-33 [Fitzpatrick (1991)]. Also see John Caputo, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (New York City: Fordham University Press, 1997), 77 [Caputo (1997)]. Regarding spectre, see Jacques Derrida, "Spectres of Marx" (1994) 205 *New Left Review* 31 [Derrida (1994)].

[8] Iqra Raza, "I (Don't) See You: Absence, Omissions, and Spectrality in the Works of Ishtiya Shukri" (2021) 86 *The Thinker* 13. Importantly the trace is never fully grasped. As Raza notes at p. 15, "[t]he spectre remains outside epistemology [theories of knowing] and it is precisely this positioning which allows it to survey without being surveyed." Raza continues, "[t]his liminality becomes a powerful subject position in that it facilitates a diagnosis," although it can never supply that diagnosis itself.

[9] Goodrich (1990), *supra* note 1 at 44.

[10] Lars Frers, "The Matter of Absence" (2013) 20:4 *cultural geographies* 431 [Frer (2013)].

As examples of "writing," these literatures can be alternatively described as "minor."[11] "Minor" or "minoritized" literatures fall outside the authoritative code on which conventional writings rely, outside "a dominant social code" that regulates the possibilities of genre and interpretation.[12] Retrieval of the minor by writing is to escape the dominant social code, toward some other meaning in expression.[13] It is to attune writing to something buried in the law as law is often and authoritatively represented; to attune to sounds, images and feelings disappeared in law's enactment as commanding texts or unassailable reason; to attune to what appears gone and is yet retrievable in writing, what can afford a reimagining of what law has done, does and might do if taken up in how we make meaning in the world. A minor legal literature or jurisprudence is, as Peter Goodrich describes, that which "rends, and thence performs a rendering through which the excluded, the others of law, the laws of others, and in methodological terms the peripheral passions, enthusiasms, tones and relationships, movements and moods, potentially intervene"[14] and open law and our experience of it.

It is in both senses I focused on three sets of literatures, historical and contemporary, which trace the significance of corporeality to the law. These literatures demonstrate material processes of the human body factoring in the body's lawful treatment: how the vitality of human flesh—even that which decomposes in spaces of burial such as in Chapter 3, is cleaved in situations of anatomy in Chapter 4, or adulterated in contexts of separation in

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[11] Peter Goodrich, "How Strange the Change from Major to Minor" (2017) 21 *Law Text Culture* 30, 30-31 [Goodrich (2017)]; Panu Minkkinen, "The Radiance of Justice: On the Minor Jurisprudence of Franz Kafka" (1994) 3:3 *Social and Legal Studies* 349 [Minkkinen (1994)]; Shaun McVeigh, "Conditions of Carriage: Finding a Place" (2017) 21 *Law Text Culture* 165 [McVeigh (2017)].

[12] Editors, "Editor's Note" (1983) 11:3 *Mississippi Review* 13, 13.

[13] Gilles Deleuze and Félix Guattari, "What is Minor Literature?" (1983) 11:3 *Mississippi Review* 13 [Deleuze and Guattari (1983)]. To encounter minoritized or minor meanings allows the scholar to reflect upon how these meanings may already matter in life and how they might be taken up, creatively and imaginatively, in the making of novel polities. Such a method involves "the deterritorialization of language, the connection of the individual [text, actor, etc.] to a political immediacy [that exceeds major narratives or stories], and [mapping] the collective assemblage of enunciation." — see Gilles Deleuze and Félix Guattari, *Kafka: Toward a Minor Literature* (Minneapolis: University of Minnesota Press, 1989), 18.

[14] Goodrich (2017), *supra* note 11 at 30-31.

Chapter 5—mediates the body's meaning in the experience of law, making a difference in their lawful use and disposal. That is a law generated in the expressiveness of corporeality, specifically the corporeality *of flesh*, which, as Marty Slaughter's metaphors of decomposition, cleavages, and adulteration helpfully illustrate, obtain their form relative to the meanings associated with the gestures and comportment of a body in fragments.[15] These literatures include writings (Chapters 3 and 4) or testimony (Chapter 5) which intuit a normativity to flesh, whose interiority authors inhabit and imagine through writing;[16] glimmers of alternate modes of writing law relative to the human body in fragments: a jurisprudence made possible and practised by *writing as flesh,* imagining how norms take place in the movements of flesh.[17] The contribution of this dissertation to jurisprudence lies in the excavation of these legal literatures, which show the persistent relation of a bodily materiality to law, and suggest the promise of a method open to the atmospheres that accrete as, engender the effects of, and transform law.[18]

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[15] MM Slaughter, "Sacred Kingship and Antinomianism: Antirrhesis and the Order of Things" (1992) 4:2 *Law and Literature* 227 [Slaughter (1992)]; also see Peter Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (Berkley: University of California Press, 1995) [Goodrich (1995)]; Peter Goodrich, "The Continuance of the Antirrhetic" (1992) 4:2 *Law and Literature* 207, 209 [Goodrich (1992)].

[16] See discussion of intuition in Henri Bergson, *The Creative Mind: An Introduction to Metaphysics* (Mineola, NY: Dover Publications, 2007) [Bergson (2007)]; Vernon W Cisney, "The Writer is a Sorcerer: Literature and the Becomings of *A Thousand Plateaus*' (2020) 14:3 *Deleuze and Guattari Studies* 457 [Cisney (2020)]. As Cisney writes (p. 461), intuition for Bergson is a method of "transporting […] oneself into the interior of the thing, and knowing it from the inside."

[17] Gilles Deleuze and Félix Guattari maintained that minor literature "mark[s] a movement of the language toward its extremes," "ceas[ing] to be representative in order to stretch toward its extremes or its limits" which inaugurates "a new expressiveness […] a new intensity." It is to "write as a dog" "precisely" because "a dog does not write," so that writing (or any act by which one makes meaning) swells and irrupts in imagination, in the process of creating. See Deleuze and Guattari (1983), *supra* note 13 at 22-23, 27. Also see N. Katherine Hayles, "Speculative Aesthetics and Object-Oriented Inquiry (OOI)" in Ridvan Askin, Paul J. Ennis, Andreas Hägler and Philipp Schweighauser, eds, *Speculations: Aesthetics in the 21st Century* (Goleta, CA: Punctum Books, 2014), 158-179, 178 [Hayles (2014)].

[18] The act of recollection, then, is not done with an eye toward the dispassionate presentation of the past as an external, intractable fact; but, rather, seeks to engage with the creative reinventions made possible by the method of "retrospection," interiorizing the trace "for those who live on or those who live now." Peter Goodrich, "Doctor Duxbury's Cure: Or, a Note on Legal Historiography" (1994) 15 *Cardozo Law Review* 1567, 1568 [Goodrich (1994)].

The literatures also complement the aporias traced in Chapter 2, where doctrines of contemporary common law and conventional jurisprudence—namely personality and property—cannot account for some differences in the lawful treatment of the human dead and tissue. As these aporias suggest, the official narratives of law are already necessarily supplemented: supplemented by the materiality of the dead body and bodily parts, which supply an alternative basis for the law. By supplement, I mean in the sense of Derrida,[19] in that the actual work of legal doctrines often avers to or relies on the materiality of the body and bodily parts in order to take effect, but in their representation as law doctrines vacates the body of its variably behaving flesh, insisting on the unchanging architecture of personality/subject and property/object by which relations of rights, duties, powers and disabilities take hold. Averment to or reliance on corporeal materiality suggests the contingency of the doctrines; it gestures to a struggle to fix legal meaning in the body, and the possibility of law being otherwise.[20] The excavation of the legal literatures in Chapters 3, 4 and 5 ought to have further evinced the possibility of the law being otherwise, even if they could not answer in full all the aporias traced in Chapter 2. Their recollection was to augur a mode of legal writing—a minor jurisprudence—which could reinvigorate the wastelands of the common law. To quote Goodrich again, it was to "break the strands that trap and hold the imagination in the dead zone of a sticky and immobile *lex*, the iron cage of a putatively comprehensive rule, decision, or other major code of code," for the purposes of critique and guiding future conduct with the law.[21]

[19] Jacques Derrida, *Of Grammatology* (Baltimore: John Hopkins University Press, 2016). At p. 175, Derrida defines supplement as supplementing, in that "[i]t only adds to replace. It intervenes or insinuates itself in-the-place-of; if it fills, it is as if one fills a void. If it represents […] it is by the anterior default of a presence. Compensatory and vicarious, the supplement is an adjunct, a subaltern instance which takes-(the)-place."
[20] Fitzpatrick (1991), *supra* note 7.
[21] Goodrich (2017), *supra* note 11 at 30.

To begin that process, I wish to conclude the dissertation by paraphrase, so that traces suggested by the literatures of this dissertation can be brought to bear on writing law going forward.[22] Etymologically, *paraphrase* comes from the Greek *para*, meaning to modify, and *phrazein*, meaning to tell a story.[23] In that sense to paraphrase is to restate a text in a modified form, which does not replace the original, but rather sits beside it.[24] The retelling may be complementary, or offer another interpretation, but altogether what matters for my purposes is that the art of paraphrase is evocative.[25] Accordingly, this concluding chapter engages in paraphrase, in an effort to complement the literatures raised in the dissertation and supply the basis for a minor jurisprudence of flesh. I want to retell the story of this dissertation to make it conversant with conventional and critical jurisprudence relative to the concept of *heteronomy*.[26] This should not come as too great of a surprise. I began the dissertation by naming *heteronomy*, and each literature has been separately related to the concept. But so far, I have neglected what the concept means to conventional jurisprudes and where its critique leads. I also have not related together the retrospection of my selected literatures to the concept of heteronomy, except for what could be purported in passing in each chapter. Paraphrase should thereby clarify the contribution to jurisprudence, by centering the parallel story of heteronomy, the pervasiveness of an inside-outside geometry owing to heteronomy's conventional treatment, and its critique in critical legal theory. The minor jurisprudence suggested by the literatures of the dissertation contribute to this critique, and depend on the re-reading of heteronomy, which can be more methodically set out here.

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[22] Goodrich (1994), *supra* note 18.
[23] Merriam-Webster, <paraphrase>, https://www.merriam-webster.com/dictionary/paraphrase.
[24] Stephen Guy-Bray, "Purdy's Art of Paraphrase" (2008) 31:3 *Journal of Modern Literature* 102.
[25] Ibid.
[26] Stewart Motha, "'The end begins': Law (*Nomos*) and Nature (*Physis*) as Genre: For Peter Fitzpatrick: In Memoriam" (2021) *Law, Culture and the Humanities*, https://doi.org/10.1177/17438721211030139 [Motha (2021)].

The concluding chapter begins with the conventional account and the critique of heteronomy, starting from Immanuel Kant and ending with Stewart Motha and Jean-Luc Nancy.[27] That critique brings me to an ecological theory of law, as offered by Andreas Philippopulos-Mihalopoulos and Margaret Davies, to which the literatures from this dissertation contribute relative to the body decomposing, in parts or otherwise in fragments.[28] But whilst human corporeality as generative of legal meaning, and feelings of justice, challenges conventional jurisprudence in the embrace of heteronomy over autonomy, it also requires the jurisprudent to revisit the notion of office if an heteronomous flesh is to be workable for law. In the final section then, the chapter and dissertation reflect on the concept of office, as that has already been explored by Olivia Barr, Shaunnagh Dorsett and Shaun McVeigh,[29] as one of the conditions needed for the jurisprudent to *write as flesh.*[30] Writing as flesh is what the literatures of this dissertation evidence, showing the viability of attuning to and inhabiting the atmospherics of law, where the jurisprudent has recourse to a corporeal generativity.[31]

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[27] Ibid; Immanuel Kant, *On the Foundation of Morality* (Bloomington: Indiana University Press, 1970), Chapter 8 [Kant (1970)].
[28] Margaret Davies, *Law Unlimited* (Abingdon: Routledge, 2017) [Davies (2017)]; Margaret Davies, *EcoLaw: Legality, Life, and the Normativity of Nature* (Abingdon, UK: Routledge, 2022) [Davies (2022)]; Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (Abingdon: Routledge, 2014) [Philippopoulos-Mihalopoulos (2014)]. Also see Elizabeth Grosz, *Chaos, Territory, Art: Deleuze and the Framing of the Earth* (New York City: Columbia University Press, 2008) [Grosz (2008)]; Illan rua Wall, *Law and Disorder: Sovereignty, Protest, Atmosphere* (Abingdon: Routledge, 2021) [Wall (2021)].
[29] Olivia Barr, "A Jurisprudential Tale of a Road, an Office, and a Triangle" (2015) 27:2 *Law and Literature* 199 [Barr (2015)]; Olivia Barr, *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place* (Abingdon: Routledge, 2016) [Barr (2016)]; also see Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Abingdon: Routledge, 2012) [Dorsett and McVeigh (2012)].
[30] Cisney (2020), *supra* note 16; Deleuze and Guattari (1983), *supra* note 13; Hayles (2014), *supra* note 17.
[31] Regarding atmospheres of law, see Philippopoulos-Mihalopoulos (2014), *supra* note 28; Wall (2021), *supra* note 28.

6.1. Heteronomy: Concept and Critique

The concept of heteronomy developed first with Immanuel Kant as the negation of individual autonomy.[32] In Kant's formulation, heteronomy (the law of the other) described an extrinsic source of law, which was imposed on or otherwise undermined the autonomy of the individual (the law of the self). Autonomy expressed "the supreme principle of morality" as a law given to oneself through the exercise of reason, which was posited as a universal law and held as one through the exercise of choice through one's will.[33] To posit a universal law was the work of what Kant described as the "categorial imperative," which was itself contentless but denoted a procedure for practical reason: coming up with a rule for action (maxim) through the exercise of reason in itself, which held as a law for oneself irrespective of what was immediately gained or lost personally by abiding by it. Heteronomy, by contrast, was a reprehensible constraint on the categorical imperative or its corruption by passive reception of what was outside oneself, which undermined autonomy as that involved true choice. For example, Kant wrote:

> Whenever the will seeks its law somewhere other than in the fitness of maxims to be self-made universal law, that is, whenever the will seeks law in the objects of choice rather than in the will itself, then the result will always be *heteronomy*. Whenever the will fails to give itself law, seeking instead the source of its rule in a desire for some objects or in some rational ideal, the derived imperative can only be hypothetical […] The moral law, therefore, must completely ignore all objects to that they have no influence whatsoever on the will; in this way practical reason (the will) will not support some outside interest but rather will exhibit its ultimate authority as the supreme lawmaker.[34]

Sources of heteronomy then included all which negated the categorial imperative, like sensations and "moral feeling."[35] Heteronomy could also be the maxim or legislation of

[32] Meriam Webster Dictionary states the first known use of "heteronomy" was in 1798. Kant appears to be who introduced the term to modern philosophy. For e.g., see Kant (1970), *supra* note 27 at Chapter 8.
[33] Ibid. In contradistinction to unthought or irrational desire, a universal law is capable of recognition and adoption by others on the basis of its expression through reason.
[34] Ibid, 441.
[35] Ibid, 442.

another, if it was not properly subjected to the procedure of practical reason.[36] Accordingly, heteronomy, as a concept, formed part of Kant's critique of modes of thought which, in his view, unseated autonomy as the supreme principle of morality. Heteronomy as the negation of autonomy connoted the possibility and superiority of a disembodied rationality, exemplary of autonomy, through which moral law could be arrived at and govern in the interests of liberty. Kant's formulation of autonomy and heteronomy tended to prioritize rights under so-called "private law" (e.g., property, contract) over public law, with the former established on the back of the free, self-legislating "legal personality" and the latter as heteronomous intrusion.[37]

By the twentieth century, Kant's formulation of heteronomy weakened in influence. The analytic jurisprudent Hans Kelsen, for example, described the free, self-legislating "nature of legal personality" so often described by the legal and political theory of the time as fictitious, in that "autonomy exists only in a highly circumscribed and imperfect sense" relative to the "objective law, as a heteronomous norm."[38] Kelsen continued by explanation that individual autonomy, as Kant and his contemporaries understood it, advanced interests in property and contracts against supposed despots, namely the sovereign, but as the contingency of all law, including private law, was recognized, their reliance on a theory of autonomy as law *a priori*, superior to any law extrinsic to oneself, could not hold.[39] Individual autonomy then depended on, and could not easily be distinguished from, heteronomy in fact;[40] positivist theories of law could not admit anything else, especially as such jurisprudents relied on a theory of command and sanction (a coercive order) as one of the

[36] Ibid.
[37] See discussion in Hans Kelsen, "The Pure Theory of Law: Its Method and Fundamental Concepts" (1934) 50:4 *Law Quarterly Review* 474 [Kelsen (1934)].
[38] Ibid, 493.
[39] Ibid.
[40] Ibid.

basic elements of valid "Law."[41] Autonomy and private law, instead of characterizing "the 'legal principle' [that is] the freedom *from* [heteronomous] law," formed part of a general theory of law as a relative differentiation, not absolute opposition.[42]

The problem of heteronomy was instead transposed onto analytic jurisprudents' theories of legal systems. Analytic jurisprudents generally studied the formal conditions of law, where law existed for them as rules and procedures posited by convention (such as Kelsen and HLA Hart), and for which a science of law depended on a certain metaphysics of legal norms and autonomy in contradistinction to so-called laws of nature.[43] Returning to Kelsen again, Kelsen's "pure theory of law" (a positive legal theory *par excellence*) presupposed the enactment of a grounding or basic norm (*grundnorm*) through a procedure analogous to Kant's categorial imperative.[44] The entire legal system was then derived, according to formal logic, from the authority inaugurated by the basic norm.[45] Autonomy—rather than denoting a quality of the individual person—expressed a notion related to the basic norm: the capacity of a legal system to give itself its own laws.[46] For example, Kelsen described a situation of *legal* autonomy wherein *legal organs* (e.g., sovereign institutions, assemblies, parties to a contract) constituted, according to a shared rationality ("cognition"), a unified or whole system of social action, where human conduct became ordered and meaningful through their correspondence and non-correspondence to legal norms.[47] Such a system functioned largely independently of nature, represented in Kelsen's distinctions between causality (a function of nature: if *A* is, then B is) and imputation (a function of legal

[41] Neil MacCormick, "The Relative Heteronomy of Law" (1995) 3:1 *European Journal of Philosophy* 69 [MacCormick (1995)].
[42] Hans Kelsen, *Pure Theory of Law* (Berkley: University of California Press, 1967), 283 [Kelsen (1967)]. Kelsen further wrote: "The logically entirely untenable dualism has no theoretical, but only an ideological character."
[43] Ibid. Also see HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 2012) [Hart (2012)].
[44] Kelsen (1967), *supra* note 42.
[45] Ibid.
[46] Ibid.
[47] Ibid, 72.

norm: if A is, then B ought to be) which did not need to cognize each other.[48] Imputation was not exhausted by, but it characterized legal norms.[49] *Legal* imputation, as opposed to any other kind, was distinguished based on its subordination to the basic norm as the original imputation (for e.g., "One ought to obey God's commands") presupposed by a legal community.[50] *Legal* imputation, as opposed to any other kind, thus conferred responsibility (or obligations, duties, etc.) actionable *at law* where one was derelict, and that imputation held valid as long as it related to a chain of norms derived from the basic norm.[51] Kelsen wrote:

> [T]he legal order is a system of general and individual norms connected in such a way that the creation of each norm of this system is determined by another and ultimately by the basic norm. A norm is part of a legal order only because it had been created according to the provision of another norm of this order. This regression leads eventually to the presupposed basic norm, which is not created according to the provision of another norm. Speaking not only of the legal order, but also of a legal community (constituted by that order), we can say that a legal norm is part of a certain legal order if it was created by an organ of that community and, therefore, by the community. But the individual who created a norm is an organ of the legal community because and insofar as his function is determined by a norm of the legal order that constitutes the community and can therefore be attributed to the community. The attribution of the law-creating function to the legal community is based exclusively on the legal norm that determines this function. Just as the legal community. Consists only in the legal order, in the same way the sentence saying that a norm is part of a legal order because it is created by an organ of the legal community, only means that a norm is part of the legal order because it is created according to the provision of a norm of this legal order and, ultimately, according to the basic norm of this legal order.[52]

Heteronomy then reappeared at the scale of systems (as opposed to individual persons) as norms or facts of nature outside legal autonomy. Instead of the purity of individual will, purity of *legal* will became the object of analysis in the sense of its derivation from the basic norm's original imputation. Of course, neither the autonomous individual nor the autonomous law was hermetically sealed against the outside world; Kant and analytic

[48] Ibid.
[49] Ibid.
[50] Ibid, 194.
[51] Ibid.
[52] Ibid, 233-234.

jurisprudents did not suggest people or law were causally isolated. Rather the categorical imperative, and the *grundnorm*, determined what counted as moral action (for Kant) or lawful action (for Kelsen and colleagues) which could coexist with that outside either.[53] The categorial imperative imputed moral responsibility, or status, to an individual's choice—treating it as an end unto itself—from which moral protection ought to have been guaranteed against extrinsic forces.[54] The basic norm and norms subordinate to it imputed legal responsibility, or status, to the behaviour of legal actors—likewise treating it as an end unto itself—from which a system of obligations and interdictions were possible.[55] The infinite chains of factual causality outside the individual or law merely became noise, backgrounded if not actively excluded *unless* it was capable of transformation by the categorial imperative, or *grundnorm*, into an expression of rational will. For example, Kant was satisfied that some heteronomous influences could be sublimated by the will into autonomy, as long as that outside the will was transformed through reason.[56] Relatedly, depending upon a given legal system, non-legal norms and facts could be cognized by legal organs according to certain norms (such as with legislation or judicial interpretation), and thus rationally (or validly) incorporated into the law.[57]

More recently, drawing inspiration from cybernetics, legal autonomy has been re-theorized—following sociologist Niklas Luhmann—as autopoietic or self-instituting, closed to its environs unless its peripheral organs transduce the communicative elements of that environment into codes meaningful within the legal system.[58] Transduction done at the boundary of a legal system does not require rationality *per se*, rather it involves conformance

[53] Kant (1970), *supra* note 27; Kelsen (1967), *supra* note 42.
[54] Kant (1970), *supra* note 27.
[55] Kelsen (1967), *supra* note 42.
[56] Kant (1970), *supra* note 27.
[57] Kelsen (1967), *supra* note 42.
[58] See e.g., Niklas Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2008); Gunther Teubner, *Law as an Autopoietic System* (London: Blackwell, 1993). Admittedly, I adopted a systems theory approach to law and society in my LLM thesis, Joshua David Michael Shaw, "Defining Death: Law, Language, and Systems." LLM Thesis, Dalhousie University, 2016.

with a set of procedures by which a signal external to a system is transformed into a language cognizable by that system, producing behavioural change endogenous to it. It is in that sense that, for Luhmann, autopoiesis is distinct from the project of Kant.[59] Luhmann explains that autopoiesis "replaces Kantian premises," in that "autopoietic systems need not be transparent to themselves" like the exercise of reason through consciousness.[60] Rather all that is required for Luhmann is "recursivity itself,"[61] whose operations can be distributed and without reflexivity. But as Drucilla Cornell notes, this is just "[t]he newest brand of legal positivism" whose "ultimate project […] remains the same": "the positive, in any of his guises, must postulate a self-maintaining, even if evolving, *cognitive system* in which there is what Luhmann calls normative closure."[62] A closure by which "the normativity of law can only be established by reference to the legal norms already in place as they are *authorized*, and, *therefore, justified* by the system."[63]

Across formulations of normative closure is a geometry which divides an inside from an outside.[64] The inside—that of autonomy—is endowed with the capacity for creation, whose powers are self-referentially generated, according to its own agency, will or virtuality

[59] Drucilla Cornell, "Time, Deconstruction, and the Challenge to Legal Positivism: The Call for Judicial Responsibility" (1990) 2 *Yale Journal of Law and Humanities* 267 [Cornell (1990)].
[60] Niklas Luhmann, "Closure and Openness; On Reality in the World of Law" in Gunther Teubner, ed, *Autopoietic Law: A New Approach to Law and Society* (Berlin: De Gruyter, 1987), 335-348, 340 [Luhmann (1987)].
[61] Ibid, 336.
[62] Cornell (1990), *supra* note 59 at 270.
[63] Ibid.
[64] Others have observed the relevance of geometry to analysing past jurisprudential traditions. For e.g., the formal or analytic jurisprudence of Christopher Columbus Langdell, in the US, was described as adopting a Euclidean geometry, common throughout Enlightenment thought including Kant, by Thomas Grey. See e.g., Thomas C Grey, "Langdell's Orthodoxy" (1983) 45 *University of Pittsburgh Law Review* 1. Grey also notes the persistence of an inside-outside distinction in Langdell's jurisprudence arrived at according to a certain geometry of scientific inquiry.

without apparent need for that which lies beyond it.[65] The outside—that of heteronomy—is encountered from the perspective of the inside, as something other, penumbral and intrusive. The identity of this inside (as the will of a moral agent, or a recursively valid law) relies on a "bracketing" or differentiation of the outside (perhaps better described as its evacuation) so the latter is removed from view, suppressed as a matter of concern except where necessary to and translated for operations inside.[66]

However, autonomy (of the individual, of the law) has undergone significant critique in the twentieth century. For example, analytic jurisprudent Neil MacCormick characterized individual autonomy (and its laws of freedom) as highly circumscribed by and dependent on the "relative heteronomy" of law.[67] Even where autonomy is extended to decisions of deliberative bodies (e.g., legislative assemblies or other democratic councils), as the sum and balance of reasons given in discourse by autonomous persons, MacCormick observed "[n]one of us is likely to achieve this unaided."[68] All expressions of so-called autonomy rely on "education," "nurture," and the "views" of others, which MacCormick described as "sympathetically administered heteronomy"—here, MacCormick cites feminist legal theorist Jennifer Nedelsky who herself writes; "If we ask ourselves what actually enables people to be

[65] MacCormick (1995), *supra* note 41. "Apparent" is an important qualification, especially where autonomy is more complicatedly rendered relative to its outside. Luhmann, for example, speaks of a material continuum which a system, differentiated from its environment, exists within. That outside the system is not mere chaos, counterposed to order established within a system. Rather, the material continuum a system is imbedded in is composed of other systems and environments which create a network of communications. A system, as a differentiation, is not isolated but forms part of this communicative network. Indeed, the system often relies on communication across the material continuum for its original and ongoing differentiation. In that case, the outside *is* needed, and "the concept of *autonomy* of the system can be freed from traditional assumptions and redefined," per Luhmann (1987), *supra* note 60 at 345. But even then "autonomy is […] the fact that operations can be linked with operations only selectively, and that recursive applications of operations to results of operations therefore inevitably, if they occur, lead to the differentiation of systems."
[66] Ibid.
[67] MacCormick (1995), *supra* note 41 at 70.
[68] Ibid, 74.

autonomous, the answer is not isolation, but relationships."[69] Furthermore, law in itself, outside the moral agent, is heteronomous, "because it is […] institutional and authoritative," "it confronts each moral agent with categorical requirements in the form of duties, obligations and prohibitions that purport to bind the agent regardless of the agent's own rational will as an autonomous moral being."[70] Autonomy is only ever possible—if it is at all—in relation with others; relations that support, facilitate, delimit, bound, etc. an individual's will.[71] Autonomy is inextricable from the relations of heteronomy which supply autonomy its content and scope, and make possible its enactment.[72]

Relatedly, transposed to legal autonomy, legal systems cannot be understood apart from the social and physical context such systems are expressed within; legal autonomy, if it exists at all, takes form in the relative heteronomy of the social and physical world, which realist and sociological jurisprudence, and critical legal theory, have each sought to theorize.[73] For example, legal realist Lon Fuller argued that actors—in both law-making and law-applying acts—rely on "implicit elements" in addition to the "made law" of legislation and court decisions.[74] A statute cannot be "self-applying," its meaning depends on "a process of

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[69] Ibid; Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 *Yale Journal of Law and Feminism* 7, 12. Also see Jennifer Nedelsky, *Law's Relations* (Oxford: Oxford University Press, 2004) [Nedelsky (2004)].
[70] MacCormick (1995), *supra* note 41 at 78.
[71] Ibid. See Nedelsky (2004), *supra* note 69.
[72] Nedelsky (2004), *supra* note 69.
[73] By "critical legal theory," I do not mean the relatively short-lived faction of American scholars conducting *critical legal studies* in the 1970s and 80s; many law teachers collapse critical legal theory with the US's critical legal studies movement, pronouncing its time of death as sometime in the early 1990s; and such a collapse is, what Illan rua Wall, Sahar Shah and Freya Middleton describe as, an "imperial move, essentially silencing the very different critical traditions that are found around the world." This includes silencing, as James Gilchrist Stewart recounts, British, Australian and (some Canadian) jurisprudents who have outlived the "dead" US movement and proliferated, and continue to proliferate, critical modes of legal theory for Anglophone jurisprudence. It also includes "critical theories of law" more generally, including "Marxism, feminism, post-structuralism, post-colonialism and critical race theory,' as well as "critical fringes of law and literature, law and film, socio-legal studies, legal ethnography and legal geography." See James Gilchrist Stewart, "Demystifying CLS: A Critical Legal Studies Family Tree" (2020) 41:1 *Adelaide Law Review* 121; Illan rua Wall, Sahar Shah and Freya Middleton, "Introduction: Critical Attractions" in Illan rua Wall et al., eds, *The Critical Legal Pocketbook* (London: Counterpress, 2021), 1-10, 3.
[74] Lon Fuller, *Anatomy of the Law* (New York City: Praeger, 1968), 44 [Fuller (1968)].

adjusting the statute to the implicit demands and values of the society to which it is to be applied."[75] Relatedly, "[e]very exercise of the law-making function is accompanied by certain tacit assumptions, or implicit expectations, about the kind of product that will emerge," which may not be rendered into legal text, but nonetheless matter to "the very meaning of law itself."[76] The presence of implicit elements led to infinite varieties of law for Fuller, corresponding with the infinite varieties of social life, belying any sense of a universal law and requiring a sensibility different from analytic jurisprudents focused on law's autonomy. Likewise, Julius Stone wrote that jurisprudence necessarily required its practitioners to be heteroglossic: law's diversity demanded different styles or modes of inquiry fit for purpose, including sociological jurisprudence (what has lately been called socio-legal theory) as a means of making sense of law's relationships to that outside it.[77] Jurisprudence as heteroglossia acknowledged that law was anything but itself, always existing as a composite which mattered differently to different speakers.[78] Law as heteroglossia is elaborated by critical legal theorists, as exemplified by Goodrich, for whom law is not a singular substance but rather complexes of inter- and intra-discourses, which accrete as effects on behaviour.[79] There is a fundamental hybridity to law and life which irrevocably complicates the project of analytic jurisprudence, and Kantian ethics, potentially jettisoning its geometry of inside/outside.

In pursuit of that hybridity, Stewart Motha has rehabilitated the critique of autonomy—and the embrace of "the heteronomous"—relative to the division of, and opposition between, *nomos* (law, culture, technè) and *physis* (nature).[80] *Nomos* is often associated with the

[75] Ibid, 59.
[76] Ibid, 60.
[77] Julius Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control, a Study in Jurisprudence* (Buffalo, NY: Hein and Co., 1946)) [Stone (1946)].
[78] Ibid.
[79] Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (London: Palgrave MacMillan, 1987) [Goodrich (1987)].
[80] Motha (2021), *supra* note 26; Stewart Motha, "My Story, Whose Memory: Notes on the Autonomy and Heteronomy of Law" (2022) 87:B *Studies in Law, Politics and Society* 1 [Motha (2022)].

human as an effect of autonomy, in that humans give themselves the law through self-creation and alteration; *physis* operates heteronomously by supplying "the push, the endogenous and spontaneous growth of things […] generative of an order" naturally destined.[81] Further, *nomos* stands apart from and over *physis* as generative of its own forms, which may be "moved by nature," but unlike nature, are also capable of further inventiveness: forms propagating forms from the infinite capacities of the human.[82] Whilst *physis* and *nomos*, like heteronomy and autonomy, are ordinarily differentiated and opposed in legal hegemony, Motha calls on legal scholars to abandon these oppositions and develop concepts to account for their interaction.[83] For Motha, the heteronomy of *physis* (of affect, of the body) ought to form an active part of enquiry as a sense-able source of law, not by supplying a mechanical order natural forms are destined to assume, but as a potentially creative or inventive force without pre-determined end.[84] That might, in Motha's view, enable the scholar to nimbly respond to the complex relations between life and non-life (especially those at stake in climatic calamities) and situate law in those relations.[85] In his critical rendering, the concept for heteronomy names and invites consideration of a source of law outside that which is familiar, not to shore up oppositions between heteronomy and autonomy, *physis* and *nomos*, but rather to think *with* that law from the outside.

Motha's rehabilitation of the heteronomous follows Jean-Luc Nancy.[86] Earlier in his scholarship, Motha cites Nancy who suggests the possibility of, and potentially the need to,

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[81] Motha (2021), *supra* note 26 at 6. Motha quotes from Cornelius Castoriadis, "*Phusis* and Autonom" in *World in Fragments: Writings on Politics, Society, Pychoanalysis, and the Imagination* (Redwood City, US: Stanford University Press, 1997), 331-341, 331.
[82] Motha (2021), *supra* note 26 at 6.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Stewart Motha, "Veiled Women and the Affect of Religion in Democracy" (2007) 34:1 *Journal of Law and Society* 139 [Motha (2007)].

exceed the binaries of autonomy and heteronomy.[87] Although writing in a markedly different context then, Motha writes:

> For Nancy, "affect is essentially heteronomous, and perhaps we should even say that affect *is* heteronomy". Because of the "force of affect" exacted through Church or State, we are now facing the impossibility of a political institution constructed by autonomy. Autonomy fails because of the resistance of heteronomy. And heteronomy leads us to the disasters of patriotism, ethnicity, and religion. Hence the task now is to think the affect by which "we" co-exist, but not through a politics that collapses under the force of affect generated by heteronomy. How do we separate Church and State and be-with each other in a way that does not fall into the civil religion of the Republic that demands sacrifice? What law, or indeed as Nancy suggest[s], what "anomic" formation, will mutually resist autonomy and heteronomy.[88]

"Hence the task now is to think the affect," to think the heteronomy, or of being with others in co-existence—what Nancy might have called the "singular plural."[89] Here differentiations between inside and outside are not possible; everyone and everything is always, already implicated in each other.

6.2. A Singular Plural: An Ecological Theory of Law; or, the "Law of the World"[90]

6.2.1. A Fleshy Lawscape

The inside-outside geometry that pervades modern law strains under a spatial lens, which renders intelligible how—across the putative boundary of law's inside—social and physical space are consequential for, and indeed productive of, everyday encounters with law (and, concurrently, its inverse, in the sense of how law is consequential and productive of

[87] Ibid, 141; Motha is referring to Jean-Luc Nancy, "Church, State, Resistance" (2007) 34:1 *Journal of Law and Society* 3, 7.
[88] Motha (2007), *supra* note 86 at 161.
[89] Ibid; Ignaas Devisch, "Doing Justice to Existence: Jean-Luc Nancy and 'The Size of Humanity'" (2011) 22 *Law and Critique* 1, 8 [Devisch (2011)].
[90] Devisch (2011), *supra* note 89.

spaces).[91] These consequences and productions might otherwise be elided in the insistence upon an a-spatial world, where an inside-outside geometry prevails.[92] Laws' relations to social and physical space have been theorized through a variety of conceptual devices, including the *lawscape*,[93] each attempting to render intelligible the rule-defined striations and abstractions that cleave, homogenize and hierarchize space, as well as the spaces that stage and animate movements of the lawful.[94] These spatio-legalities take form in action, as "a quality of […] network[s]"[95] of actors and objects affecting each other; and, given the contingency of such networks, spatio-legalities are always transforming.[96] In other words, law is realized in the particularity of place, time and affect.[97] In doing so, *nomos* and *physis* are,

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[91] That includes splices, nomospheres, chronotopes, and a surfeit of cartographic metaphors, among others. See e.g., Nicholas Blomley, "From 'What?' to 'So What?': Law and Geography in Retrospect" in Jane Holder and Carolyn Harrison, eds, *Law and Geography: Current Legal Issues* (Oxford: Oxford University Press, 2003), 17-33 [Blomley (2003)]; David Delaney, "Beyond the Word: Law as a Thing of this World" in Jane Holder and Carolyn Harrison, eds, *Law and Geography: Current Legal Issues* (Oxford: Oxford University Press, 2003), 67-84; David Delaney, *The Spatial, the Legal and the Pragmatics of World-Making: Nomospheric Investigations* (Abingdon: Routledge, 2010); Leslie Moran, "The Gaze of Law: Technologies, Bodies, Representation," in Ruth Holliday and John Hassard, eds, *Contested bodies* (Abingdon: Routledge, 2001), 107-116; Boaventura de Sousa Santos, "Law: A map of misreading: Toward a postmodern conception of law" (1987) 14:3 *Journal of Law and Society* 279; Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Abingdon: Routledge, 2015); Maurice Yip, "We Have Never Been So Bounded: Pandemic, Territoriality and Mobility" (2021) 187:2 *The Geographical Journal* 174.

[92] Nicholas K Blomley and Joel C Bakan, "Spacing Out: Towards a Critical Geography of Law" (1992) 30 *Osgoode Hall Law Journal* 661; David Delaney, "Tracing Displacements: Or Evictions in the Nomosphere" (2004) 22:6 *Environment & Planning D: Society & Space* 847 [Delaney (2004)].

[93] See discussion in Andreas Philippopoulos-Mihalopoulos, "Atmospheres of Law: Senses, Affects, Lawscapes" (2013) 7 *Emotion, Space and Society* 35, 36 [Philippopoulos-Mihalopoulos (2013)]; Andreas Philippopoulos-Mihalopoulos, "Lawscape" (2020) *International Lexicon of Aesthetics*, online: http://doi.org/10.7413/18258630100 [Philippopoulos-Mihalopoulos (2020)].

[94] Chris Butler, *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (Abingdon: Routledge, 2012) [Butler (2012)].

[95] Valverde (2015), *supra* note 47 at 61.

[96] Ibid. Also see Blomley (2003), *supra* note 90. Blomley argues that there is a *splicing* of law and space, through which he conceptualizes law and space as inseparable, dynamic qualities that make the world. Splicing involves "all sorts of ongoing enactments, through technologies, discourses, and practices," which, although entrenching spatio-legal orders, are vulnerable to "slippage and creative reworking." Neither law nor space are inert, animated exclusively with changes in the other. Rather, law and space imbricate in complex relation, congealing in each other.

[97] Davies (2022), *supra* note 28; Philippopoulos-Mihalopoulos (2014), *supra* note 28; Philippopoulos-Mihalopoulos (2013), *supra* note 92; also see Joshua David Michael Shaw, "Transcarceral Lawscapes Enacted in Moments of Aboriginalisation: A Case-Study of an Indigenous Woman Released on Urban Parole" (2020) 16:4 *International Journal of Law in Context* 422 [Shaw (2020a)]; Joshua David Michael Shaw, "The Spatio-Legal Production of Bodies Through the Legal Fiction of Death" (2021) 32:1 *Law and Critique* 69 [Shaw (2021)].

as Motha argues, entangled.[98] *Physis* does not stand apart from *technè* (and *nomos*), rather they braid together.[99] Normativity emerges in the process of affecting, and being affected by, the world, by which milieus take on normative meaning.[100]

Nicole Graham and Andreas Philippopoulos-Mihalopoulos have separately named and developed the concept of the lawscape,[101] but both speak to the material-discursive flux in which law takes form. Graham defines lawscape as "the relationship between the abstractness of […] law and the physical materiality of place,"[102] which, as Alain Pottage notes, plays with the hybridity already implied in the word landscape:

> Etymologically, the term landscape equivocates between representation and territory. The landscape is a reflex of the means and idioms in which it is represented: there is no territory without the map, no *paysage* without the *tableu.*[103]

Lawscape achieves something similar for Graham as landscape did for geographers, "get[ting] away from the divisions that shape modern [legal] thinking—persons and things, persons and place, propositions and things—and to think instead in terms of relations of hybridization, or connections whose terms are not persons and things but agents that 'exchange competences.'"[104] The lawscape forms from "a doing […] that includes or absorbs the subject in a process of variation or transformation"[105] that gives rise to the emplacement of norms, the infusion of paradigms, the materialization of the law in and through the physical world.[106] The non-human materials of place participate in this doing.[107] Philippopoulos-Mihalopoulos similarly thinks of lawscape as a doing—as a process, to *lawscape* through

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[98] Motha (2021), *supra* note 26.
[99] Ibid.
[100] Davies (2022), *supra* note 28.
[101] Philippopoulos-Mihalopoulos (2020), *supra* note 92. Also see Nicole Graham, *Lawscape: Property, Environment, Law* (Abingdon: Routledge, 2010) [Graham (2010)].
[102] Graham (2010), *supra* note 101 at xiii.
[103] Alain Pottage, "Forward" in Nicole Graham, *Lawscape: Property, Environment, Law* (Abingdon: Routledge, 2010), ix-xii, xi [Pottage (2010)].
[104] Ibid, xi-xii.
[105] Ibid, xii.
[106] Graham (2010), *supra* note 101 at 5.
[107] Ibid, 199.

movements that compose and recompose reality.[108] The lawscape takes form through the duration of movement—the affection of, between, within bodies, objects and environs—sustaining, in the composition of their material and discursive effects, the creation, regularisation and excess of life.[109] Philippopoulos-Mihalopoulos writes:

> The law in the lawscape is co-determined with the space between bodies (as in a social interaction or a multinational treaty or the slavery trade); the space that is produced and is occupied by bodies; the movement of bodies; the desire of bodies; and the withdrawal of bodies for another law.
>
> Space in the lawscape is the continuum of material and immaterial bodies that includes humans, nonhumans, linguistic bodies, disciplinary bodies, buildings, objects, animals, vegetables, minerals, and so on. Bodies are not just in space but are space. Bodies are always collectivities, assemblages that include human and nonhuman elements. Just as a body, an object is already functionalised, normalised, never independent of its normative position in the world. In that sense, human, natural, artificial bodies come together in determining and being determined by the law.[110]

The lawscape incorporates more than the documentary or media, exceeding the composition of court files,[111] the profligate display of emblems,[112] or the economy of text circulating in and between offices,[113] although law's materiality certainly includes all that as well.[114] The lawscape is "a fractal manifestation of […] 'open ecology,' namely the assemblage of natural, the human, the artificial […] and so on,"[115] whose affections include those of physical and inorganic matter, far from desks and texts. The lawscape "def[ies] conventional categories of natural and cultural because [it] disrupt[s] the human/nature binary

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[108] Philippopoulos-Mihalopoulos (2014), *supra* note 28. Also see Wall (2021), *supra* note 28.
[109] Barr (2016), *supra* note 29; Philippopoulos-Mihalopoulos (2014), *supra* note 28.
[110] Philippopoulos-Mihalopoulos (2020), *supra* note 93.
[111] See e.g., Cornelia Vismann, *Files: Law and Media Technology* (Redwood, US: Stanford University Press, 2008).
[112] See e.g., Peter Goodrich, *Legal Emblems and the Art of Law:* Obiter Depicta *as the Vision of Governance* (Cambridge: Cambridge University Press, 2013).
[113] See e.g., Matthew S Hull, *Government of Paper: The Materiality of Bureaucracy in Urban Pakistan* (Berkley: University of California Press, 2012); Sara Kendall, "Inscribing the State: Constitution Drafting Manuals as Textual Technologies" (2020) 11:1 *Humanity: An International Journal of Human Rights* 101.
[114] Davies (2017), *supra* note 28; Valverde (2015), *supra* note 91. At p. 111, Valverde seems to consider "non-human scales: […] spaces of flows, assemblages, and networks," but this is limited elsewhere in her description of chronotopes to bodies and documents (authored by, handled by and always in networked relation with human subjects).
[115] Philippopoulos-Mihalopoulos (2013), *supra* note 93 at 36.

and there reveals the 'mutual constitution and embeddedness' of human laws in the world,"[116] incorporating water, coal, among other "more-than-human ecologies."[117] That includes law's mutual constitution and embeddedness in the human body, with their organic bits and parts entangled in a co-constitutive relation with the normativity of law, so that law materializes in the body and the body materializes in lawful affordances.[118] Both theses related to the human body acknowledge that bodies themselves are socially produced spaces (i.e. body-spaces), and that the vibrant architectures of body-space exist in recursive relation with social and physical space, mediating spatial practices and representations through the body.[119]

With relevance to organic bodies, including those of the human, lawscapes form in part from the engagement of organisms with their environment as world-creating agents.[120] Biology becomes "a *factum,*" "something made or manufactured and something 'out there,'[121] by which it becomes a "doing," a movement or action.[122] Margaret Davies, for example, draws on the thought of Georges Canguilhem to describe how organisms, in their *doings*, exhibit *conatus*—a directedness for their continued propagation—by which normative meanings are constructed:

> For Canguilhem, the norms of nature emerge from the polarity of normal and pathological, from the effort the organism makes to repair itself and avoid suffering, and from the dynamics of adaptation. The process of living involves a preference to expel suffering. The organism's life is therefore directed in some way rather than random: the process of life is purposive and teleological. The directed nature of life does not imply that there is intentional or conscious choice towards a particular goal, and nor does it imply a final state of being, or even progress towards perfection. There are no design

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[116] Nicole Graham, "Sydney's Drinking Water Catchment: A Legal Geographical Analysis of Coal Mining and Water Security" in Tayanah O'Donnell, Daniel F Robinson and Josephine Gillespie, eds, *Legal Geography: Perspectives and Methods* (Abingdon: Routledge, 2020), 201-220, 202 [Graham (2020)].
[117] Ibid, 203.
[118] Davies (2017), *supra* note 28.
[119] Delaney (2010), *supra* note 91; Shaw (2021), *supra* note 97; Also Elizabeth Grosz, "Bodies-Cities" in *Space, Time, and Perversion* (London: Routledge, 1995) [Grosz (1995b)]; Elizabeth Grosz, "Space, Time, and Bodies" in *Space, Time, and Perversion* (London: Routledge, 1995) [Grosz (1995c)].
[120] Davies (2022), *supra* note 28.
[121] Alain Pottage, "*Unitas Personae*: On Legal and Biological Self-Narration" (2002) 14:2 *Law and Literature* 275, 300 [Pottage (2002)].
[122] Margrit Shildrick, *Visceral Prostheses: Somatechnics and Posthuman Embodiment* (London: Bloomsbury, 2022) [Shildrick (2022)].

> principles that explain the organism's end apart from its preference to avoid suffering and to continue — its *conatus*. Rather, life's directedness simply implies that the immanent norms created by life are aligned with a purpose. As Mark Orkent has put it, "Taken as a whole, the life processes of an organism are for the sake of continuing those life processes; the goal of a living thing is to continue to be the living thing that it is".[123]

That directedness to propagation—that *conatus*—then informs how the organism relates to its environment.[124] That which is outside the organism is folded into the organism's milieu (*umwelt*), a "self-created meaningful environment," by which the "world-as-sensed" is perceived as an array of stimuli which are normal (life-affirming) or pathological (harmful) and to which the organism responds as an expression of that *conatus* (here Davies is drawing on ecologist Jakob von Uexküll).[125] Further, as Elizabeth Grosz notes, *conatus* need not only service survival; the directedness of organic life facilitates a panoply of creations, artful and sensuous, by which pleasures swell, share and proliferate.[126] In either sense, the organism thereby participates in the evaluative construction of the outside world; a participation that engenders normativity in how the organism orients to, makes meaning of and acts within its environment so to continue living in avoidance of pain and death, and toward pleasure, joy and other sensuous affections.[127] Davies continues:

> [T]he subjective experience of living matter is not inconsequential to certain forms of normativity, in particular the onto-epistemological engagements—perception, cognition, emotion—that rely on the self-felt *value* of life and the desire of living beings to persist, thrive, and replicate. Meaning, signification, and communication are constituted from these subjective engagements, resulting in distinctive characteristics and capacities for living things. The subjective existence of life is connected to the plural semiotic worlds of living collectives of organisms, both plants and animals. It gives rise to a second-order normativity associated with meanings and values—the information sharing between individuals in social groups and ultimately the prescriptions and directions, the institutions and bureaucracies, that subsist between living things.[128]

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[123] Ibid, 63-64. Also see Georges Canguilhem, *The Normal and the Pathological* (Brooklyn: Zone Books, 1991).
[124] Davies (2022), *supra* note 28.
[125] Ibid, 64-65. Also see Jakob von Uexküll, *A Foray into the Worlds of Animals and Humans: With a Theory of Meaning* (Minneapolis: University of Minnesota, 2010).
[126] Grosz (2008), *supra* note 28.
[127] Davies (2022), *supra* note 28.
[128] Ibid, 67.

Davies' addition of "biogenesis" to the lawscape affirms the possibility that heteronomy (of *physis*) can be thought productively, not in opposition with law, but as part of the genesis of law. Lawscape as a concept already acknowledges a tautology between law and space, discourse and matter, *nomos* and *physis,* having flattened ontology to an infinite network of affects.[129] Biogenesis further suggests how lawscapes can form: as ever-complicating folds of normativity borne by overlapping organisms and their self-created environments.[130] These folds can cohere, intersubjectively, as relatively stable normative structures shared by multiple organisms in processes of "co-habiting," wherein normative worlds are created jointly in relation between organisms.[131] The organism's autonomy is not irrelevant to these processes; the *conatus* of an organism in a way embodies a fundamental autonomy that supplies an original principle of directedness in the world. But its effects, and meanings, are always already situated among multiple relations—of heteronomies—which add creatively to autonomy's effects. Law like life is made in the middle of autonomy and heteronomy, which follows with increasing levels of complexity from the behaviour of slime mould (Davies' favoured example) to human inventions like the common law.[132]

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[129] Davies (2017), *supra* note 28.
[130] Ibid.
[131] Ibid.
[132] Davies (2022), *supra* note 28. In that argument, Davies demonstrates the naturalistic principle of continuity exemplified by American pragmatists. As Mark Johnson argues, drawing on John Dewey, a principle of continuity requires understanding "[m]ore complex levels of organic functioning as just that – levels – and nothing more," per Mark Johnson, "Mind Incarnate: From Dewey to Damasio" (2006) 135:3 *Daedalus* 46, 49 [Johnson (2006)]. The principle:

> […] denies any ontological gaps between various levels of functional complexity. According to Dewey:
>
> > There is no breach of continuity between operations of inquiry and biological operations and physical operations. "Continuity" … means that rational operations grow out of organic activities, without being identical with that from which they emerge.
>
> The continuity thesis implies that any explanation of the nature and workings of mind, even of abstract conceptualization and reasoning, must have its basis in an organism's capacities for perception, feeling, object manipulation, and bodily movement.

The result then is a dynamic, complex bundle of relations that is always in the process of moving, expanding, withdrawing, staying still; composing and recomposing time and space in its flux, creating an array of connections (and disconnections) to place as the lawscape folds and separates and refolds.[133] This rendering does not mean the lawscape is a meaningless chaos; it is regularized and stabilized, albeit always provisionally, through "[i]nheritance [which] helps maintain those spaces over extensive periods of time."[134] Some of this inheritance is instituted in and around the subject, as the subject is a space of belonging "held up" in the articulation of their lifecourse,[135] but Sarah Keenan emphasizes that these relations extend outside and apart from the subject, in the walls of the homestead, the burnish of a locket, the "natural" embankment on the dried-lake's ridge overlooking a settlement.[136] Inheritance allows a "haunting;"[137] for example, it "allows for ghostly subjects by retaining a space shaped around and holding up the departed subject […] preserving spaces of belonging in their existing shape."[138] Through inheritance, the movement of bodies relative to their milieu impart choreographies to life which sustain a given lawscape, allowing its continuation despite the loss of individual subjects.[139] The lawscape coheres as multiple

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Johnson quotes from John Dewey, "Logic: The Theory of Inquiry (1938)" in *John Dewey, The Later Works 1925-1953 (Volume 12)* (Carbondale: Southern Illinois University Press, 1991), 26 [Dewey (1991a)]. Relating cognition, and other social forms, to an "organism's capacities for perception, feeling, object manipulation, and bodily movement" draws attention to the aesthetics of the body, or of the organism making sense and meaning in its environment, as the organism "acts" and relates with that outside itself. Johnson argues this aesthetic function underlies "rational" or "cognitive" processes, like logic. Meaning is a dynamic effect between organism and environment. As Dewey commented, "it is not simply that we happen to have *an* organism drop down into *an* environment and then these two react upon each other." Rather, "[i]t is quite the opposite […] [o]rganism and environment are the two things which converge in the life process." See John Dewey, *Lectures on Ethics: 1900-1901* (Carbondale: Southern Illinois University Press, 1991), 364 [Dewey (1991b)]. Also see Mark Johnson, *The Meaning of the Body: Aesthetics of Human Understanding* (Chicago: University of Chicago Press, 2007) [Johnson (2007)].

[133] Philippopoulos-Mihalopoulos (2014), *supra* note 28.

[134] Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Abingdon: Routldge, 2015) [Keenan (2015)].

[135] Ibid.

[136] Ibid, 167.

[137] Ibid, 166.

[138] Ibid, 168.

[139] Ibid.

orders of things, in the unities and continuities that relations of affection and inheritance create, and which hold together.

Any inheritance is always an imperfect performance even as a networked effect. The body is like all matter in its individuation: a provisional effect that is composed from affections which are never exhausted by any given individuation, always inducing the individuation's transformation to the next.[140] The body phases, de-phases and rephases through the always changing distributions of affections, in continuous intercourse with the body's milieu and that milieu's individuations and affections (of physical, organic matter; of physical, inorganic matter; of technologies).[141] The given organization of individuations and milieu can create a relatively stable ecosystem, like the individualized body, but that stability is only ever an appearance at a point in time, as it is characterized by the ongoing flux of matter.[142] Occasioned by radicalizing technologies, calamities and other events, apparently stable entities like organic bodies and milieus can be noticeably altered, affording different capacities and relations with others.[143] Those different affordances include differences in the regularization and organization of social forms relative to the body, which can mediate change to the lawscapes bodies inhabit.[144]

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[140] Joshua DM Shaw and Roxanne Mykitiuk, "Jurisgenerative Tissues: Sociotechnical Imaginaries and the Legal Secretions of 3D Bioprinting" (2023) 34 *Law and Critique* 105 [Shaw and Mykitiuk (2023)]. Also see Elizabeth Grosz, "Identity and Individuation: Some Feminist Reflections" in Arne de Boever, Alex Murray, Jon Roffe and Ashley Woodward, eds, *Gilbert Simondon: Being and Technology* (Edinburgh: Edinburgh University Press, 2022), 37-56; Erin Manning, "Always More than One: The Collectivity of a Life" (2010) 16 *Body and Society* 117; Erin Manning, *Always More than One: Individuation's Dance* (Durham: Duke University Press, 2013); Erin Manning, "Wondering the World Directly—or, How Movement Outruns the Subject" (2014) 20 *Body and Society* 162.
[141] Shaw and Mykitiuk (2023), *supra* note 140.
[142] Ibid.
[143] Ibid.
[144] Ibid.

6.2.2. Fragments: A Supplement

To die or to be injured may introduce further difference to the lawscape, especially where death or injury extinguishes a body's *conatus* and the order that body sustained. Death or injury are externalities to *conatus*; forces destructive to the motion impelled by *conatus,* or as a reduction to a body's power.[145] The literatures addressed in this dissertation demonstrate that in the ways human bodies, dead and in parts, are consequential to the lawscapes bodies inhabit; how new choreographies for lawscapes irrupt through the movement of dead or sub-organic matter; how past inheritances held up by the lawscape are disrupted by changes in organic bodies. That undertaking opened me to the particular effects of the biogenesis and jurisgenesis of the flesh, not with a general "body" interchangeable with all other possible human bodies, but in the specificity of decomposing flesh, flesh that is cleaved into parts, and flesh which confounds identities through its dislocations, hybridizations and adulterations.

The dissertation thereby diverges from the work of Olivia Barr and Marc Trabsky who, following Italian philosopher Giambattista Vico theorized how the movement of the human dead (e.g., by burial, by coronial investigation) "juridified" the earth—creating lawscapes—as institutions of inheritance.[146] For Barr, burying the dead implied walking the dead over the ground to a burial spot which, through repetition, furrowed the land, marking out a place where the common law was at work.[147] Likewise, Trabsky argued that coroners "hawked" the mislaid dead to places of coronial investigation, ascertaining the cause of death (subduing threats to lawful lives) and removing the dead to their proper place in the city (the

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[145] Baruch Spinoza, *Ethics* (Cambridge, MA: Hackett, 1992) [Spinoza (1677)]; also see Gilles Deleuze, *Spinoza: Practical Philosophy* (San Francisco: City Lights, 1988) [Deleuze (1988)].
[146] Barr (2016), *supra* note 29; Marc Trabsky, *Law and the Dead: Technology, Relations and Institutions* (Abingdon: Routledge, 2019) [Trabsky (2019)]. Also see Giambattista Vico, *The New Science* (Ithica: Cornell University Press, 1967); Robert Pogue Harrison, *The Dominion of the Dead* (Chicago: University of Chicago Press, 2003).
[147] Barr (2016), *supra* note 29.

cemetery).[148] Without disputing their analyses in those contexts, the dead bodies they follow appear whole and akin to persons (if not persons), and their movement, whilst putatively of the dead, are actually of the living who gather, carry and dispose of the dead.[149] Tracing decompositions, cleavages and adulterations suggest a wider and more fractal array of affections in the composition of the lawscape, owing to the materiality of flesh. Decompositions, cleavages and adulterations suggest different doings, movements and actions for bodies in the constitution of law. Those differences are best understood by reference to the concept of "non-law," specifically as non-law is spaced in the architectonic of the lawscape.

Throughout the dissertation, I framed decompositions, cleavages and adulterations as lawscaping through the interaction between law and non-law. I started with Goodrich who argues that "the Law"—in the sense of the King's Law—was antirhettic, in that the law produced power and order through the rhetorical and actual extirpation of another, an outside, or excluded class.[150] Goodrich argues that the common law depended on styles of denunciation, of rhetorical and actual evisceration of that which it opposed so to construct an image of itself as ancient, derived from natural reason and complete.[151] Such styles gave rise to an image of law that determined what belonged to it, and that which needed to be excluded, with its antirhettic form facilitating the King's domination by the unities (the Crown's divine right to the realm) and continuities (the Crown's succession) it upheld through the negation of alternative rule.[152] Marty Slaughter adds to this the notion of non-law as that

[148] Trabsky (2019), *supra* note 146.
[149] I made a similar criticism elsewhere in Joshua David Michael Shaw, "Confronting Jurisdiction with Antinomian Bodies" (2020) *Law, Culture and the Humanities*, https://doi.org/10.1177/1743872120942770 [Shaw (2020b)].
[150] Goodrich (1992), *supra* note 15; Goodrich (1995), *supra* note 15.
[151] Goodrich (1995), *supra* note 15. Namely, the common law was counterposed to a law that was "Roman," Catholic and written in the civil law tradition.
[152] Goodrich (1992), *supra* note 15. Also see Goodrich (1995), *supra* note 15. Goodrich observes that this antinomic quality was something the common law inherited from its fractal past, possessed by disparate courts and laws, not existing in harmony but in upheaval.

which eliminates the unities and continuities of law as an order of things, by effecting their decay, partition and dissolution.[153] Slaughter describes non-law primarily by analogy to biological processes—namely, decompositions, cleavages and adulterations that the King's Law works to prevent—which embody law's limit as isolation, discontinuity and chaos.[154] Whilst Goodrich and Slaughter are describing law of a very different time, there are resonances between their analyses and the situation of the human dead and fragments in the literatures of the dissertation. Whilst for Slaughter non-law presented metaphorically through *images of* decomposition, cleavage and adulteration, these metaphors are apparently *materialized* in the flesh of the dead and bodily fragments.[155] And like Slaughter, non-law did not represent something apart from law's antirhettic form but rather confirmed it as a feature of its constitution.[156] The human dead and tissues, and the durations of non-law they embody, are not just involved in the undoing of law but also its transformation; the dead and fragments are generative of the law even as their spacings expire it. But exactly how change

[153] Slaughter (1992), *supra* note 15.
[154] Ibid.
[155] Ibid.
[156] Ibid.

to the lawscape is expressed depends on the duration of that spacing and the conditions of its milieu, as Chapters 3 to 5 suggest.[157]

Spacings of non-law thereby function as ruptures to the lawscape, by which parts withdraw from each other and change is induced.[158] Spacings of non-law brought on by flesh exhibit the ontological condition of withdrawal that Philippopoulos-Mihalopoulos describes.[159] Orders sustained in the lawscape are disturbed, as their spaces of belonging are disrupted by parts—dead, sub-organic and non-living—falling away from the coherence of a body's frame. These parts move outward from where they once rested, released in an abundance of movement, withdrawing from the body to which they belonged. That withdrawal is a process of dephasing, parts turning inward into themselves as they are displaced disparately, making space for new lawscapes to individuate if conditions allow.

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[157] For example, in Chapter 3, decompositions of the human corpse spaced non-law through the gradual elimination of the body, giving up particles of the body to an entropic tendency toward chaos (more disorder). Chaos portended the loss of law embodied in the human, around which institutions of burial developed to sublimate or contain. The right to return to one's parental earth, for example, sublimated spacings of non-law through the prism of eschatology that established the place of burial as a temporary holder of peoples' mortal forms, and suitable for generations of the dead. Spacings of non-law—their disruptions to legal order—thereby temporalized material use the parish churchyard for Christian burial. Containment was necessary where spacings of non-law were experienced as ungovernable, generally demonstrated by law reforms that required extramural burial so to eliminate miasmas or other lethal effluents thought to emanate from the decomposed dead. Here the chaos wrought by spacings of non-law could not be sublimated and needed to be expelled from the subjects of law. In Chapter 4, the lawfulness of intrusion on, and retention of, the human body relied on it being cleaved into parts. Spacings of non-law exhibited a different spatio-temporal form with dissection as abrupt irruptions of chaos, of disorder, coinciding with each cleavage, which rend parts from prior identities (of the person, of another law) and made them into specimens (of property, of the Law) suitable for collection (or where no longer of use, abandon). Having regard to the gendered and racialized contexts of anatomical production, the importance of cleavages to the antirhettic form are foregrounded as both actual and ontological violence, embodied in practices of differentiating, sorting and classifying kinds (e.g., white from non-white, human from non-human) after evacuating them of human substance. Finally, in Chapter 5, spacings of non-law resulted in or from the actual or potential separation of a part from the body, which was incorporated into experience of one's body relative to the part. Separation adulterated the identity of self, confronted by the part's ex-corporation, opening the self outward in relation with others. The putative closure of the human individual was disrupted in these moments potentiating many relations, in excess of what hegemonic body-cultures recognize and sustain. This resulted in ambiguous identifications with bodily fragments, and feelings that fragments needed to be retained, used or disposed in particular ways, often to preserve one's corporeal integrity.
[158] Andreas Philippopoulos-Mihalopoulos, "Withdrawing from Atmosphere: An Ontology of Air Partitioning and Affective Engineering" (2016) 34:1 *Society and Space* 150, 154 [Philippopoulos-Mihalopoulos (2016)].
[159] Philippopoulos-Mihalopoulos (2014), *supra* note 28.

Spacings of non-law may also suggest justice as a supplement to law in the disposal of the body and parts.[160] Spacings of non-law are not only an ontological feature of law as constitutive of lawscapes, but also notions of justice that propagate normative evaluations of such lawscapes—what Philippopoulos-Mihalopoulos, engaging Derrida, refers to as the discontinuous circularity of law and justice.[161] Derrida claimed justice exceeded law as its supplement or deconstruction, especially in that justice itself was an "undeconstructible" notion outside the "proper" remit of law: deferred, unrealized and unknowable yet necessary for law's formation.[162] Law, by contrast, was eminently constructed—making it a suitable object for deconstruction—in that "the founding and justifying moment that institute[d] law implie[d] a performative force, which [was] always an interpretive force" escribed in the gathering of disparate parts and congealed in their putative fixture.[163] The deconstruction (or better put, deconstructions) of law through justice "disturb[ed]" these fixed constructions "by way of exploring what systematically dropp[ed] through" them, obscured in yet necessary for the appearance of law.[164] Justice was an irruptive force; an opening of law in the lurch toward the supplement.[165] However, grasping the supplement was an impossible act as it was constantly deferred, unrealized or unknowable; it always evaded capture.[166] Falling short, justice effected a radical instability through which law stumbled; the latter continuously made

[160] See Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority'", Drucilla Cornell, Michel Rosenfeld and David Gray Carlson, eds, *Deconstruction and the Possibility of Justice* (Abingdon: Routledge, 1992), 3-67, 15 [Derrida (1992)]; Andreas Philippopoulos-Mihalopoulos, "Law's Spatial Turn: Geography, Justice and a Certain Fear of Space" (2011) 7:2 *Law, Culture and the Humanities* 187 [Philippopoulos-Mihalopoulos (2011)]; Philippopoulos-Mihalopoulos (2014), *supra* note 28.
[161] Andreas Philippopoulos-Mihalopoulos, "The Suspension of Suspension: Settling for the Improbable" (2003) 15:3 *Law and Literature* 345, 358 [Philippopoulos-Mihalopoulos (2003)].
[162] Derrida (1992), *supra* note 160; Fitzpatrick (1991), *supra* note 7.
[163] Derrida (1992), *supra* note 160 at 13.
[164] Caputo (1997), *supra* note 7 at 77. Also see Jackson and Mazzei (2012), *supra* note 6.
[165] Derrida (1992), *supra* note 160.
[166] Ibid.

anew in the wake of its deconstructions, although never fully in the way one expected.[167] Justice then brought a fundamental indeterminacy to law owing to law's relation to justice.[168]

Philippopoulos-Mihalopoulos likewise theorized justice as irreducible; as a rupture to the lawscape without content of its own and effected in bodies' withdrawal.[169] Because multiple bodies cannot occupy the same precise place at once, he argues, the presence of one necessarily acts as a supplement to the other displacing the other by forcing its withdrawal from the unity (order, lawscape) it previously formed part of. What results is the imperative to move, to give up space, not toward any particular redistribution of bodies (what might come to occupy for some the notion of justice's "achievement"), but rather without direction: simply the imperative to move, to change, to individuate differently.[170] That imperative to move outside oneself confronts cognition with the need for reflection, for an evaluation, whose content is theoretically infinite yet constrained by the conditions of cognition's milieu.[171] As Philippopoulos-Mihalopoulos writes: "Justice is not a condition of arrival but of departure," endlessly repeated in meeting with the lawscape.[172]

The irreducibility of justice is infinitely jurisgenerative, facilitating both the genesis of law and the mediation of that process through ethics.[173] It offers a counter-law to the genre of law, an irritant that opens and risks the collapse of law in different compositions. The materialist theory of law advanced earlier is thereby transformed so to respond to the distinct, future-oriented effects of human imaginaries, particularly as those fan the cinders of justice.[174] Justice in this sense is not knowable.[175] It cannot be experienced as much as its

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[167] Ibid.
[168] Ibid.
[169] Philippopoulos-Mihalopoulos (2014), *supra* note 28.
[170] Ibid.
[171] Ibid.
[172] Ibid, 156.
[173] Ibid.
[174] Ibid. Also see, regarding the productive potential of human imaginaries, Moira Gatens, *Imaginary Bodies: Ethics, Power and Corporeality* (Abingdon: Routledge, 1996) [Gatens (1996)].
[175] Derrida (1992), *supra* note 162.

phantasm appears everywhere. Justice is constantly deferred, a generative supplement to law in how it subtends law's articulation. Justice is located in the encounter with a supplement, a duration of non-law—in this dissertation, found principally in encounter with a bodily fragment—whose ex-corporation simultaneously intrudes on the subject/ the body/ "the Law," and lures relations elsewhere.

6.3. Office for a Fleshy Jurisprudence

The dissertation has, through the retrospection of failed and minor literatures, shown how material processes of the human body factored in the body's lawful treatment: how the vitality of human flesh—even that which decomposes in spaces of burial such as in Chapter 3, is cleaved in situations of anatomy in Chapter 4, or adulterated in contexts of separation in Chapter 5—mediates the body's meaning in the experience of law, making a difference in their lawful use and disposal. Through that retrospection law materializes as something other than autonomy, as something heteronomous, helpfully conceptualised through lawscape and biogenesis which fracture the conventional inside-outside geometry to law.[176] Law thereby proliferates as an open ecology, whose normative orders are mere effects, always already at risk of collapse.[177] The literatures of this dissertation demonstrate situations where collapse is risked, particularly where those normative orders are composed with or from the relations constitutive of the human body.

The effect of the body in fragments is variable across these literatures. The materiality of flesh does not act the same beyond a given literature, in part because varied offices have been erected to administer them. Chapter 3, for example, described the office of Christian burial, which in the case of *Gilbert v Buzzard* (1820) was concerned with human

[176] Motha (2021), *supra* note 14; also see Davies (2022), *supra* note 28; Philippopoulos-Mihalopoulos (2014), *supra* note 28.
[177] Philippopoulos-Mihalopoulos (2014), *supra* note 28.

decomposition as that mattered to the status of land and relations that could form relative to it.[178] That office was challenged and ultimately displaced by offices of public health or municipal law, whose concern with human decomposition mattered differently.[179] Likewise, Chapter 4 described the office of the anatomist and their putative authority at common law to take, cut up and dispose of flesh in the interests of medical science,[180] and, albeit to a lesser extent, Chapter 5 described an array of medico-legal offices across experiences of the disposal of their tissues and other parts.[181] These offices join those described by Olivia Barr (colonial burial) and Marc Trabsky (the coroner) in that they too cultivate and order lawful relations with respect of the human body, converging in the settlement and ordering of lawful living among human flesh.[182]

"Office" has been theorized by critical legal theorists as a mode of instituting authority and taking responsibility for aspects of life, conferring obligations on its occupants to engage or conduct living in specific ways.[183] That includes a "relation between status and official *persona*" which "shapes the attitudes, obligations and responsibilities that are required to

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[178] *Gilbert v Buzzard and Boyer* (1820), SC 3 Phill 335 (London Consistory Court) (UK) [*Gilbert* (1820)].
[179] See e.g., *Burial Act 1852*, 1852 c 85, s 1 [*Burial Act* (1852)]; *The Metropolitan Interments Act, 1850,* 13&14 Vic c52, s 6 [*Metropolitan Interments Act* (1850)]. Also see Sir Edwin Chadwick, *Report on the Sanitary Condition of the Labouring Population of Great Britain: A Supplementary Report on the Results of a Spiecal [sic] Inquiry into the Practice of Interment in Towns at the Request of Her Majesty's Principal Secretary of State for the Home Department* (London: Her Majesty's Stational Office, 1843) [Chadwick (1843)] [located within the archives of Wellcome Foundation in London, UK].
[180] In this situation, I rely principally on *Report of Board of Inquiry Re Dr. Ramsay Smith* (22 September 1903) (South Australia) [records were produced from the archives of the City of Adelaide in Adelaide, Australia, and copies remain on my person] [*Ramsay Smith* (1903)].
[181] See e.g., Interview with "Adele" (7 September 2021) [Adele Interview (2021)]; Interview with "Andrew" (23 July 2021) [Andrew Interview (2021)]; Interview with "Beatrix" (27 July 2021) [Beatrix Interview (2021)]; Interview with "Isabella" (16 December 2021) [Isabella Interview (2021)]; Interview with "Michelle" (29 December 2021) [Michelle Interview (2021)]; Interview with "Penelope" (11 January 2022) [Penelope Interview (2022)]; Interview with "Sara" (7 December 2021) [Sara Interview (2021)]; Interview with "Wendy" (6 August 2021) [Wendy Interview (2021)]; Interview with "Zelda" (15 December 2021) [Zelda Interview (2021)].
[182] Barr (2016), *supra* note 29; Trabsky (2019), *supra* note 146. Also see Marc Trabsky, "Walking with the Dead: Coronial Law and Spatial Justice in the Necropolis" in Chris Butler and Edward Mussawir, eds, *Spaces of Justice: Peripheries, Passages, Appropriations* (Abingdon: Routledge, 2017), 94-109 [Trabsky (2017)].
[183] See e.g., Barr (2016), *supra* note 29; Dorsett and McVeigh (2012), *supra* note 29.

adequately conduct [an] official life," "best learned, and taught, through conscious and productive activity, or exercise."[184] History provides many examples of office including "those of state (judge, legislator, governor, soldier), church (bishop, priest), and other public and private corporations."[185] Ordinarily these offices have been formally instituted, including the conferral of duties, powers and benefits by legislation, and the taking of oaths to higher authorities (e.g., God, the sovereign, shareholders).[186] There have also been "social or intellectual offices," like of "doctor, engineer, philosopher, poet, artist, or critic," although Shaun McVeigh notes these offices are more likely in recent history to be "viewed in terms of vocation, profession or career."[187] Regardless, each office entails the obligation to "official" living by which occupants perceive and make meaning in the world.

The obligation to official living varies. McVeigh observes that the cultivation of eloquence—a vital part to a "humanist persona (*elocutio*)"—was especially important to Renaissance "scholar-jurisprudents."[188] Barr evocatively describes the office of the colonial common law as itinerant, carried by jurist and settler alike to and across "undiscovered" lands, bringing subjects into the shared fabric of the King's Law no matter their distance (and no matter the viability of Indigenous legal orders).[189] Likewise the offices I have described in

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[184] Ann Genovese and Shaun McVeigh, "Nineteen Eighty Three: A Jurisographic Report on *Commonwealth v Tasmania*" (2015) 24:1 *Griffith Law Review* 68, 69 [Genovese and McVeigh (2015)].
[185] Shaun McVeigh, "Afterword: Office and the Conduct of the Minor Jurisprudent" (2015) 5:2 *UC Irvine Law Review* 499, 500 [McVeigh (2015)].
[186] Ibid.
[187] Ibid.
[188] Ibid, 502.
[189] Barr (2016), *supra* note 29. Movement is not alien to the common law; as Barr notes, movement formed part of its "literal and metaphysical" expression through the itinerant offices of the common law. Olivia Barr, "Movement: An Homage to Legal Drips, Wobbles, and Perpetual Motion" in Andreas Philippopoulos-Mihalopoulos, ed, *Routledge Handbook of Law and Theory* (Abingdon, UK: Routledge, 2019), 129-150, 145 [Barr (2019)]. Barr quotes Goodrich (1990), *supra* note 1, who writes:

> The history of the common law has always been a history of movement, of a wandering nomos, a narrative of itinerant justice and itinerant justices. Its movement has been both literal and metaphysical, a question of a peripatetic court and also laws of transmission of legal knowledge: moveable bodies become moveable signs.

this dissertation attune occupants to the materiality of flesh in instituting the proper disposal of bodies and parts. For example, the ecclesiastical office of sepulchre required the dead's permanent disposal proximate to holy sites, in consecrated land and property, and in a manner that prevented their indecent treatment.[190] Aspects of that office—*Imago dei* or humanity's resemblance to God, and eschatological narratives of the Last Judgment—enjoined the parish to administer and refrain from interfering with Christian burial; it also enjoined them to deny Christian burial to those who transgressed the community in Christ, requiring alternatives proper to their status and often done in materially elaborate forms (e.g., disposal in non-consecrated land, disposal off highways with stakes through the heart and quicklime).[191] For centuries in England, the lawful disposal of the dead was exclusively the concern of ecclesiastical office, encompassing more than a mere right of every parishioner to be buried; it instituted authoritative modes of living with the dead through specific forms of disposal.[192] Through office, their understanding of the right to burial—or, in contemporary terms, decent and final disposal—was enhanced, seen not narrowly as the quality of a subject (i.e. a right possessed by the person to be buried or disposed) but as an element of a much larger performance in official living.

The obligation to official living, and the ways by which that obligation is effected, can alternatively be described as *technē*.[193] As mentioned before, *technē* refers to the artful craft, practice or technique that creates;[194] what Alain Pottage describes as "a power or capacity to produce things whose eventual existence was contingent upon the exercise of that power,

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Further, Barr notes that William Blackstone's itinerant common law, "carr[ied]" by subjects wherever they go "by birthright," is traced in the practices of colonists "settling" Australia, and expressed in the walking, the hawking and disposing their dead. See William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon University Press, 1765), 106.

[190] *Gilbert* (1820), *supra* note 178; also see Henry Spelman, *De Sepultura* (1641); Robert Phillimore, *The Ecclesiastical Law of the Church of England* (London: Sweet and Maxwell, 1873), Chapter 10.

[191] *Gilbert* (1820), *supra* note 178.

[192] Ibid.

[193] Dorsett and McVeigh (2012), *supra* note 29.

[194] Ibid.

things whose existence was 'caused' by the craftsman, rather than by the operation of necessity or nature."[195] *Technē* are iterative and summative, capable of complex organization and effect as *technē* compose, and act in concert, with one another.[196] Office may thereby be thought of as an assemblage of *technē*, forming a frame through which its occupant encounters, takes responsibility for and acts on the world, including how the objects of office (e.g., the materiality of a corpse or tissue) are experienced as meaningful, animated in the perceptual field that an office creates. Office is itself the product of *technē* just as office conduces *technē*, establishing specific modes of relating through what office creates.[197] Likewise, notions of responsibility, including their official expression relative to certain forms of living, are also the product of *technē*.[198] Such an understanding allows for office to be treated as extensive with social practice, generally, whilst attending to the unique expressions of social organization office performs. For example, the office of the anatomist relied on the proximity of the "medical man" to the human body, and unilateral acts of mutilation, to stake authority.[199] Beyond mere functions of being an anatomist, proximity to and cutting the body factored in creating the anatomist and their authority to dissect: someone whose specially endowed labour, done with the purpose and "care" expected of the medical man, transformed nature into specimens of medical science despite the claims of others including kin. In this way actions of that office mediated its ongoing performance, including the ranking of official authority over competing claims.

But whilst the historical offices of these literatures have tended to be culturally closed, even as they admit the heteronomy of flesh, this dissertation sketches another in retrospection: an office for a critical jurisprudent, whose concern lies in how the body, and its

[195] Pottage (2002), *supra* note 121 at 275.
[196] Grosz (2008), *supra* note 28.
[197] Dorsett and McVeigh (2012), *supra* note 29.
[198] Barr (2016), *supra* note 29.
[199] *Ramsay Smith* (1903), *supra* note 180.

flesh, factors in composing, decomposing and recomposing the lawful. That office would demand a certain sensibility to law and life, to cultivate a critical ethos.[200] Generally, that sensibility is "areal,"[201] or atmospheric,[202] encountering law and life as processes of affection, as forming in co-existence with others.[203] The critical jurisprudent dwells differently with *technē*, playing with their organization so to engender alternatives to the law that was, to create different possibilities for existence, so to inhabit new futures.[204] Nancy would describe that sensibility as attuning to the *eco*-technical production of the world, in that *technē* are always dwelling (*eco*) someplace that exceeds and informs the *technē*.[205] Whilst the offices of this dissertation commonly subtracted the *eco* from consideration, the *eco* always forms part of the apparatus of *technē*.[206] Attuning to, and attempting to act on, the *eco* thereby attempts to conduce a new dwelling, working appetitively with the areal or atmospheric toward different relations.[207]

To assume the office of a critical jurisprudent of flesh does not require discarding law. Rather that office would compel the jurisprudent to trace and reflect on—amongst affections actually or potentially present—a place for the lawful, with which the jurisprudent and others could enact the lives they desire (not as projects wholly in their control, but as something to work toward, incrementally, experimentally and self-critically). As Barr writes:

> "Lawful place" is a phrase […] that intends to capture the critical potential of paying attention to the place of law, and the law of place, as well as attending to the ways in which we live with law in place. As the discipline responsible for the *prudentia* of law (i.e. its practical wisdom or good conduct), the question of lawful place is therefore a task that falls within the realm of jurisprudence. Directed especially, though not exclusively towards the jurisprudent, as one of the primary offices responsible for jurisprudence and the ongoing workings of common law, [attending to the place of law]

[200] The methods, and substantive observations, of such a sensibility have been canvassed in earlier chapters; what remains is the question of office which this conclusion attempts to address.
[201] Jean-Luc Nancy, *Corpus* (New York City: Fordham University Press, 2008) [Nancy (2008)].
[202] Philippopoulos-Mihalopoulos (2014), *supra* note 28; Wall (2021), *supra* note 28.
[203] Anastasia Tataryn, *Law, Migration and Precarious Labour: Ecotechnics of the Social* (Abingdon: Routledge, 2021) [Tataryn (2021)].
[204] Tataryn (2021), *supra* note 203.
[205] Nancy (2008), *supra* note 201.
[206] Tataryn (2021), *supra* note 203.
[207] Ibid.

> deepens an account of how the common law actually works. Noticing how common law's technical and material practices are place-related, […] [such an approach] raises questions of how these workings or legal mechanics relate to the conduct of lives lived with common law.[208]

In this dissertation, that lawful place has been at the interstices of flesh; in how the encounter with flesh is incorporated in, and (re)generates, relations with others that, through repetition, form patterns in the experience and movement of life. Those patterns, once absent or irregular, become regular and regulated in the accretion of norms for conduct, a process that the jurisprudent can then cultivate by doubling back and reinforcing. The office of a critical jurisprudent is differentiated from other offices in how that lawful place, at the interstice of flesh, is encountered; the critical jurisprudent intervenes not only in the cultivation of lawful relations, but also in acceptance of that place at all. The critical jurisprudent unsettles the lawful, reconsidering the place in which law dwells, abiding responsibilities to the heteronomous where the *eco* takes root.

6.4. Writing as Flesh

In antiquity, Diogenes the Cynic reportedly ordered his friends to, upon his death, throw his body without the city limits.[209] His friends resisted, fearing that, beyond the protection of the city wall, the corpse would be devoured by beasts, but Diogenes replied by calling on them to place a staff near the spot where his body lied so he could "drive them away."[210] The notion that Diogenes could drive animals away whilst dead was incredible to his friends, "for you will not perceive them," to which Diogenes answered, "How am I then injured by being torn by those animals, if I have no sensation?"[211] That story was rendered again, more provocatively

[208] Olivia Barr, "A Jurisprudential Tale of a Road, an Office, and a Triangle" (2015) 27:2 *Law and Literature* 119, 200 [Barr (2015)].
[209] Marcus Tullius Cicero, *Tusculan Disputations* (London: Harpers & Bros., 1877). Diogenes is said to have lived between 412 – 323 BCE.
[210] Ibid, 55.
[211] Ibid, 56.

in Laërtius' biography of Greek philosophers where, it was said, Diogenes "ordered his friends to throw his corpse away without burying it so that every beast might tear it, or else to throw into a ditch, and sprinkle a little dust over it," or cast it into the river or otherwise find use to his brethren.[212] In either account, among others, Diogenes reflects the disenchanted corpse—a corpse denuded of the human, of culture, of sentiment—given up to the worms, the dogs and whatever else desired its silent meat.[213] The corpse was mere matter decaying and, as cultural historian Thomas Laqueur puts it, "do[es] not matter."[214] All else is superstition. All else is the superfluity of human culture which, for Diogenes, distracted from a virtuous life living immediately as dogs do.[215]

Laqueur argues that Diogenes' refrain repeats throughout cultural history in the west, acting as "an enormously generative trope."[216] Diogenes might be said to suffuse this dissertation as well—albeit with different effect. Initially taking his lead, I have sought to foreground modes of legal thought embosomed in the materiality of the human dead and tissue; modes of writing law that delight in imagining what bodies—what flesh—do and mean in relation to others. Doing so is a rejection of narratives hegemonic in the modern common law, which dephysicalize the world, instituting a system of rights, duties, powers and

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[212] Diogenes Laërtius, *The Lives and Opinions of Eminent Philosophers,* translated by CD Yonge (London: G. Bell and Sons, 1915), 247.

[213] Thomas W Laqueur, *The Work of the Dead: A Cultural History of Mortal Remains* (Princeton: Princeton University Press, 2015) [Laqueur (2015)]. Diogenes made much the same argument in the *Dialogues of the Dead,* written by the Syrian satirist Lucian, see Lucian, *Dialogues of the Dead, Dialogues of the Sea-Gods, Dialogues of the Gods, Dialogues of the Courtesans* (Cambridge, MA: Harvard University Press, 1961), Dialogue 29. In the *Dialogues*, Diogenes was in conversation in the afterlife with King Mausolus of Caria (d. 353 BCE), where Mausolus boasted of his beauty and the size of his tomb. Diogenes replied, 'But, my handsome Mausolus, the power and the beauty are no longer there,' and continued:

> […] If we were to appoint an umpire now on the question of comeliness, I see no reason why he should prefer your skull to mine. Both are bald, and bare of flesh; our teeth are equally in evidence; each of us has lost his eyes, and each is snub-nosed. Then as to the tomb and the costly marbles, I dare day such a fine erection gives the Halicarnassians something to brag about and show off to strangers: but I don't see, friend, that you are the better for it, unless it is that you claim to carry more weight than the rest of us, with all that marble on the top of you.

[214] Laqueur (2015), *supra* note 213 at 35.

[215] Ibid.

[216] Ibid, 39.

disabilities that smother the body's capacities.[217] Against the immaterialism of the modern common law these minor legal literatures suggest the promise of a materialist theory of law which takes seriously how the human dead and tissue can matter to the law.[218] But importantly that materialist theory does not follow Diogenes' retreat into *physis* (nature), set apart from *nomos* (law, culture, technē) as a pure essence for being—for example, I do not propose access to virtue unmediated by superstition as Diogenes might.[219] Rather *physis* and *nomos* are entangled, their ontological forces and relations coinciding in processes of creation by which the world, life and normativity take form.[220] On this argument, human flesh is expressive of law not because a pure entity of nature determines the content of law, or that law is an epiphenomenon that merely reflects what materially unfurls. Rather, normativity forms in the intercourses mediated by flesh, and changes to that media—to flesh—correspond with differences in their production.[221]

Moving from re-reading to writing, the materialist theory of law suggested by this dissertation may inspire future "minor legal literatures."[222] For Gilles Deleuze and Félix Guattari, the meaning sought by the work of minor literature is prior to language and representation, taken in the ebbs and flows of "intensities" that form, fleetingly, in images, senses and feelings before becoming something else: "in short, an asignifying, *intensive use* of language," outside the bounds of authoritative code, where language is understood broadly as the action by which meaning is enacted.[223] As mentioned already, Deleuze and Guattari maintained that minor literature "mark[s] a movement of the language toward its

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[217] See e.g., Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26:8 *Yale Law Journal* 710.
[218] Regarding minor legal literatures generally, see Goodrich (2017), *supra* note 11.
[219] See discussion in Phlip Bosman, "Did the Cynics Condone Theft? Possession and Dispossession in the Diogenes Tradition" (2005) 6:2 *Phronimom* 63, 64-65.
[220] Motha (2021), *supra* note 26; Davies (2022), *supra* note 28.
[221] See discussions of flesh in Elizabeth Grosz, "Merleau-Ponty and Irigaray in the Flesh" (1993) 36 *Thesis Eleven* 37 [Grosz (1993)].
[222] Goodrich (2017), *supra* note 11.
[223] Deleuze and Guattari (1983), *supra* note 13 at 22.

extremes," "ceas[ing] to be representative in order to stretch toward its extremes or its limits" which inaugurates "a new expressiveness […] a new intensity."[224] It is to "write as a dog" "precisely" because "a dog does not write,"[225] so that writing (or any act by which one makes meaning) swells and irrupts in imagination, in the process of creating.[226]

Diogenes' injunction to live (and die) as a dog, and Deleuze and Guattari's to write like a dog, share in the escape of organization; it is to "[work] in opposition to the order of the always already-existing laws, in the spirit of *parrhēsia* prefigured by Diogenes the Cynic" and Deleuze and Guattari "in the direction of creating artistic realities."[227] The literatures of this dissertation suggest something similar. A jurisprudence made possible and practised by *writing as flesh*. In this mode, the jurisprudent attempts to intuit an interiority to flesh which they inhabit through writing.[228] The jurisprudent folds in alongside the sinews, the fœtid cuts, pus, pulses, bright and gushing blood, to feel the touch of skin abutting, overlaying, sliding, the warmth of a belly full of breath, skin receding, bone buckling, the wet pallor of a limb slender from infection and disuse: a polyphony of existence, typically withdrawn in the recesses of our bodies' depth, yet generative of meaning.[229] Importantly to the jurisprudent, that meaning is perfused with the normativity of bodies touching, charged in the space where organic life makes contact, reaching inside and past each other, forming a complex of relations; normativity in feelings—affection, animus, love, pain—which accumulate from the effects of flesh, and order how bodies correspond; and normativity in creation, enhancement and the decomposition of organic life by which individuated life forms experience their

[224] Ibid, 23.
[225] Ibid, 27
[226] Ken Gale, "Writing Minor Literature: Working with Flows, Intensities and the Welcome of the Unknown" (2016) 22:5 *Qualitative Inquiry* 301 [Gale (2016)].
[227] Xiao-Jiu Ling, "Thinking Like Grass, with Deleuze in Education?" (2009) 7:2 *Journal of the Canadian Association of Curriculum Studies* 31, 38.
[228] Bergson (2007), *supra* note 16; Cisney (2020), *supra* note 16.
[229] Drew Leder, *The Absent Body* (Chicago: University of Chicago Press, 1990).

milieu.[230] Conjured in writing,[231] feelings of normativity—imagined in flesh taking form—undulate through the jurisprudent-as-flesh, with which their senses pullulate, and movement of the world recomposed in perception from the advantage of that fleshy interior. In other words, by *writing as flesh*, the jurisprudent comes to coincide with the relations that make up flesh, and the relations flesh authorizes in its expression; the jurisprudent metamorphizes into flesh in their writing so to feel the flow of corporeality in the impulse of movement.

To *write as flesh* the minor jurisprudent must be unafraid of thinking about objects- or things-in-themselves which cannot be "known" directly. Rather to write as flesh is to strain and rearticulate experience through unreality, through imagination, to metamorphize, following intensities of writing toward the creation of something else.[232] The task of inquiry is fundamentally one of aesthetics, as opposed to correlating experience to truth, attending to how meaning is made by objects through human imagination.[233] Nancy Katherine Hayles explains how an object is never known completely, it withdraws from human senses presenting some qualities in ephemeral conditions of encounter; importantly the qualities given by an object are not passively given to the human, rather "humans *attend* to certain qualities in specific contexts" which work to construct qualities of concern.[234] For Hayles, the aesthetic practice of imagining other entities can "say a great deal about a real object's real qualities,"[235] by thinking through relations of objects by which their meaning is produced and makes a difference to other objects; by thinking through inferential "evidence about their ways of being in the world,"[236] to arrive to plausible explanations of existence whose criterion ought to be what lives they allow us to inhabit. That aesthetic criterion—what lives do

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[230] These ecological senses of normativity can be gleaned from Canguilhem (1991), *supra* note 123; Davies (2022), *supra* note 28.
[231] Cisney (2020), *supra* note 15.
[232] Deleuze and Guattari (1983), *supra* note 4 at 27.
[233] Hayles (2014), *supra* note 17; Robert S Lehman, "Toward a Speculative Realism" (2008) 11:1 *Theory and Event*, https://muse.jhu.edu/article/233870 [Lehman (2008)].
[234] Hayles (2014), *supra* note 17 at 172.
[235] Ibid, 174
[236] Ibid, 178.

explanations allow us to inhabit—is suited to the minor jurisprudent who assumes responsibility for people "meet[ing] well" with the law.[237]

It is in that sense of minority that some critical legal theory has been described as a minor literature.[238] Not because critical legal theory aligns with or seeks justice for minority or otherwise marginalized groups, although it can do that too.[239] Critical legal theory can appropriate the task of theorizing law from majoritarian jurisprudence, making theory and law fundamentally an aesthetic practice, creating meaning through what theory conceptualizes—yes—but also in how writing brutishly enables one to inhabit different worlds.[240] Whilst the dissertation does not, in itself, write as flesh, the historical and contemporary literatures covered evince modes of legal thought which hold, or assume, human corporeality is jurisgenerative. The dissertation thereby does preparative work. Now let us write.

[237] Barr (2016), *supra* note 29; also see Dorsett and McVeigh (2012), *supra* note 29.
[238] Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (Abingdon: Routledge, 1996).
[239] Ibid.
[240] Goodrich (2017), *supra* note 11.

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