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FRANCESCO'S DEVILISH VENUS: NOTATIONS ON THE MATTER OF LEGAL SPACE

IGOR STRAMIGNONI*

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* Department of Law, London School of Economics and Political Science. A first, shorter version of this paper—drawing on E. T. A. Hoffmann's *The Devil's Elixirs* to expose my notion of poetic comparisons of law—was presented as a Faculty Seminar at the LSE in October 2003. I wish to thank those of my colleagues who provided some feedback on that version of the paper—above all, no doubt, Martin Loughlin for the verve with which he attacked my radical, that is, poetic questioning of law. I am also especially grateful to Michael A. Gillespie of Duke University, Peter Goodrich of Cardozo Law School and Anton Schütz of the School of Law at Birkbeck College London for their erudite comments on later drafts of the paper. Many thanks go too to Boris A. Uspenskij of the Istituto Universitario Orientale di Napoli for the many enriching conversations over the years and, in particular, for pointing out to me *The Devil's Elixirs* when I first indicated to him my desire of engaging with the elusive matter of legal space. Finally, I am most grateful to Lupo who—while I was on sabbatical leave in Rome—retrieved for me in the British Library the forgotten English translations of Hoffmann's magnificent book.

Thus said, the responsibility for this article rests, of course, solely with me.

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In the following pages, I start by telling the strange story of a painter and of his picture. The story, I argue, invites questions about artistic space that could be productively asked of legal space too—the space, that is, that every legal theory and practice, each time and in different ways, institutes and rules. What, the story seems to ask, is to “think” pictures? Where do the origins of artistic space lie? Indeed, where is the heartland of artistic space? And so too—*where is the heartland of legal space?* Where for example is the heartland of contract, murder, citizenship or war? Such questions—as it will be apparent to anyone interested in today’s most troubling debates over the future of the nation states and of the rule of law—are of considerable

importance and should not be ignored by a genuinely imaginative legal scholarship. In what follows I first suggest that many questions about say contract, murder, citizenship or war are better understood as “how” questions rather than “what” or “where” questions—then I work out some insights for a post-Heideggerian understanding of legal space. So the point here is not to look specifically into one or another, legal or political practice. Nor am I thinking here of a new theory, or even *meta*-theory, thereof. Instead, and much more limitedly, I hope merely if resolutely to do just that—to tell a story and ask what I think is a very central question: the question, that is, of legal space. To the extent that it is by asking a question that we can best visualize and then tackle its contours, the following considerations offer a fresh outlook on assumptions dominant in legal theory and practice—though to suspend judgment and invite reflection, rather than spell out the specific agenda of any change, is the immediate task of these first notations on the matter of legal space.

INTIMATIONS

1. *The Devil's Elixirs*. At one point in the book entitled *The Devil's Elixirs*,¹ Hoffmann tells us the strange story of a young, gifted painter whose world and craft go suddenly into pieces. Here is the story.²

Once upon a time, the mighty Republic of Genoa decided to ask Camillo, prince of P., whether he would be prepared to give a good lesson to some fearsome Algerian corsairs who were raiding the Republic's coasts. Camillo was an ambitious person—so, without too

1. E.T.A. HOFFMANN, *THE DEVIL'S ELIXIRS* (Ronald Taylor trans., John Calder Publishers, Ltd. 1963). The history of the publication and of the translation of this book is unusual. Here, suffice to say that there are two German editions of the book, one of 1816, the other of 1827. Where possible, I have followed the first 1816 edition, published in Berlin under the title *Die Elixiere des Teufels—Nachgelassene Papiere des Bruders Medardus eines Capuziners*. The choice seemed justified by the fact that the 1816 edition was the only one authorized by Hoffmann himself, who died in 1822, five years before the second German edition came to light (1827). Furthermore, on the initial 1816 German edition is based the particular English translation (by R. Taylor, Calders and Boyars Limited, 1963), which I have referred to in my text. Though an earlier English translation of 1824 seemed at times preferable for its overall warmth and evocative atmosphere, that earlier translation represents only an abridged version of the German original—hence the decision to keep to the later 1963 English translation for the purposes of this essay.

2. *Id.*

much thinking about it, he decided to write to his eldest son Francesco, instructing him to return home and govern in his place while he was away on his punitive expeditions. At that time, Francesco was studying painting at the academy of Leonardo da Vinci and was so taken by his occupation that, we are told, he had no intention of returning home—for, he replied to his father, he “knew how to wield the brush but not the scepter.”³ After a further failed attempt to bring his son home, without more the old prince decided to disown Francesco in favour of his brother Zenobio. Relieved rather than upset by such a harsh decision, Francesco “signed a document solemnly revoking his succession to the Prince’s throne in favour of his younger brother[.]” and “renouncing his name and rank, became a painter, and eked out a scanty existence on the small yearly allowance which his brother granted him.”⁴ At the side of the old master, and learning from him, Francesco soon became a renowned painter securing commissions for many an altar-piece in churches and monasteries. Leonardo, on his part, continued to provide the young Francesco with his advice and assistance—until his death, at a great age.⁵

At this point, the story takes a first, unexpected turn. “Then like a fire that has been smouldering for a long time, pride and wantonness broke out again in the young Francesco. He considered himself the greatest painter of his time, and coupling his artistic perfection with his rank, he called himself ‘the noble painter.’”⁶ It was thus that, we are told, Francesco began to speak with increasing condescendence of his old master while, on the other hand, taking to paint in a wholly new manner.⁷ His figures were now richer and his colours brighter—a style that, while gaining Francesco much praise, also made him more and more vain, and more arrogant than ever.⁸ Needless to say, Francesco was soon attracted by all sorts of dubious youth and practices.⁹ Such reproachable company seemed to be mainly one of painters and sculptors “who were completely absorbed in the art of Antiquity and scorned all that modern artists, inspired by Christianity, had conceived and executed in its glory.”¹⁰ Francesco, in particular, excelled in the art of portraying very realistically “the sensuous beauty of the female

3. *Id.* at 252.

4. *Id.* at 253.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 254.

form, for he drew the erotic quality from living models and his formal values from the marble busts of Antiquity.”¹¹ Among such ancient statues, Francesco, we are told, had long had a real liking, indeed a true obsession, for one well-known portrait of Venus, of which Hoffmann here tells us no more.¹²

Now, it so happened that Francesco's libertine life soon caused him to run into trouble. Short of money, Francesco recalls that a Capuchin monastery had some time before commissioned him a picture of Saint Rosalia—for which he had been promised a considerable recompense.¹³ Despite his repulsion for the sacred art, Francesco now imagines “to portray Saint Rosalia in the nude, with features like those of that Venus.”¹⁴ It is at this point that the story takes a second, unexpected turn. As the young painter starts on his new work, he is progressively overwhelmed by a truly inexplicable power, by force of which Francesco is pushed “to drape round the naked body,” as initially conceived, “demure and graceful robes—a crimson gown and an azure cloak.”¹⁵ An angelic face, too, now appears on the canvas, though Francesco is unable to take himself to complete it.¹⁶ At first the only figure on the canvas about which the Capuchins had earlier given no particular instructions, Francesco now draws Saint Rosalia surrounded by a number of other figures in a scene suggesting her holy martyrdom.¹⁷ What is more, Hoffmann tells us, Francesco

was completely absorbed in his picture: it was as though it had become a powerful spirit which was holding him in his arms, high above the wicked life which he had hitherto been living. Yet he was still unable to complete her face, and this tormented him day and night.¹⁸

It is then that Francesco's party arrives—finding him lying in bed, looking rather unwell.¹⁹ Francesco's protestations that by some evil demon he was being prevented from completing his picture meet with skepticism and laughter.²⁰ By contrast, some Syracusan wine is now passed around and drunk before the incomplete picture, and toasts are

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 254-55.

16. *Id.*

17. *Id.* at 255.

18. *Id.*

19. *Id.*

20. *Id.*

made to pagan divinities.²¹ This time, however, Francesco is reluctant to join-in, and all the more derided by the others for that reason.²² Finally, one of the party, pretending to be a doctor, takes out a bottle from under his cloak.²³ That is an odd moment. “A strange scent filled the room, overcoming the men so that they sank into their chairs and closed their eyes as if in sleep.”²⁴ Francesco, annoyed for the continuing derision to which he had been subjected, suddenly takes the bottle and drinks a mouthful.²⁵ The scene now changes rapidly. All others, wakening from their stupor, leave.²⁶ As to Francesco, Hoffmann tells us:

As Mount Vesuvius roars and sends forth its destructive flames, so streams of fire shot through Francesco’s soul. All the pagan subjects he had ever painted appeared as living forms before his eyes, and cried out fiercely: “You too must come, my beloved goddess. You too must live and be mine, or I shall deliver myself up to the gods of the underworld.” Then he saw Venus standing close to the picture, beckoning gently to him.²⁷

At the sudden view of his beloved Venus, Francesco quickly stands up and rushes to paint the head of Saint Rosalia—yet, inexplicably,

[i]t was as though his will could no longer command his hand, for the brush continually slipped away from the clouds enveloping the saint’s head, and painted involuntarily the heads of the barbaric figures which surrounded her. But her celestial countenance emerged more and more plainly, and suddenly she looked at him with such dazzling eyes that he fell to the ground as if struck by lightning.²⁸

Fainting and then waking up again, Francesco drinks more of the bottle’s contents.²⁹ But, turning once more to his picture, he now realizes that, meanwhile, his work has been mysteriously completed—though the picture now shows a lustful Venus, not a pious St Rosalia.³⁰ The picture, in fact, seems alive and moving—yet frantic

21. *Id.*

22. *Id.* at 255-56.

23. *Id.* at 256.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 257.

28. *Id.*

29. *Id.*

30. *Id.*

attempts by Francesco to take this devilish Venus in his arms show that, out there, there is only inert matter.³¹ And yet,

[o]n the third day, while he was standing before the picture motionless as a statue, the door of his room opened and he heard a rustling sound behind him as of a woman's dress. Turning round, he saw alive before him, in all her loveliness, the woman of his picture. Speechless, he fell at her feet, raising his hands to her in worship. The woman lifted him up, a gentle smile on her lips, and told him that, when she had been a little girl and he a student at Leonardo's academy, she had often seen him and cherished even then an all-consuming love for him; she had left her parents and relatives and come to Rome to look for him, for an inner voice had told her that he loved her too, and that he had painted her portrait out of desire and longing for her. Francesco realized that he was under the spell of a mysterious spiritual relationship to this woman, and that this relationship had caused his passionate love and the wonderful picture to merge into one.³²

THE ORIGINALITY OF LEGAL SPACE

*"Ars est perceptionum exercitatarum constructio ad unum exitum utilem vitae."*³³

2. *Thinking.* Hoffmann's generally unorthodox, personal story is known. Trained as a lawyer, Ernst Theodor Amadeus Hoffmann (1776-1822) was an unusual personality of many talents (he was, amongst other things, a judge, a musician and a writer), and he exercised a great deal of influence over the likes of Baudelaire, Balzac, Poe, Dostoevskij, Schumann and Offenbach. *The Devil's Elixirs*—one of his most famous works—has been widely read, as widely analyzed has been its psychological inventiveness, gothic narrative and romantic angst. The aim of the book, Hoffmann once wrote to a friend, was

to reveal, through the strange, perverted life of a man who from his birth had been tossed to and fro by the forces of Heaven and Hell, those mysterious relationships between the human mind and the higher values enshrined in Nature, values whose meaning we glimpse

31. *Id.*

32. *Id.* at 257-58.

33. DIOMEDES, DE ARTE GRAMMATICA, 2 (GL. 1.421.5—7K.).

in those rare moments of insight which we choose to call the products of Chance.³⁴

Thus, Hoffmann seems to ask, what is it that we normally summon when we speak of “Nature”—when we speak of the *visible world* unfolding, or so we think, “out-there”? Is meaningful insight into “Nature” the result of “Chance”? How is “Nature,” the visible world, grasped—how is it thought—by human being?

The Devil's Elixirs is a complex book with many themes. Yet one of the central questions that Hoffmann seems to be asking throughout his book is, quite simply, *what is each time at stake in thinking*—here, in thinking pictures? Is thinking a representing or imitating of the visible world (a *re-presenting* of it)—in the sense of the scholastic *adaequatio rei et intellectus*?³⁵ Or is there something else that is everywhere at stake in thinking? If thinking is only a representing or imitating of the world outside—what, then, of Francesco’s failed attempts to paint saint Rosalia “in the nude, with features like those of that Venus,”³⁶ his model, that he liked so much? The cynical might be tempted to treat the story of Francesco and his devilish Venus as just another instance of a mad painter given to drink, and heaven only knows what other similar practices—and so give those attempts no special notice. That in my view would be a rather rushed move—doing a bad service to someone who is still today regarded by many as one of the most interesting and complex writers of modernity. By contrast, one set of questions raised by Francesco’s failed attempts to paint a somewhat iconoclastic image of the saint after a Venus he knew so well seems to be: is representation really ever possible? And if it is, how is it possible? To start with, Francesco seems to be overtaken by a ‘powerful spirit’ forcing him to paint a holy image of the saint, not an iconoclastic one.³⁷ Secondly, however, he seems to be strangely unable to paint the *face* of the saint, in whatever fashion. Until, that is, Francesco suddenly gains a glimpse of his beloved Venus “standing close to the picture, beckoning gently to him.”³⁸ It is only at that point that Francesco feels he has the energy to try again—only though to find out that all he can in fact draw are the heads of the

34. Ronald Taylor, *Introduction* to HOFFMANN, *supra* note 1, at ix.

35. See, e.g., MARTIN HEIDEGGER, *On the Essence of Truth*, in BASIC WRITINGS 111, 113 (David Farrell Krell ed., HarperCollins Publishers 1993) (1977).

36. HOFFMANN, *supra* note 1, at 254.

37. *Id.* at 255.

38. *Id.* at 257.

“barbaric figures” near Saint Rosalia, rather than the saint herself.³⁹ Yet it is as if, somewhat paradoxically, the reluctant painting of those unlikely figures *makes* the saint look all the more resplendent. In the end, the picture is in fact completed—and it *does* show a lustful Venus rather than a pious Saint Rosalia. How though could it all happen the way it did? Who or what is really the devilish Venus that suddenly appears next to the picture and, then, comes alive “in all her loveliness”?⁴⁰ What place does that Venus really have in Francesco’s thinking the thought—and so painting the picture—of St Rosalia? Surely, I would suggest, there is here a figure of “excess”—an excess in respect of the picture that Francesco had initially set out to paint. But if Francesco’s devilish Venus is, as it were, the excess of the painter’s intended representation—what, then, might be at stake in thinking?

3. *Contract, Murder, Citizenship and War.* Surely, to ask what is thinking—what is each time at stake in thinking—asks us to begin with thinking *thought* afresh. That is, it asks us to begin with what Martin Heidegger called “meditating thinking,” a thinking that meditates thought—as opposed to “calculating thinking,” a thinking that measures, calculates thought.⁴¹ But what in particular might *lawyers* need to think afresh? One obvious answer is that lawyers might need to think afresh the many theories and practices they put in place—those, for example, that tell us what counts as contract, murder, citizenship or war. In other words, lawyers might need to interrogate what I would like here to call the characteristic “space” that each time such theories and practices institute and rule. Indeed on inspection it is precisely the status of such space—the status of the space that is each time traced out by what legal theory or practice is each time in

39. *Id.*

40. *Id.* at 257-59.

41. The difference between “meditating thinking” and “calculating” thinking (this latter being the “metaphysical,” instrumental thinking characteristic of Western thinking, including legal thinking, from Plato onwards) is a recurrent theme in Heidegger’s work. See, e.g., MARTIN HEIDEGGER, *What is Metaphysics?*, in *PATHMARKS* 82 (David Krell trans., 1998); MARTIN HEIDEGGER, *Gelassenheit*, in *DISCOURSE ON THINKING* (1966); 13 MARTIN HEIDEGGER, *Zur Erörterung Der Gelassenheit: Aus einem Feldweggespräch über das Danken*, in *GESAMTAUSGABE* 37-75 (Vittorio Klostermann 1983) (1944); MARTIN HEIDEGGER, *ÜBERLIEFERTE SPRACHE UND TECHNISCHE SPRACHE* (1989) [hereinafter HEIDEGGER, *ÜBERLIEFERTE*]. Importantly, calculating thinking is *en-closed* or self-referential thinking. UMBERTO GALIMBERTI, *IDEE: IL CATALOGO È QUESTO* (1992) (“C’è un pensiero che calcola e c’è un pensiero che pensa. Il primo è un pensiero *chiuso* che nasce quando l’uomo non si coglie più *nel* mondo, ma pone il mondo *innanzi a* sè e, oggettivandolo, ne dispone in vista del suo impiego, della sua manipolazione, del suo dominio.”). *Id.* at 25-26. See also *infra* ¶ 18.

place—that is in my view so dramatically at stake today in so many current debates over the future of Western democracy and the rule of law.⁴²

Initially, however, to interrogate legal space as a way of thinking thought afresh must mean, I suggest, to *question the origins of legal space* rather than to examine the form or contents of a particular theory or practice—thereby positing those origins as given.⁴³ As we will see, to posit the origins of legal space as given would be to imply the universality and neutrality of legal space and so to deny, in particular, what I would describe as the *evidence* of its politics.⁴⁴ By contrast, I

42. The debates which I refer to here are those concerning such controversial issues as, for example, economic globalization, the globalization of communication technologies, the globalization of transportation, the advent of “Risk Society,” the ecological impact of reflexive modernization, and U.S. exceptionalism and the “new world order.” Diverse as such issues of course are, one thing they have in common is that they raise questions of exceptional importance for the legal jurisdictions implicated in those processes. See generally ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* (1990); ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* (Mark Ritter trans., 1992); JEAN-MARIE GUÉHENNO, *LA FIN DE LA DEMOCRATIE* (1993); ZYGMUNT BAUMAN, *GLOBALIZATION: THE HUMAN CONSEQUENCES* (Columbia Univ. Press 1998); MICHAEL HARTD & ANTONIO NEGRI, *EMPIRE* (2000); HAROLD JAMES, *THE END OF GLOBALIZATION: LESSONS FROM THE GREAT DEPRESSION* (2001). For views of the impact of such processes on the law, see, e.g., BAUMAN, *supra* at ch. 5; WILLIAM TWINING, *GLOBALIZATION AND LEGAL THEORY* (William Twining & Christopher McCrudden eds., 2000) [hereinafter TWINING, *GLOBALIZATION*]; the numerous contributions to *Diritti e Globalizzazione IX*, *RAGION PRATICA* 16 (Piero Barboni ed., 2001); and TRANSNATIONAL LEGAL PROCESSES (Michael Likosky ed., 2002). According to one increasingly popular view, “[i]t is in the legal realm that we find many of the deepest weaknesses and greatest hopes of our age. It is in the process of law, perhaps more than in economic institutions, that the greatest puzzles facing our societies lie.” Jeffrey Sachs, *Globalization and the Rule of Law*, Address Before Yale Law School (Oct. 16, 1998), in *YALE LAW SCHOOL OCCASIONAL PAPERS* (2d ser., No. 4), available at <http://lsr.nellco.org/yale/ylsop/papers/2>.

43. One excellent but ultimately insufficient instance of this, combining Kelsenian and Saussurian insights and distributing the legal system along the axes of an “ordre normatif” and of an “espace normatif,” is generally GÉRARD TIMSIT, *THÈMES ET SYSTÈMES DE DROIT* (1986). For this author, “ordre normatif” is a “système d’archinormes” or “d’engendrement des normes,” that is, “un système des règles assignant un certain type de rapports, de compatibilité, de conditionnement, aux normes considérées dans leurs relations réciproques et dans les relations qu’elles entretiennent avec les organes, avec les institutions . . . qui les engendrent.” *Id.* at 29. By contrast, “[a]vec la notion d’En [espace normatif], il n’est plus question de s’interroger sur le système d’engendrement des normes, sur le mode de generation des règles, mais sur le contenu des normes elles-mêmes, et la signification qu’elles revêtent pour ceux auxquels elles s’adressent.” *Id.* at 69.

44. The work of the Critical Legal Studies movement has been of course pivotal in attracting (unwanted) attention to the politics of law, but in many cases the evidence of those politics has been discovered *within* the legal theories or practices examined, thus paradoxically reaffirming the very theory and practices that were being criticized. See generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Duncan Kennedy, *Freedom & Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL. EDUC. 518 (1986) (I am grateful to Duncan Kennedy for pointing out this paper to me); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987). For a parallel approach in comparative law, see David Kennedy, *New Approaches to Comparative Law: Com-*

suggest that the question initially must be: what is each time at the beginning of legal space? How may a certain legal theory or practice have originated? Did it really stem from, as the prevailing legal-philosophical tradition of the West would normally hold, one or another of the innumerable, usually written *texts* of yet another legal theory or practice? Or is it perhaps the *institutional context* of any such theory or practice that—in a socio-legal tradition closer to our own—we should be looking at, instead? What is that which is at the beginning of legal space—text, institutional context or—and this would be a third possibility—some other sort of “space”? Is my contractual space, for example, truly that which my written or oral contract says it is or even that which, say, my specific economic position allows or induces me to negotiate? Or is it perhaps the case that, by contrast, such space is in fact some other sort of space—neither textual nor properly institutional-contextual? Is it my being a murderer really, principally linked to my evil deeds, or even to the institutional context that calls me a murderer? Perhaps not, as shown for example by Raskol’nikov’s odd fortunes in *Crime and Punishment*.⁴⁵ Am I a citizen of this country only so long as my papers say so, or so long as I live and work here, or can it be the case that I am a citizen because of something else that, quite literally, *makes* me a citizen? And is war simply what international treatises say that it is,⁴⁶ or even that which a particular institutional context, for example, a supposed “clash of civilizations”⁴⁷ may or may not be said to trigger—or is it perhaps something else that *makes* the war? And, finally, if contract, murder, citizenship or war are not only what they appear to be, but something else—what then is every time at stake in legal space? These are by and large the sort of questions that interest me here—the questions that I here begin to ask as a way into what I propose to call the *heartland* of legal space, as well as a contribution towards the debate over the future of Western democracy and the rule of law. In particular, to interrogate legal space—to walk back toward what must be the ever mobile heartland of legal space—is, I suggest, to ask *how* is each time

parativism and International Governance, 1997 UTAH L. REV. 545 (1997).

45. FEODOR DOSTOEVSKY, *CRIME AND PUNISHMENT* (George Gibian ed., Jessie Coulson trans., W.W. Norton & Co., Inc. 1964) (1953).

46. Both the attack on the Twin Towers and, in a perfect parallel, the second war in Iraq show how, unfortunately, war is *not* simply that which an international treatise may or may not say that it is.

47. This is the notoriously disputable thesis of Samuel P. Huntington, *The Clash of Civilizations, in THE FUTURE OF PEACE IN THE TWENTY-FIRST CENTURY* 454 (Nicholas N. Kittrie et al. eds., 2003).

the legal space that is each time at stake. Or, to put it somewhat differently, to start on the way back towards the heartland of legal space is to think about the *originality* of that space—so that it is really on that originality and the inauguration thereof (rather than the “origins” as one might think at first) that I wish to offer here some preliminary considerations.

4. *The Matter of Legal Space.* But first, how might Hoffmann’s story have anything to suggest to a lawyer? Is Francesco not an *artist*—and only that, at that?

Francesco is indeed an artist and his picture is a work of art. So, how might the making of a work of art be at all regarded to be in any way similar to, for example, the ruling of a court or the drafting of legislation—and, in fact, how might a work of art, of all things, be in any way associated to, say, a legal decision or a statutory provision? Simply put, a parallel would lie in that both painters and lawyers are said to be the holders of particular techniques that allow them to *represent* the visible world “out-there” within the confined boundaries of, for example, a canvas or a legal theory or practice. In a way, therefore, both pictures and legal texts such as, for example, judicial decisions or statutory provisions can be said to be representations resulting from *experience*—artistic representations the former, legal representations the latter. Both Plato and Aristotle argued how, in fact, representations can only amount to interpretations by a particular individual trying to *imitate* reality (representations are *mimesis*)—though Aristotle, unlike Plato, thought such representations, however imperfect, to be useful to knowledge.⁴⁸ Cicero, on his part, apparently employed the term “ars” (art) to translate a definition of “technique” by the Stoic Zeno—stressing how techniques are the representation of each time a particular individual concerned with a particular end that is thought to be useful to life (*ars est perceptionum exercitatarum constructio ad unum exitum utilem vitae*).⁴⁹ Indeed, according to Quintilian, the

48. On Plato’s concept of “technē” (technique), see generally MARGHERITA ISNARDI PARENTE, *TECHNE: MOMENTI DEL PENSIERO GRECO DA PLATONE AD EPICURO* (La Nuova Italia 1966); 2 A.A. LONG & D.N. SEDLEY, *THE HELLENISTIC PHILOSOPHERS* (1987); DAVID ROOCHNIK, *OF ART AND WISDOM: PLATO’S UNDERSTANDING OF TECHNE* (1996).

49. See DIOMEDES, *supra* note 33. Diomedes’ attribution of this definition to Cicero is supported by PARENTE, *supra* note 48, at 290. Sceptical, by contrast, is Ioanna Garbarino, in M. TVLLI CICERONIS, *FRAGMENTA* 109 (Ioanna Garbarino ed., 1984). Isnardi Parente argues that the transformation of the Roman “jus civile” from “scientia iuris” to a more structured concept of “ars” (the Roman equivalent of the Greek *technē*) had already begun in the period between the first century B.C. and the first century A.D.—though the first ever mention of the term “ars” in this respect is in the later, well known definition of “ius” by Celsus as “ars boni

most common definition of art amongst the Romans highlighted precisely the same points (“*artem constare ex perceptionibus consentientibus et coexercitatis ad finem utilem vitae*”),⁵⁰ a point confirming how generally Romans agreed with Aristotle, not with Plato, as to the cognitively useful if no doubt imperfect character of any such representation.⁵¹

The parallel between an artist and a lawyer is not far-fetched, and has been made or implied before, for example, in the case of adoption. In holding that adoption must imitate nature, Dig. 1, 7, 16 and Inst. 1, 11, 4 refer to an old Aristotelian maxim both to explain the limits of adoption and to highlight the artistic power of the lawyer. Bartolus and then Baldus reiterate the point, while in the 17th century Joannes Oinotomus goes as far as freely recognizing how adoption, like art, imitates nature.⁵² Nor has the association between artists and lawyers become any less popular since. Pringsheim, for example—on comparing the Roman system of actions with the English forms of action and noting the reliance of both on an individual, personified action—observed how

in entering the domain of art, both nations show a similar inclination and endowments. Eminently Roman and eminently English is the ability to portray, and especially the ability to depict the characteristic head; both Roman sculptor and English painter exhibit a grasp of personal characteristics, a sense of reality and of the significant, which is related to the juridical talent just described.⁵³

Lawyers are being painted as painters to this very day. So, for example, one critic has recently argued how “[a] healthy global general

et aequi.” DIG.1.1.1pr. (Ulpianus, 1 inst.), <http://www.thelatinlibrary.com/justinian.html> (last visited Nov. 4, 2004). The debate is examined in VINCENZO SCARANO USSANI, *L’ARS DEI GIURISTI: CONSIDERAZIONI SULLO STATUTO EPISTEMOLOGICO DELLA GIURISPRUDENZA ROMANA* ch. 1 (G. Giappichelli ed., Torino 1997).

50. MARCUS FABIVS QUINTILIANUS, *INSTITUTIO ORATORIA* liber 2, cap. 17, § 41 (T.E. Page et al. eds., Harvard Univ. Press 1921), http://www.intratext.com/IXT/LAT0332/_index.htm#fonte.

51. See also MARCUS TULLIVS CICERO, *ACADEMICA PRIORA* liber 2, cap. 7, § 22 (n.d.), available at <http://phil.flet.mita.keio.ac.jp/person/nakagawa/texts/cicero/acadprio.html> (“*ars uero quae potest esse nisi quae non ex una aut duabus sed ex multis animis perceptionibus constar*”); MARCUS TULLIVS CICERO, *DE NATURA DEORUM* liber 2, § 59, at 148 (T.E. Page et al. eds., Harvard Univ. Press 1961) (“*ex quibus conlatis inter se et comparatis artes quoque efficimus partim ad usum vitae . . . necessarias*”); PARENTE, *supra* note 48.

52. Ernst H. Kantorowicz, *The Sovereignty of the Artist: A Note on Legal Maxims and Renaissance Theories of Art*, in *DE ARTIBUS OPUSCULA XL: ESSAYS IN HONOR OF ERWIN PANOFSKY* 267, 269-71 (Millard Meiss ed., New York Univ. Press 1961) (1960). “*Adoptio enim seu ars imitatur naturam.*” *Id.* at 269 n.11 (quoting J. INST. 1.11.4. (Venetiis, 1643)).

53. Fritz Pringsheim, *The Inner Relationship Between English and Roman Law*, 5 *CAMBRIDGE L.J.* 347, 358-59 (1935).

jurisprudence should be able to give a total *picture* (descriptive/explanatory/normative/analytical) of the phenomena of law in the modern world."⁵⁴ For, it is maintained, the question for jurisprudence is "what is involved in *depicting* (i.e. interpreting, describing and explaining) a single legal system or order[.]"⁵⁵ and it is to questions such as that one that "a substantial part of our vast heritage of jurisprudential writing is ostensibly addressed."⁵⁶ In an alternative view, lawyers are painters whose portraits are self-portraits that need to be subjected to a comparative semiological analysis,⁵⁷ or else painters whose paintings offer competing views of the visible world that need not be attacked or reconciled, but simply accepted on their own terms.⁵⁸

Many more examples of this old-standing parallel between the art of painting and the art of law could of course be mentioned. But the point here is simply to highlight how Hoffmann's story (the strange story of a picture that was meant to show an "illicit" St Rosalia but, as it turns out, does not do just that) might indeed help us think legal theories and legal practices—the *legal space* they institute and rule—afresh. For there is some obvious similarity between a picture and a legal text or even the institutional context which may have led to it—at least to the extent that both legal texts and their institutional contexts are traditionally thought to be reflecting, however imperfectly or creatively, the worldly experience of those who set them up or lived them through. In particular, it is experience that, in such a view, lies at the origins of both the art of painting and the art of law—of both legal and artistic space.

So on inspection our initial question asking what is at the beginning of legal space could be aptly reformulated as asking, in particular, what is at the beginning of legal experience. Take for example the history of judicial decisions, statutes, legal procedures, substantive

54. TWINING, *GLOBALIZATION*, *supra* note 42, at 88 (emphasis added). See also William Twining, *Reviving General Jurisprudence*, in *TRANSNATIONAL LEGAL PROCESSES* (Michael Likosky ed., 2002).

55. TWINING, *GLOBALIZATION*, *supra* note 42, at 165 (emphasis added).

56. *Id.*

57. Mitchel Lasser, *Comparative Law and Comparative Literature: A Project in Progress*, 1997 UTAH L.R. 471 *passim* (1997). According to Lasser, American lawyers John Dawson and John Merryman "paint . . . portraits of the French civil judicial system" that "are rather difficult to believe." *Id.* at 472-73. This critic's proposed strategy is thus to resort to a comparative semiological analysis treating judicial texts in France and the U.S. as "portraits" and, "[i]nsofar as judicial texts offer representations of their judicial authors and of these authors' practices, . . . as self-portraits." *Id.* at 481. See generally Mitchel Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, (1995).

58. Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221, 226 (1999).

laws, the architecture of courts or prisons, etc. Indeed, that history shows well how—just as painters, sculptors, etc. must develop a mix of practical skills and personal sensibility to produce what piece of work they may have had initially in mind—so, too, lawyers must become the skillful holders of complex techniques, both personal and useful, if they are to do properly their job. Accordingly, lawyers like painters work out their ideas—they build each time their different stories—on the basis of what relevant experience they might or might not have of the outside world. For, indeed, “[t]he life of the law has not been logic: it has been experience.”⁵⁹ As Roscoe Pound generally put it in regard of what he called “legal precepts,”

[t]here is in any legal system a traditional technique of developing and applying legal precepts by which those precepts are eked out, extended, restricted, and adapted to the administration of justice. This technique of developing and applying the precepts is quite as authoritative as and no less important than the precepts themselves.⁶⁰

However, if at the beginning of legal space is—as the parallel with artistic space suggests—experience, the more difficult question, it seems to me, is: *what is each time the how of that experience?* Is the how of that experience subjective, objective or, by contrast, neither properly subjective nor properly objective? Is it imitation or is it creation? And if the how of that experience is neither simply subjective nor simply objective—neither sheer imitation nor outright creation—how then is that experience? Once again—on asking such questions I wish in what follows to interrogate the origins of that experience rather than immersing myself in it by analyzing its many forms and contents as they can be found in everyday life. In particular, I wish to ask: *how original is the experience that is each time at the origins of legal space?* Ultimately, as I have earlier indicated, to interrogate legal space is precisely to interrogate that originality.

It is important at this point to consider that, in fact, the question seems to be twofold. First, that question asks: *how* is each time, precisely, the space of legal representations? Second, that question asks: which is, each time, the *heartland* of legal space? No doubt, legal procedures, judicial decisions, legal rules, regulations, courts, prisons etc., but also, for example, legal histories—are each time the specific *place* of given judicial, legislative or administrative instructions that

59. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1923).

60. Roscoe Pound, *Comparative Law in Space and Time*, 4 AM. J. COMP. L. 70, 74 (1955) [hereinafter Pound, *Comparative*].

may or may not be a reflection of one's own experience of everyday life. Collectively, such places make what might be called the "legal archive." But, then, *how* is each time the legal archive? Where might its originality lie? Or, which is the same, where do those legal places really come from?⁶¹ Do they come from what other predominantly written texts the legal archive is typically seen to arrange orderly together? Alternatively, do they come from the institutional context of which the legal archive is said to be each time the product? To be sure, for the setting up of that strange archive the individual and collective experience of those involved matters. It sets the rhythm of ideas.⁶² It provides, each time, the building site of a different world. So, lawyers like painters might well be "artists"—but, clearly, their art is of a worldly nature. It is experience—namely, a means to an end. It is, quite literally, archival, rhythmic interpretation of texts and institutional contexts. But then, again, how is precisely that experience—how is precisely the art of legal space? How, in particular, is the space of that interpretation and, also, which is each time the heartland thereof?

Together, the how of legal space and the heartland of legal space would be nothing less than what I will here call, for short, the matter of legal experience—and so the *matter of legal space*. That matter is, I think, intriguing—and, again, as I understand it that matter would be something other than the mere form or content of any particular legal theory or practice. Nor, on the other hand, would there be here always the *same* matter, or else the simple, crude matter of the supposed instrumental function of any such theory or practice. And yet—neither just form or contents, essence, structure or function—the matter of legal experience is, it seems to me, central in the precise sense that it lies at the core of so many of today's more challenging legal and political debates.

So then, what is the matter of legal experience—what is the matter of legal space?

5. *Comparing As Such, or the How of Legal Space*. As noted, a first response to the core question of the matter of legal space requires us to take a first step back toward the inauguration of legal space.⁶³

61. Again, by asking *where* does a certain legal place come from I mean to ask questions about the *originality* of those places—not just the textual or contextual origins of them.

62. For an elegant essay on law's rhythm, see Jan Patrick Oppermann, *Anaximander's Rhythm and the Question of Justice*, 14 L. & CRITIQUE 45 (2003).

63. See *supra* ¶ 3.

What then is it that inaugurates legal space—or, better still, *how* is it that legal space is inaugurated? I will return to that question throughout the remainder of this paper.⁶⁴ Before we can proceed, however, we must briefly consider how *comparisons* seem to be needed of both artistic and legal measure—however apparent that may or may not happen to be in any particular instance. So to interrogate legal as well as artistic space—to ask which is the matter of a lawyer’s experience and so, then, which is the matter of legal space—must involve some consideration of the art of comparison. In particular, we must ask: is comparing central or peripheral to those arts?

(i) Here, it will be sufficient to note how comparing has been generally explained to be, quite simply, a drawing of comparisons. But then, the question is, what would those comparisons be like?

Etymologically to compare means to bring jointly into presence—from the Latin *cum-parere*, to present together. Thus, according to a first traditional view, comparing draws comparisons *as* co-presences. That is, in particular, what for example comparative lawyers would typically do—draw comparisons as co-presences. Co-presences of what? Co-presences of present-presences—legal texts or institutional contexts—for, surely, one can only compare what is always already there, available for comparison.

But then, if comparing is a drawing of comparisons as co-presences of present-presences, each comparing and its comparisons must, on this first account, come *after* the present-presences that, on comparing, are to be presented together (or so, at least, it would appear). That is to say, there must be here, once again, a representation—in the very sense of there being, each time, a *re-presentation* or imitation of certain present-presences that only thus would come into their co-presence. Comparisons, in this first, commonly-held view, would therefore be but a particular type of legal representation—in fact, a second-order representation, or a representation of representations—one whereby the *re-presentation* of the visible world occurs, as it were, through a copy of a copy rather than through the “original copy” itself. But then, a pale image of themselves, comparisons, in this first view, end up fading away in their unbridgeable distance with the Same.

(ii) That could well be so—comparisons could indeed be the result of a very imperfect attempt to represent (imitate) the world “out-there”—and no doubt many believed and others continue to believe

64. See *infra* ¶ 6.

that *that* is what comparisons ultimately amount to (some very imperfect representation of reality). But then the question becomes—or so a second view would immediately point out—*where do present-presences come from?* Clearly, according to this second view, those present-presences come from a *separating* of sort—the separating of a picture or of a written legal text or of a certain institutional context from the world at large. Indeed, the holders of this view would argue, it is precisely that separating that, above else, lets picture, legal text or institutional context *come* each time *into their presence*, or else *into their co-presence*—and, in particular, it is the painter or the lawyer (whether individually or collectively considered) who draws the parting line at one point rather than another of the visible world. To put it otherwise, representations in this second view would be *creations* of sort and so legal representations, far from being merely a matter of imitating something already present that lies in the surrounding world, must be, they too, creations—the result of a separating as *creating*—by those who, each time, set out to draw them.

So, on this second account, present-presences would come into presence as a result of what separating-creating each time allows them to be present or, else, to be co-present—like, for example, in the case of legal representations and of legal comparisons. But if that is so, then, one would think, comparisons including legal comparisons must be much more (or, depending on one's outlook, much less) than second order representations, or copies of other copies. Instead, they must be a painter's or a lawyer's or a comparative lawyer's very own artifact. That is why legal comparisons could not, in this second view, be treated like second-order legal representations (a species to a genus)—more than any other legal representation could legitimately be treated as just a second-order legal comparison. Legal comparisons and other legal representations, by contrast, should be now let loose of one another and then treated on an equal footing. For in this view there would be each time the result of an individual or collective separating-creating—so neither a copy as such, nor a copy of another copy.

Comparisons, in particular, would make themselves heard individually just enough to disappear, back again, into the *mare magnum* of legal difference where no comparison is any longer possible—that is, into the infinite variety of the Other (which is nothing Other than the Same).⁶⁵

65. Sarfatti noticed how the development of comparative law was at the beginning actively opposed by *both* the natural law school, for which comparisons were hopelessly imper-

(iii) It is only now that we can ask the key question of the matter of legal space: how, we must now ask, might be the *heartland* of any such separating-creating—whether the result be a comparison or any other representation? How, in particular, might the heartland be of a lawyer’s separating-creating of legal representations or of a comparative lawyer’s separating-creating of legal comparisons? And might this heartland affect or infect, each time, such separating-creating in a way that might have to be carefully considered?

One last point, though, needs to be clarified first—before we go to the core of the question of legal space. On careful analysis, the separating-creating that is here in question seems to be a presenting-together of a presence *thus being made present* together with what presence that presence is *being separated from* and so, too, *made present*. In that sense, separating-creating seems to be a parting that is indeed a *creating* of two or more parts—rather than a parting-disappearing of one particular part from the whole. But then what that must mean is that legal comparisons and other legal representations may well be creations—yet one’s own creating must first and foremost be a “comparing” in the specific sense of being *a producing of two or more presences that only thus can come properly into their co-presence*. Comparing, in this third sense, must thus be *at the beginning* of comparisons as well as of other legal representations—not *after* the Same (first view), nor at the *end* of it (second view). Or, which is the same, comparing would be something other than, merely, a passing appearing of present presences or of co-present co-presences (first view). And it would also be something other than a final disappearing thereof (second view). All to the contrary, comparing would be now much more accurately understood as a *withdrawing from what is present, so as to let comparisons or other legal representations come properly or finally* (depending on one’s views) *into sight*. As such, comparing would in this third view “precede” comparisons and other legal representations (that is the sense of its being “at the begin-

fect, and the historical school, for which comparisons were outright irrelevant.

Au XVII^e et au XVIII^e siècles, le développement du droit comparé fut contrarié par l’opposition des écoles. D’une part, en effet, l’école du Droit naturel, dédaigneuse de toute observation fondée sur des faits sociaux et désireuse d’établir les éléments d’un droit idéal et immuable, se refusait à étudier des législations qui selon elle ne pouvaient être que plus ou moins défectueuses; l’école historique, d’autre part, s’opposait à la législation: selon elle, l’évolution juridique avait lieu fatalement d’une manière indépendante de la volonté humaine et par une orientation spontanée des exigences collectives populaires

M. Sarfati, *Les Premiers Pas du Droit Comparé*, in II MÉLANGES OFFERTS À JACQUES MAURY 237 (1960) (internal citation omitted).

ning”)—it would neither follow them behind nor pass away with them, as the first two views by contrast would suggest. In particular, there would be here, I suggest, *a clearing of what is each time present at hand so that each time a different legal difference can properly or finally come into sight.*

(iv) So, we can preliminarily conclude, experts as they are in the art of representing the visible world through, respectively, a blank canvas or a legal text or an institutional context—both painters and lawyers including comparative lawyers have a “comparing,” rather than an imitating or a creating, as the true matter of their doing—and that is what remains generally concealed in legal representations and legal comparisons alike. Their comparing, in particular, would be at the beginning of their doing, not *after* it or at the *end* of it. And it would be each time an original comparing, not a comparing of the Same or a comparing of the Other. Such comparing, however, would be “original” in the rather overlooked sense of being productive—poietic, poetic, imaginative, immanent, that is, eminently human. It would be, in particular, a comparing that is the clearing that lets difference come properly or finally into sight. In short, there would be what I would call a *confined creating of difference.* As a creating, it could not be merely an imitating. As a *confined* creating, such comparing could not be a creating out of nothing (*ex-nihilo*). That is why such a comparing—a “comparing as such,” shall we now say (as opposed to comparing in the common sense of that word) —would seem to be central to the art of law and, indeed, central to the art of thinking, not peripheral. That is, it would seem to be what lies at the beginning of legal space always, already inaugurating the originality of that space—the originality, that is, of every legal theory and practice that such space each time institutes and rules.

Take, for example, premodern law. Skilled as they had to be in the representation of law’s many domains, did not lawyers always have to be *lawyers-comparatists*? Indeed what, for example, might Celsus’s famous definition of law—“*ius est ars boni et aequi*”—⁶⁶ be,

66. DIG.1.1.1pr. (Ulpianus 1 inst.), <http://www.thelatinlibrary.com/justinian.html> (last visited Nov. 7, 2004). “Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. est autem a iustitia appellatum: nam, ut eleganter Celsus definit, ius est ars boni et aequi.” *Id.* This is the oldest known and probably most famous definition by a Roman lawyer of law itself (*ius*). The definition is contained in a text by the Roman jurist Ulpian that was probably compiled in A.D. 213 or 214, TONY HONORÉ, *ULPIAN* (Clarendon Press 1982), but Ulpian attributes the definition to Publius Iuventius Celsus, a praetor in A.D. 106 or 107 and consul for the second time in 128 (Celsus also served as governor of Asia and on Hadrian’s council). The definition refers comprehensively to the “*ius civile*,” DIG.1.1.6pr. (Ulpianus 1 inst.), <http://www.thelatinlibrary.com/justinian.html> (last visited Nov. 7, 2004), the “*ius naturale*,”

if not a first important trace of an ancient, sustained, repeated attempt to separate posited, man-made law from total, god-like justice?⁶⁷ And then what might that attempt be if not an on-going, never-ending and never-ended process of cautious comparing of what counts as law and what doesn't, as well as a continuing effort to shape law's many domains into a range of balanced, skillful, even imaginative, though always imperfect, no longer "infinite" objects of, now, human control? And, finally, what would that process of comparing be if not, each time and crucially, a clearing through which only what counts as law and what doesn't—what difference the law makes—can thus come properly or finally into sight?

(v) So, comparing as such—this confined creating of difference—is central to the art of law as it is central to the art of painting. And so too, I suggest, it will be central to modern comparative law when later on that curious discipline is invented, along with a host of other social sciences and other (somewhat more self-assured) legal disciplines: land law, contract law, family law, etc.⁶⁸ At that later time, when the lawyer-comparatist becomes a comparative lawyer (a lawyer specialized in legal comparisons), the attempt will be to represent *from without* what processes of punctilious separation had, in fact, already been going on from within—and to do so via an ever increasing, ever more probing, ever more detailed *co-present-presenting* of what *differences* and *similarities* could be found to exist within the wholly new world of the nation state and the rule of law.⁶⁹ Somewhat paradoxically, though, the comparing as such required of those legal comparisons seems to have been generally forgotten or else actively ignored. Yet, it seems to me, that comparing is always there and is in one first important sense a confined creating of difference. It is, moreover, a comparing *from within*—a *comparing from a heartland*—and not, as conventional comparative law would have it, a representing from

id. at DIG.1.1.1.3, and the "ius gentium," *id.* at DIG.1.1.1.4.

67. Whether or not it was Cicero who, as it has been suggested, had first referred to "ius" as an "ars," the definition in Ulpian's *Institutiones* seems to indicate that by the second century A.D. "ius" had finally come to be generally understood as being much more than a "scientia iuris." See generally SCARANO USSANI, *supra* note 49 and text accompanying note 49. Arguably, however, an opposite conclusion could be drawn. See, e.g., DIG.1.1.10.2 (Ulpianus 1 inst.), <http://www.thelatinlibrary.com/justinian.html> (last visited Nov. 7, 2004) ("Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scienti").

68. I say a "curious" discipline in that, according to the prevailing view and unlike the other social sciences, comparative law, as such, "does not exist" for, it is pointed out, "[c]omparative law . . . is not a topic, but a method." O. Kahn-Freund, *Comparative Law as an Academic Subject*, 82 L.Q. REV. 40, 41 (1966).

69. See *infra* ¶ 6.

without, either of the Same or of the Other. The heartland of comparisons, in that sense, seems to be each time nothing less than, quite literally, a comparing of the heart. And it is to that heartland that we must now turn.

TAKING PLACE

Navy: Please divert your course 15 degrees to the North to avoid a collision.

Civilian: Recommend you divert *your* course 15 degrees to South to avoid collision.

Navy: This is the Captain of a US Navy ship. I say again, divert *your* course.

Civilian: No, I say again, divert *your* course.

Navy: This is the aircraft carrier *Enterprise*. We are a large warship of the US Navy. *Divert your course now!!*

Civilian: This is a lighthouse. Your call.⁷⁰

6. *Space.* So, in one first important sense, the matter of legal space—the how of legal as well as of artistic experience—is a *comparing* from a heartland, or “comparing as such.” But then, which might be each time the *heartland* of that comparing—the heartland of legal space? And, first of all, which is the space that normally counts as space in law including comparative law?⁷¹

Before a response to those questions can begin to emerge, we must consider what counts as space in Francesco’s own story—in the story of the painter and of his art. For, it can be safely suggested, what counts as space in that story is, by and large, what generally counts as space in law including comparative law. And just as in Francesco’s story what counts as space is then reflected into his picture, as well as in his broader relationship with that picture—so too what counts as space for a lawyer is likely to be reflected in the representations she makes.

And yet, the next interesting point is that, as we look again at the story of Francesco and his devilish Venus—at the story of the picture and its excess—it soon becomes obvious how what counts as space in

70. Canadian Naval Radio Conversation, *quoted in* J.D. BARROW, *THE BOOK OF NOTHING* 138-39 (2000).

71. As it will become apparent, I distinguish in what follows that which *counts as* space from what space is *at stake* in law, legal comparisons and comparative law.

that intriguing story is hardly the space that is there *at stake*. How then might that other space be?

7. *Physical Space (Linear, Measurable, Calculable)*. As it will be readily recognized, space is generally understood to be a “given” in everyday experience and, in particular, something geometrical defined by what material bodies or structures we physically encounter or do not encounter in our daily affairs—the physical world which, as it were, meets us, hosts us and buries us. Space, for example, is the *physical place* occupied by or surrounding a particular person—for example, a fellow traveler sat next to me on my train ride home. Space is also the physical place occupied by or surrounding a certain building (for instance, the Piazza San Pietro in Rome, or the Blue Mosque in Istanbul, or the Red Square in Moscow, or the Tate Modern in London), or else the physical place occupied by a well-defined natural site (an island, a mountain, a lake or the desert, for example, or the sea). So, then, we normally speak of a fellow traveler taking up “too much space” in the carriage, or of the Tate Modern as a “great space” for the showing of modern and contemporary art, or of the Fujiyama as a most beautiful “natural space” lying outside busy, metropolitan Tokyo. In such a popular view, all sorts of bodies can be and will be *in* space (this ant, rose, or stone, or that table, book or grain of dust—and so on)—and that, in turn, will each time help us give space its particular height, width and depth. Material bodies and other structures are, in this view, seen to be coinciding.

In this first commonsense understanding, then, space could be described as some sort of *linear, material mark* (or lack thereof) that, if need be, can be properly *measured* and properly *calculated* by measuring and calculating its different *contents*—once more, the material bodies or structures that space encounters or *a-voids*. Depending, moreover, on one’s more specific understanding of things, that linear, material mark would then be seen to be, for example, rather like an *a priori* realm of consciousness—the linear, material mark of a *subject* (Kant)⁷²—or, by contrast, like a true *res extensa*—the linear, material

72. In this view, subjective space is just as linear, measurable and calculable a space as objective or, for that matter, institutional space—to the extent, at least, that space is an *a priori* form of understanding. Kant’s physicism is indeed well known. Greatly influenced by Newton’s physics, Kant’s *Critique of Pure Reason* is, according to one author, “a masterly description of what the structure of the human mind should be, in order to account for the existence of a Newtonian conception of nature, and assuming that conception to be true to reality.” ETIENNE GILSON, *THE UNITY OF PHILOSOPHICAL EXPERIENCE* 229 (1952).

object of a mark (as initially suggested by Descartes).⁷³ Either way, space remains, in this first sense, a *physical place*—the place of a particular subject or else the place of a particular object.

As to modern mathematics, they allow that linear, material mark to open up into a wide, imaginative range of different, somewhat independent, even “cell-like” instances of space (Spinoza, Bergson),⁷⁴ to which, however, we will have to return.

8. *Institutional Space (Linear, Measurable, Calculable)*. In a rich set of alternative views that cannot be here adequately represented, space is each time the place resulting from a given “institutional” context (broadly understood)—namely, a particular socio-political or linear-historical environment—rather than, as noted earlier, a mute physical object that can be found “out-there” or even the particular subjectivity that each time would go to express it.⁷⁵ In a way, there is now a mere shift of focus—from the institution of space (space *as* a thing or else space as the thing *of* a subject) to space as institution, individual or collective, historical or socio-political—yet such a shift is, in its different and progressively more and more abstract versions of it, rather momentous. That is to say, space is now increasingly analyzed in its direct causal link with a particular institutional context that is said to have generated it and on the existence of which that particular space is therefore thought to be dependent in a fundamental, structural way,⁷⁶ or else in a functional-instrumental one.⁷⁷ In the many different views of the more recent social theories,

73. See generally RENE DESCARTES, *Discourse on the Method of Rightly Conducting the Reason and Seeking the Truth in the Sciences*, in FRENCH AND ENGLISH PHILOSOPHERS 13 (Charles W. Elliot ed., P.F. Collier & Son Co. 1910) (1889).

74. See generally THE COLLECTED WORKS OF SPINOZA (Edwin Curley ed. and trans., 1985); HENRI BERGSON, *THE CREATIVE MIND: AN INTRODUCTION TO METAPHYSICS* (2002).

75. See *supra* ¶ 7.

76. The list here would be very long; see, e.g., the pioneering work of F. DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* (Charles Bally & Albert Sechehaye, eds., Roy Harris trans., Duckworth 1983) (1972); LOUIS ALTHUSSER, *POUR MARX* (1967); CLAUDE LEVI-STRAUSS, *THE SAVAGE MIND* (Julian Pitt-Rivers & Ernest Gellner eds., Univ. of Chicago Press 1966) (1962); FREDRIC JAMESON, *THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT* (1981). For a critique of some of such analyses as “foundationalist,” see generally Stanley Fish, *Anti-Foundationalism, Theory Hope, and the Teaching of Composition*, in *THE CURRENT IN CRITICISM: ESSAYS ON THE PRESENT AND FUTURE OF LITERARY THEORY* 65 (Clayton Koelb & Virgil Lokke eds., 1987). See also *infra* ¶ 11.

77. A bibliography of the functionalist approach in the social sciences would be beyond the scope of the present argument, but among the initiators the names of B. Malinowski and A.R. Radcliffe-Brown (in anthropology) and D. Armstrong and H. Putnam (in philosophy) come to mind first. In sociology, see the work of ROBERT K. MERTON, *Manifest and Latent Functions*, in *SOCIAL THEORY AND SOCIAL STRUCTURE* 73 (enlarged ed., 1963); and of TALCOTT PARSONS, *THE SYSTEM OF MODERN SOCIETIES* (1971).

the space resulting from any given institutional context would be seen to be constructed in a seamless sort of way in consequence of historical processes engendered by individual or collective actors who continually institutionalize it,⁷⁸ or else continually perceive it, represent it and typify it as such.⁷⁹ According for example to one critic, commodities occupy a “space” lay out by “politics”:

Economic exchange creates value. Value is embodied in commodities that are exchanged. Focusing on the things that are exchanged, rather than simply on the forms or functions of exchange, makes it possible to argue that what creates the link between exchange and value is *politics*, construed broadly. This argument . . . justifies the conceit that commodities, like persons, have social lives.⁸⁰

9. *An-Other Space (neither Linear, nor Measurable, nor Calculable)*. We will return on the implications of such commonly held concepts of space in relation to law.⁸¹ But here let us just ask: is it only that sort of space—physical or institutional—that is *at stake* in Francesco’s story? Are we, for example, talking of something like Genoa (the residence of prince Camillo, but also the glorious seat of a mighty Republic), or Genoa’s coasts (raided as we are told by some Algerian pirates, but also the focus of the projected intervention by the prince)? Are we talking of something like the Capuchin monastery—understood as either the final destination of Francesco’s work or, else, the worthy patron of Francesco’s art? Is it really the particular loca-

78. For some of the most interesting recent approaches in sociological theory see, on the one hand, those who give place of pride to social structures and the macro-aspects of society. See, e.g., NIKLAS LUHMANN, *SOZIALE SYSTEME: GRUNDRIS EINER ALLGEMEINEN THEORIE* (1984); ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY* (1990); PIERRE BOURDIEU ET AL., *LA MISERE DU MONDE* (Olivier Bétourné ed., 1993). On the other hand, for theories that remain principally if not exclusively centered on individual actors and their interactions, see generally PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (Anchor Books 1989) (1966); ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974). In the specific field of the sociology of science, see BRUNO LATOUR & STEVE WOOLGAR, *LABORATORY LIFE: THE CONSTRUCTION OF SCIENTIFIC FACTS* (Princeton Univ. Press 1986) (1979).

79. See e.g., E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* (Penguin Books, Ltd. 1968) (1963); GARETH STEADMAN JONES, *LANGUAGES OF CLASS: STUDIES IN ENGLISH WORKING CLASS HISTORY, 1832–1982* (1983); LUC BOLTANSKI, *LES CADRES: LA FORMATION D’UN GROUPE SOCIAL* (1982); ALESSANDRO PIZZORNO, *I SOGGETTI DEL PLURALISMO: CLASSI PARTITI SINDACATI* (1980); Alessandro Pizzorno, *Political Exchange and Collective Identity in Industrial Conflict*, in 2 *THE RESURGENCE OF CLASS CONFLICT IN WESTERN EUROPE SINCE 1968*, at 277 (Colin Crouch & Alessandro Pizzorno eds., 1978); JOAN WALLACH SCOTT, *GENDER AND THE POLITICS OF HISTORY* (rev. ed. 1999).

80. Arjun Appadurai, *Introduction: Commodities and the Politics of Value*, in *THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE* 3 (Arjun Appadurai ed., 1986).

81. See *infra* ¶ 11.

tions where Leonardo famously exercised his art and led his school that interest us most—or, maybe, the specific quarters where following to Leonardo's death Francesco lived and worked, and began to lead his dissolute life? And so, finally, is it really the physical setting of Francesco's picture, or its subject (St Rosalia)—that is at stake in Francesco's story?

Genoa, the Capuchin monastery or Francesco's quarters—each of those *res extensae*, subjectivities or institutional places could of course be validly treated as each time the particular space where, in a given chronological sequence, Francesco's story specifically unfolds. Furthermore, whether the physical or institutional space in question happened to be a real space lying "out-there" or, like in *The Devil's Elixirs*, only a space described by a literary work—that would be here relatively unimportant. Real or fictional, the sort of space that we would normally be representing to ourselves or to others would be, we can safely assume, either a true Cartesian *res extensa* or a Kantian *a-priori* realm of consciousness or the place of a particular institutional struggle—each of which would be seen to be varying or fixed, empty or taken-up by certain structures and, in any case, to be signaled by some measurable, calculable boundaries including something while at the same time excluding something else.⁸² In short, there would be what I would generally call some *instrumental space*—both the perimeter and the threshold of a "solid," worldly theatre, a space where to represent the objects of our *cogito* or the linear, material experiences of our consciousness or the linear, material effects of a particular institutional struggle that we happen to master, endure or simply witness.⁸³

82. Take, for example, Genoa's coasts. In the world "out-there" (as in THE DEVIL'S ELIXIRS) Genoa's coasts would be typically understood and represented as having a certain physical or social *substance* to them. There would be a space occupied by, say, a combination of natural vegetation, of human, animal and mineral life, of odd buildings, villages and towns, etc. There would be, in addition, a space marked, for example, by the coasts of neighboring provinces, as well as by the Mediterranean Sea and its many recurrent tides. All that (and, of course, much more) would be Genoa's coasts—as the reader would be likely to see them in her daily life, as well as to be reminded of when reading something like THE DEVIL'S ELIXIRS. For an interesting example of institutional struggle concerning the proposal to install an "eruv" in northwest London, see Davina Cooper, *Talmudic Territory? Space, Law and Modernist Discourse*, 23 J.L. & Soc'y 529 (1996). According to Cooper, the intense opposition that the proposal met by a certain part of the local population occurred because, in the view of the objectors, "space was a finite container" and so "[t]he eruv proposal appeared to alienate space in three ways: by privileging minorities, religion, and inappropriate civil governance." *Id.* at 43.

83. It should therefore be clear that I here propose to use "instrumental" in a broad sense—meaning for example both foundational and functional-instrumental.

Yet, on reflection, the sort of space primarily *at stake* in Francesco's own story might well be another one—one, I would suggest, made obvious by the sudden appearance of Venus alive, next to Francesco, toward the end of the story. (Nor am I presently thinking of what outer space there might or might not be lying beyond the atmosphere—a space where stars and other heavenly bodies are said to reside and move).⁸⁴ In other words, what in Francesco's story could be at stake could be a space radically different, radically "other" from the instrumental space that the reader, if prompted, would normally consider as space. One, of course, must be careful. Here, as elsewhere, one must start from *some* linear, measurable, calculable space—so that, for example, we will here start from the space where Francesco the painter is busy painting St Rosalia. However, as we begin, in what follows, with that sort of space, with what Western rationality would normally understand to count as space in Francesco's own story—we must also attempt to move on, or perhaps sideways, and slowly re-focus our attention on a somewhat different, non-linear, non-measurable, non-calculable, indeed incalculable sort of space—a different "space," an-*other* space, a *space-other*, a space that, however, is *not* other than space,⁸⁵ whilst at the same time being radically *other* than the instrumental space with which we are normally familiar. But *where* might that other "space" actually be? Better still, *how* might that "space" be?

Initially, it might be difficult to see any such radically other-space, so we must proceed with circumspection.

10. *The Place of Francesco's Space.* The story of Francesco and his devilish Venus is as a whole quite interesting but, also, quite complex. Let us therefore in the following pages narrow our focus on what space might be defined by Francesco as the *subject* of his story (Francesco the painter)—and Francesco's picture as the *object* of his art and troubles.⁸⁶ So which and how is the space of Francesco and his canvas, taken together?

84. *But cf.* Barton Beebe, *Law's Empire and the Final Frontier: Legalizing the Future in the Earlyorpus Juris Spatialis*, 108 YALE L.J. 1737 (1999); Kieran Tranter, *Terror in the Texts: Technology—Law—Future*, 13 L. & CRITIQUE 75 (2002).

85. It is not, for example, "mental" space—to the extent, at least, that by that one understands a space with no outside.

86. The matrix of (Western) modernity remains, in my view, Cartesian—it remains implicated in a separation between the *cogito* and his object that, it would seem, not even Kant was ever able fully to overcome.

Together, Francesco and his canvas—the subject and his object—occupy and embody an out-and-out, seemingly pre-existing physical space that is linear and, if need be, could be easily measured and easily calculated. A certain objective or subjective space would result, for example, of the physical distance between painter, picture *and* the surrounding physical world; or between painter *and* picture; or between painter, picture *and* that which the picture reproduces from within—the perspective employed by the painter in his picture.⁸⁷ On the other hand, we could alternatively treat Francesco and his picture as the “effect” of, again, some sort of institutional plight. In that sense, there would be here a space where, for example, Francesco the pupil of Leonardo can show his friends how so much better his own craft has become in comparison to that of his master, thus demonstrating at the same time that as an artist he is worthier than his master, and as a man he is just as worthy as anybody else of his friends’ companionship. In such case, the painter and his picture might be seen as the site of a particular power struggle highlighting either the social distance characterizing the relationship between Francesco and Leonardo, or else the social closeness that Francesco now feels to exist in respect of his friends.

But—the question was—how is the space that Francesco and his picture specifically take up? That is what here interests me most—so that the real or fictional, physical or social distance between Francesco and his canvas, master and friends would not be yet the immediate focus of analysis. Instead, what of this example I wish now to note is just how *the separation of a subject from his object, the separation of a painter from his work, the separation of Francesco from his picture, that separation* (which becomes all the more apparent once we look at that story from Hoffmann’s point of view⁸⁸) *points out each time to a non-linear, non-measurable, non-calculable place which is all-pervasive yet remains normally unthought-of by those concerned*—Francesco, his friends, his readers etc. That particular place has no author.⁸⁹ And it emerges, even “insurges,” into view—it has not, in that sense, an origin in the common sense of that concept. Furthermore, it is each time a genuinely novel place—if only because it is a place wholly *other* from the objective, subjective or institutional

87. See generally Jurij M. Lotman, *The Stage and Painting as Code Mechanisms for Cultural Behavior in the Early Nineteenth Century*, in *THE SEMIOTICS OF RUSSIAN CULTURE* 165 (Ann Shukman ed., Judith Armstrong trans., 1984).

88. See *supra* ¶ 3.

89. Although we are here dealing with a fictional story that, therefore, *has* its author—that is to say, Hoffmann himself.

spaces (real or fictional) that, as it were, are already surrounding as well as occupied by Francesco, his party and his picture even before the story begins. How, then, is each time that other place? And how is each time the relationship between the physical or institutional space in which somebody like Francesco and his picture are normally said to be (and that we typically think of as space) and that “other-space,” that other place that is here at stake? How is each time the relationship between those two sorts of places, which only on surface could be said to be at all coinciding? *That other-space*, I suggest, is a non-chronological, yet timely sort of place through which Francesco’s story is then allowed to happen—or, quite literally, to “take place.”

Clearly, it would be easier to understand Francesco’s story as a highly complex yet linear, measurable, calculable space—a linear, measurable, calculable territory whereby characters (Camillo, Francesco, Leonardo, his party, etc.) and things (the original Venus, the portrait of St Rosalia, the devil’s elixir, etc.) are then deployed and move. But the more difficult question would be, how does that space, how does that complex territory take place? We must ask that question for something odd happens in the story—in that, as we know, Francesco and his canvas suddenly find themselves *elsewhere* (so to speak) while, at the same time, *being there*, in the physical or institutional space that, so far, the painter, his friends and even his readers could see so clearly. No doubt, moreover, each *res extensa*, subjectivity or institutional struggle in the story will only take its bit of place—the place it needs to make that story. Or (which is the same) the story as a whole only takes its bit of place—vis-à-vis the larger environment within which it will be inscribed. Even so, how is each *res extensa*, subjectivity or institutional struggle that we can think of, how is that story, how is that complex space—if not, each time and at the same time, an *other-space* that in a timely sort of way already belongs there even before it all begins, and some physical or institutional space can accordingly be duly deployed and duly represented to count as space? Again, always already there as it all begins (though not there before it all begins), space is each time, it seems to me, a timely sort of place before it becomes the space that it is—before becoming something else, something real or fictional, something physical or institutional, something powerful or powerless, etc.—before becoming, for example, a specific construction, a sudden void, a particular practice or a well-tested theory.

Such a critical discovery—to the extent that it does ring true—immediately suggests what our everyday concept of space might well presuppose and determine—in fact, how very limited, how excep-

tional might that concept be. On the other hand, that discovery still leaves wholly concealed the very characteristics of that “other-space” through which each time each story, its characters and objects, can be represented and deployed as taking place. So, how is each time that “other-space”? How, for example, is each time the place through which legal comparisons can be normally represented as spaces of comparison? Let us here begin by suggesting that *the sort of place that I want here to visualize may well be such in the radical, original sense of being each time not just linear, measurable, calculable space but that which occurs, an event that be-comes each time a “space,” an event that each time comes-to-be-a-particular-space, an event upon which only everything else can eventually take place—that is to say, its bit of place.* As such, that place does not properly pre-exist while, on the other hand, it is always already there as and when it all begins. So neither metaphysical nor uniform, neither eternal nor immobile—that place is each time an original event, in the specific sense of being an always co-existing, always immanent, always imaginative (though by no means imaginary), mobile sort of place. It is each time an original gesture—each time, originally, a place of separation, emergence or insurgence. It is, quite literally, the heartland of legal space.

SCHISMS

11. *Law’s Innumerable Spaces.* What counts as physical or institutional space in Francesco’s story reflects a widely held if, we now begin to realize, somewhat naïve view—according to which space simply *is* the linear, measurable, calculable bodies or other structures that Space itself encounters or avoids (say, the rooms where Francesco is busy painting his St Rosalia, or else the libertine friends who exert on Francesco their unorthodox influence). In other words, the *transparency of our normal concept of space* allows for an *apparent equivalence* to come into sight—the equivalence between an imaginary (though by no means imaginative), pre-existing “Space” and the bodies and other structures that are now seen to lie within (painter, canvas, window, friends, etc.).⁹⁰ But does that equivalence reveal any-

90. Lefebvre takes issue, on the one hand, against what he calls the “illusion of transparency” and, on the other hand, the “realistic illusion.” HENRI LEFEBVRE, *THE PRODUCTION OF SPACE* 27 (Donald Nicholson-Smith trans., 1991). The illusion of transparency, Lefebvre argues, betrays a concept of space

thing of the Space that that equivalence is supposed to re-present—to present again, whether after or at the end of it—particularly, when it characterizes as being equal to it what bodies and other structures might be associated to it? No. Instead, to the extent that the replacement of an imaginary Space for its particular spaces remains always unseen, such an equivalence strongly if subtly invites the belief of it being merely a descriptive, neutral representation of what Space must be all about (a claim on the *neutrality* of Space), as well as inviting the further belief that the same equivalence must be true of every other space everywhere else at any other time (a claim on the *universality* of Space). In short, that equivalence suggests claims over the assumed *essence* of each particular space that we encounter, dwell in or leave. For if space is each time that which is now in my presence (and only that), then whatever else will ever be in my presence (and only that) must be, that too, all that Space must be *essentially* all about.

12. Space and Law. One consequence of the equivalence that appears to order our normal concept of space is that it will then be seen to operate not only in our daily affairs (for example, in Francesco's story), but also in *law's many domains*—for the simple reason that such domains would, they too, be normally seen to be everywhere in space (some fraction of linear Space that can thus be properly measured, carefully calculated and, if need be, attentively compared).⁹¹

as luminous, as intelligible, as giving action free rein. What happens in space lends a miraculous quality to thought, which becomes incarnate by means of a *design*. . . . The design serves as a mediator . . . between mental activity (invention) and social activity (realization); and it is deployed in space. The illusion of transparency goes hand in hand with a view of space as innocent, as free of traps or secret places. Anything hidden or dissimulated—and hence dangerous—is antagonistic to transparency. . . . Hence a rough coincidence is assumed to exist between social space on the one hand and mental space—the (topological) space of thoughts and utterances—on the other.

Id. at 27-28. But, asks Lefebvre, “[b]y what path, and by means of what magic, is this thought to come about? The presumption is that an encrypted reality becomes readily decipherable thanks to the intervention first of speech and then of writing. . . . to the detriment of a social practice.” *Id.* In my view, space is everything *but* “luminous” or “intelligible”—as the story of Francesco and his painting clearly indicates—nor, for that matter, is space characterized by “naturalness” or “substantiality”—the attributes that, Lefebvre argues, have long lead to what he calls the “realistic illusion.” *Id.* at 29-30. The way out of this apparent stand-off, according to Lefebvre, is to treat space as a social product. *Id.* at 30.

91. So, for example, one writer argues:

[L]aw is concerned with the ordering of relations between agents or persons (human, legal, unincorporated or otherwise) at a variety of levels, not just relations within a single state or society. One way of loosely characterizing these levels of relations is *geographical*. In terms of *space* they include the global, international, transnational, regional, inter-communal, municipal (nation-state and subsidiary ju-

Thus, for example, the comparative lawyer would, if asked, promptly concede that she, the object of her comparisons and even the comparisons she makes simply are *in* physical or institutional space. This is important—for the implication would then be not only that legal space is normally understood as physical or institutional space (and nothing else)—but also that *that* space is each time understood to be what the Space of legal comparisons must be all about (“neutrality” claim). And that, on the other hand, *that* space must too be the same sort of space as the Space of comparative law (“universality” claim). In short, the *place* of legal comparisons would be, in this view, the *neutral, universal space* in which comparisons (quite literally) take place.⁹²

However, a perhaps less obvious consequence of that apparent equivalence is precisely that, just as Francesco’s apparent relationship with his picture (the artistic space drawn by Hoffmann for his readers) is suddenly undermined by the emergence or insurgence of some hidden, somewhat prior event whose existence is suggested by the appearance of the devilish woman next to the canvas—so, at a closer look, law’s innumerable theories and practices might too turn out to hide much more than lawyers, lawyers-comparatists and comparative lawyers alike are normally able or prepared to consider. They might hide, in particular, certain events that will have quite literally inaugurated those legal theories or practices without being, as such, at the origins of their being. So then what for example might there be, each time, to the mapping-out of foreign legal jurisdictions, or else of the institutional space of one or another “legal family?”⁹³

risdictions), sub-state local and non-state local. These different levels are not nested simply in a single hierarchy of larger and smaller *spaces*. Rather, they co-exist, overlap and interact in complex ways.

Twining, *Reviving*, *supra* note 42, at 4 (emphasis added) (internal citation omitted).

92. Thus, for example, the inaugural lecture delivered by Professor F. H. Lawson at Oxford on February 2, 1949, could be aptly entitled “The *Field* of Comparative Law.” See F.H. Lawson, *The Field of Comparative Law*, in 61 JURID. REV. 16 (1949) (emphasis added). In it, Professor Lawson indicated how a professor of comparative law should, “if he is wise, try to *set bounds* to the *field* within which he can fairly hold himself out as possessing a special knowledge and aptitude and a willingness to assist his less omnivorous colleagues,” *id.* at 16 (emphasis added), thus signifying clearly a link between (comparative) knowledge and a territory that by that knowledge is both evoked and confirmed. The language was no mere rhetorical artifice—for the lecture went on to discuss what Professor Lawson described as the comparative lawyer’s “possible geographical fields” whereby “[l]uckily for him, the laws of the world fall into four great groups.” *Id.* at 23.

93. The concept of legal “family” is dear to comparative lawyers. See RENE DAVID, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW (John E.C. Brierley trans., Stevens & Sons, Ltd. 3d ed. 1985) (1964). For an analysis of the internal contradictions of David’s project, see Jorge L. Esquirol, *The Fictions*

In spite of the ubiquity of Space in law's many legal domains—or, perhaps, precisely because of that ubiquity—modern Western law seems to pay little attention to it. We know, for example, how central legislation is deemed to be in what comparative lawyers call “Civil law” jurisdictions. Nevertheless—and quite apart from the now somewhat trite point whether such a characterization is accurate or not—what is interesting is that in those countries legislation says little if anything on space as such—while, at the same time, being firmly built around presuppositions about space that, then, judges, practitioners and legal scholars (including comparative lawyers) seldom if ever notice or question. Treated as a *given*—as an objective fact that, therefore, must be valid for everyone, everywhere, at every time—space is rather seen as having or not having certain legal *effects* (depending on the circumstances), on which attention is therefore redirected.

So, for example, according to one eminent Italian scholar, space is neither a *cosa* (a material thing), nor a *bene* (this being defined as any material thing which could be of use, and therefore could be the object of appropriation and of a legal relationship).⁹⁴ Rather, space is a *mezzo* (a “means”)—within which lies the object of a right, and through which that right comes to existence and can thus be properly exercised.⁹⁵ Yet, beneath such an apparently simple, universal premise lies of course something else—an exclusionary move which allows the legal system to reaffirm one and the same concept of space, while simultaneously eliminating or at least greatly reducing the impact in legal analysis of competing notions of space that might otherwise spring up and then, quite literally, displace it. Once that elimination or reduction has been successfully operated, the Italian *Codice Civile* but, also, the French *Code Civil* or even the Japanese Code Civil (to mention but a few traditionally eminent acts of legislation in Civil law

of Latin American Law, 1997 UTAH L. REV. 425, 433-36 (1997).

94. F. SANTORO PASSARELLI, *DOTTRINE GENERALI DEL DIRITTO CIVILE* 55-57 (Napoli 1962).

95. *Indeed*,

[n]on è cosa lo spazio, nè deve trarre in inganno una disposizione del codice che allo spazio fa riferimento (art. 840). Lo spazio non è oggetto, ma semplice mezzo in cui si trova l'oggetto del diritto, mezzo necessario per l'esistenza e l'esercizio di quest'ultimo; mezzo che, se è più appariscente per la proprietà fondiaria, è in realtà necessario per ogni relazione giuridica: testualmente è notevole che la citata disposizione estende in principio la proprietà del suolo al sottosuolo, ma non allo spazio sovrastante.

Id.

jurisdictions) are only too happy to regulate, that is to juridify, what legal effects the preferred concept of space might be seen to be determining. However, the problem remains that such an open juridification of space is open only at one end—a centrifugal, progressive, chronological act that, at its center, firmly holds and even more firmly returns one and the same concept of space that, if need be, can (or so it is hoped) be properly measured, properly calculated and then properly controlled.⁹⁶ *Cose* and *beni*, that is, are used as spatial tools before they can be employed by law as the objects that they are (legally) known to be.

13. *Schism Within.* A *schism* thus seems to be emerging from within our normal concept of space (physical or institutional, but also neutral and universal), as we look at it from close enough—and, from there, within what concept(s) of space may be reflected in law, legal comparisons and comparative law. A schism would seem to be emerging between what normally counts as space (whether common sense space, or the space of law's many domains) and what other-space that space may or may not let us see on its trail.⁹⁷ Let us attempt

96. Linear, calculable space is, of course, deemed to be just as central in other Western legal systems, as is in countries of civil law. The English *common law* and, more generally, all sorts of UK laws refer to space too—no less casually, however, than other European legislations do. Historically, the separation between law and (the fact of) space was, in the common law, operated by juries.

97. It is interesting to note how Lefebvre is able to reject what he generally calls philosophico-epistemological space and to criticize its supporters for being unable to “eliminate the need for a subject of some kind.” LEFEBVRE, *supra* note 90, at 4, and to commit what is in fact, from the logico-mathematical point of view, the perfect paralogism: they leap over an entire area, ignoring the need for any logical links, and justify this in the vaguest possible manner by invoking, as the need arises, some such notion as *coupure* or rupture or break. *Id.* at 5. According to Lefebvre, his opponents’ “growing dogmatism” and “basic sophistry whereby the philosophico-epistemological notion of space is fetishized,” *id.*, is a clear indication that theirs have become the “dominant ideas which are perforce the ideas of the dominant class” and that such philosophical-epistemological space “is apparently, but only apparently, extra-ideological.” *Id.* at 6. Indeed, Lefebvre rhetorically asks, “[a]s for Knowledge thus defined on the basis of epistemology, and more or less clearly distinguished from ideology or from evolving science, is it not directly descended from the union between the Hegelian Concept and that scion of the great Cartesian family known as Subjectivity?” *Id.* Instead of philosophico-epistemological space, Lefebvre, by contrast, seeks to bring out “a *truth of space*, an overall truth generated by analysis-followed-by-exposition,” *id.* at 9, calling for a “unitary theory,” *id.* at 11, of the physical, the mental and the social. However, the starting point for such a unitary theory would be neither philosophy, nor literature, nor architecture nor, for that matter, anything as general as the notions of text, information, communication, message, code, sets of signs, etc. Instead, Lefebvre proposes to start from certain Hegelian “concrete universals” like “the concepts of production and of the act of producing.” *Id.* at 15. “What is called for . . . is a thoroughgoing exposition of these concepts, and of their relations, on the one hand with the extreme formal abstraction of logico-mathematical space, and on the other hand with the practico-sensory realm of social space.” *Id.* Thus, one must first of all ac-

to capture such a looming schism by suggesting that, if it will hardly be doubted that *law is (seen to be) everywhere in space* (what judicial practice or legal principle, office, concept, rule, regulation, procedure, standard, technique, ideal, comparison, etc. each time there is, it appears to be each time *in* some linear, measurable, calculable space, thus amounting to a linear, measurable, calculable place in its own right), it is also clearly the case that, conversely, “*space is each time everywhere in law* (what space there is, it is always present in every bit of law’s many places). But exactly *how* and *where* is the space that is everywhere in law? And how might the container, so to speak, be contained by its contents? Quite simply, space might turn out to be, on inspection, something more than what Western legal thinking has relentlessly if somewhat incautiously taken it to be. And if that is the case, then that might be why some other-space, some “space” that is radically other from what is normally thought to be, remains systematically unthought-of in law, legal comparisons and comparative law—in spite of it being in law all the same.

It is here suggested that, in order to retrace that state of affairs and let what other possibilities there might be emerge fully into view, space should be treated as a basic, critical component of law, legal comparisons and comparative law.

14. *Everywhere in Space . . .* First, I have suggested, law is everywhere in space (or so it is seen to be).⁹⁸ What precisely do I mean by that? Quite simply, what I mean is that in the West, law’s many places always appear to be *in* as well as *of* some sort of linear, measurable, calculable Space—the same space that Brunelleschi discovered,⁹⁹ Newton posited as absolute,¹⁰⁰ Descartes distinguished from the

knowledge how (social) space is a (social) product, how social space is both a means of production and of domination, and how there is out-there “a diversity or multiplicity of spaces quite distinct from the multiplicity which results from segmenting and cross-sectioning space *ad infinitum*.” *Id.* at 27. Second, one must accept that physical space is disappearing. Third, “every society . . . produces a space, its own space,” and not just every society but, more accurately, “each mode of production.” *Id.* at 31. But what is social space? For Lefebvre, social space includes “spatial practice,” *id.* at 33 (the making of space), “representations of space,” *id.* (the ordering imposed by space), and “representational spaces,” *id.* (the symbolic aspect of space).

98. “Law is everywhere in space” to the extent that there is something that we can call “law.” See generally Simon Roberts, *After Government? On Representing Law without State*, revised text of the thirty-third Chorley Lecture, given at the London School of Economics and Political Science (June 9, 2004) (on file with the author).

99. Renaissance Humanism had a great influence on concepts of space and of time as previously understood. All aspects of the real are now seen to be organized by the human mind in such a way that they then manifest themselves in the unitary and universal form of space and of time. In particular, such a rational form or representation of space was called

cogito,¹⁰¹ Kant re-appropriated to the subject,¹⁰² Hegel to the State and Marx to historical time. Such a Space, in particular, seems to exist *before* we and law's many places come to be (before the arrival of the object, the subject, the State or of material labor), and it seems to continue to be there once we and those many domains have changed, moved on or disappeared. The *same* irrespective of which space it is (the specific object that it might be), of who you are (the particular subject that might inhabit it) or of where it comes from (the institutional context of which it might be each time a different result)—such a Space, moreover, seems to be wholly *co-extensive* to what legal places (sites, instructions or people) may or may not go, each time, to occupy or reproduce it.

Take, for example, law's many material locations—the guarded precincts where what law there is, is everyday announced and imparted, reminded-of and applied, dutifully taught and dutifully learned, keenly catalogued and attentively researched or, else, professionally illustrated and then dearly made available. Take, in other words, our tribunals, courts, prisons, police stations, universities, law schools, law libraries, archives, law firms, etc. These precincts are seen to rise (as physical constructions) or develop (as institutional places) *in* Space—a linear, measurable, calculable space that they are thus seen to express or to protect. Consider, too, law's innumerable people—the people by whom the law is said to be represented and, each time, given a name, a face and a voice—the name, face and voice of the thousand legal practitioners, judges, law professors, law students, inmates, etc. who live, breathe and work in the West. They too are usually seen to occupy or be surrounded by, each time, this or that particular fraction of linear, measurable, calculable Space—this or that building, this or that subjective place (the place of a subject “like them”), or this or that office or bench (the place generated by a particular institutional context)—a space, moreover, with which we may

“*prospettiva*” by Filippo Brunelleschi who is generally credited to have discovered it. It was then Leon Batista Alberti who, in his *Trattato della pittura* of 1436, would theorize over the new concept for the first time. See GIULIO CARLO ARGAN, *STORIA DELL'ARTE ITALIANA* ch. 3, at 79 (1968).

100. See generally SIR ISAAC NEWTON, *Book 1: The Motion of Bodies*, in *MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY AND HIS SYSTEM OF THE WORLD* (Andrew Motte trans., 1729, Florian Cajori trans. rev., U. Cal. Press 1934) (1686). “For Newton, space and time were absolutely fixed quantities, unaffected by the presence of the bodies contained within them. Space and time provided the arena in which motion took place; Newton's laws gave the marching orders.” BARROW, *supra* note 70, at 168.

101. See *supra* ¶ 3.

102. See *supra* ¶ 3.

or may not come across one day during our own everyday activities. Take, finally, law's almost infinite web of legal instructions (rules, regulations, offices, judgments, procedures, principles, concepts, etc.), which, they too, are to be found (or so it appears) *in* linear, measurable, calculable Space—in the physicality, subjectivity, powerfulness or powerlessness of this or that act of parliament, code, judgment, witness statement, jury's verdict, judicial procedure, consultation process, law-book, etc. Accordingly, *in* space *as* legal places law's many material locations, people and instructions invoke and evoke the (legal) evidence of a neutral, universal equivalence (the equivalence between Space and the places that they are),¹⁰³ as well as contextually suggesting what, from now on, the *essence* of each (legal) place should be dutifully taken to be.

15. . . . *or, else, of Space.* Now, law's many locations, people and instructions, etc. are, we usually assume, in space (physical or institutional)—and that is where comparative lawyers, for example, traditionally look for them when setting out to compare this or that particular rule, function, degree of efficiency, history, linguistic expression, judicial office, legal procedure, etc. So much so that, it is often repeated, the comparative lawyer is a bit of a “traveler”—thus someone who (presumably) travels in space in order to find, in space, the place(s) of her future comparisons.¹⁰⁴ Yet the pervasiveness of space in legal comparisons (space is everywhere in law), and its instrumentality (space is a means to an end, that is, a means of representing law's many locations, people and instructions *vis-à-vis* one another) is, here, not the only point. The other point is that, at the same time as they are *in* space, each of those many locations, people and instructions carefully carve-out and punctiliously define some further legal places, as a result of being in some physical or institutional space and having thus seized that space for their own particular ends. Are those further legal places any different from the space from which they seem to be originating? It is difficult to answer to this question but, *in* physical or institutional space (like the locations, people and instructions to which they belong) as well as *of* that space, such further legal places seem to be but one more series of multiple reflections of what by law space is deemed essentially to be. If that is the case,

103. Although, as we have earlier pointed out, such an equivalence seems to say nothing of the Space that it is supposed to validate. See *supra* ¶ 11.

104. Igor Stramignoni, *The King's One Too Many Eyes: Language, Thought and Comparative Law*, 2002 UTAH L. REV. 739, 740-42 (2002) [hereinafter Stramignoni, *King's Eyes*].

then the original equivalence continues to rule sovereign—multiplied, amplified and reinforced by its own innumerable reflections. That equivalence continues to rule sovereign—but, it would seem, its sovereignty is a rather solitary affair. For amongst so many innumerable reflections—amongst so many innumerable legal places—Space (what space that equivalence is each time meant to represent or to reflect) is soon forever lost.

And if Space is lost, if Space comes to an end, *how could what law there is be any longer there?*¹⁰⁵

16. *Private Spaces, Extra-Spaces.* Before we consider not only how law is everywhere in space but also, and somewhat more radically, how space is everywhere in law,¹⁰⁶ one more point needs to be highlighted. As in modernity law's many domains were taking place—as they were busy mapping-out what Space should now each time become a new legal space of modernity—they had to figure-out what private spaces there must be seen to be within the ever expanding citadel of law. That is what (to make but the most obvious example) property law, contract law, tort law, family law, etc., but also, for example, public and administrative law, are there to signal—that is, one another's private, exclusionary space of discipline and control. And that is, likewise, what such things as “comparative contract law,” “comparative tort law,” “comparative family law,” etc.—began to mark. The former, the “inside” (as it were) of nation states and of the rule of law—the private spaces within. The latter, their “outside”—the private spaces visible from without.

Yet clearly the original gesture is the former—while the latter is merely a representation from without of a gesture made long before.¹⁰⁷ Accordingly, one eminent sense in which private law historically (that is, spatially and linear-temporally) can be meaningfully said to lie at the heart of Western law—a position firmly held, among others, by comparative lawyers¹⁰⁸—is not at all sufficiently conveyed by the familiar but somewhat didactic contrast with public law, however so-

105. I do not mean here to make a theological-apologetic point—quite the opposite, to caution against the normal assumption that there *is* such thing as “space” in the Newtonian sense.

106. See *infra* ¶ 19, at 55-56.

107. See *supra* ¶ 5.

108. According to Lawson, for example, “[p]rivate law is doubtless the most promising field of comparative law.” Lawson, *supra* note 92, at 20. Professor Lawson's remarks are particularly interesting in light of the fact that he was the first holder of the Chair of Comparative Law at the University of Oxford, and he made them on occasion of his inaugural lecture in which he felt he should set out the boundaries of the new subject.

phisticated the elaboration of that contrast can be.¹⁰⁹ Instead, private law can be said to be at the heart of Western law in the rather more complex, immanent and indeed generally overlooked sense of there being the most hidden place where Western law makes of the world as such a private, exclusionary domain—that is, a circumscribed territory where to rule sovereign. That is, by appearing to leave private law outside of its immediate rule (private law is *jus dispositivum*, not *cogens*), Western law brings private law arrangements firmly within its grip. Thus the privateness of private law conceals more than it reveals—it conceals *a truly original, exclusionary act of individual or collective sovereignty* while apparently signifying the very opposite of that act. Within that territory, private law *stricto sensu* and public law (but also, for example, private international law or public international law, whereby the individual sovereign law is only one of the concerned players) are but one more expression—indeed, one more reflection—of that original if somehow forgotten act of sovereignty, common to them all.¹¹⁰

Secondly, on progressively charting out such a territory, law's many domains cannot but correspondently constitute what *extra-spaces* there must be left aside—so that it is really the status of these extra-spaces, or excesses, that is today so very evidently at stake in law's many domains.¹¹¹

Finally, the very encounter with any such legal domain quietly refers to, and so recursively reaffirms, a rather specific, limited concept of space—that of an absolute, Newtonian, instrumental space—a physical or institutional space that will then be understood to amount to an “evident” and not-to-be-challenged, pre-legal element of law.

17. *Alternatives.* That is what seems to be happening in many cases. That is, lawyers including comparative lawyers seem to be

109. See generally DAWN OLIVER, COMMON VALUES AND THE PUBLIC-PRIVATE LAW DIVIDE (William Twining & Christopher McCrudden eds., 1999). For a sociological account, see, e.g., RICHARD SENNET, THE FALL OF PUBLIC MAN (1977).

110. Again, an influential attempt to tackle the problematic nature of that act of separation has been that of the Critical Legal Studies movement, though the stress has been often laid upon the outcome rather the inauguration of that separation. See generally KELMAN, *supra* note 44. For an alternative, compelling and all in all more imaginative attempt to analyze that separation (focusing on the patriarchal implications of the public-private law divide), see, e.g., the highly diversified output of feminist jurisprudence of KATHERINE O'DONOVAN, THE SEXUAL DIVISIONS IN LAW (Robert Stevens et al. eds., 1985); KATHARINE T. BARTLETT & ROSANNE KENNEDY, FEMINIST LEGAL THEORY (1991); REGINA GRAYCAR & JENNY MORGAN, THE HIDDEN GENDER OF LAW (1990).

111. See *supra* ¶ 16.

thinking of space (when they think of it at all) as either a physical or an institutional place—and in so doing they offer representations that end up being merely a reflection of that particular, indeed rather exceptional concept of space.

The very exceptionality of the normal concept of space indicates just how that cannot be the only way of thinking space as such. In particular, that exceptionality seems to suggest how space in the normal sense is unlikely to be the only place of law and legal comparisons that is available for thinking. One, again, could object that irrespective of what the alternatives might be—space in the normal sense is the place that lawyers and comparative lawyers have explicitly or implicitly agreed to treat as space.¹¹² That might be so but then, I have argued, legal representations including comparisons are a comparing as such—a confined creating of difference that is the how, at least at one level, of a particular experience.¹¹³ What that suggests is that the space of legal representations including comparisons must therefore come neither *after* nor at the *end* of the Same, but together *with* it.¹¹⁴ A comparing that is a confined creating of difference upon which only the space of legal representations including comparisons can properly come into presence—space in the normal sense must be therefore neither a universal place nor a fixed, natural or neutral place at that. Instead, space must be the place—one of the places—of law's most original imagination. So, lawyers and comparative lawyers may well have agreed on a particular legal theory or practice but if the representing of that legal space is, as such, a comparing that is a confined creating of difference as the how of one's own experience, the question inevitably becomes: *what is each time the heartland of that comparing?* What in particular is the heartland of the experience of space that is common—and is there one that is or can be common—to lawyers and comparative lawyers alike? Here then the task is really that of trying to open-up the normal concept of space in law and legal comparisons alike—in order to let alternative spaces come slowly in view. Or (which is the same), the effort is that of trying to see what the normal sense of legal space might each time be truly about. If nothing else, this should at least guard the possibility of that which, at first, might seem to some to be absolutely impossible—for example, the possibility itself of thinking space afresh and so the possibility of recovering *on its own terms* each time an-*other* space (many other

112. See *supra* ¶ 16.

113. See *supra* ¶ 5.

114. See *supra* ¶ 5.

spaces) that under given circumstances might well be worthy of notice or debate.

So, then, where is each time the space of legal representations? Better still: *how* is each time that space? Which is the matter of legal space? Take once again the private-public divide in any one jurisdiction, as opposed to the same divide in another jurisdiction. As earlier noted, many interesting studies on the relationship between public and private law attempt to establish whether or not public and private law can be usefully kept separate—yet, articulated though the result often is, such analyses tend to loom large of the more important question concerning the nature each time of the separation in question.¹¹⁵ Where could one start, instead? Coming lawyers caring for that particular opposition could start, for example, by clearing that divide wherever they find it—say, vis-à-vis a given private or public rule, or a legal function, or a particular legal-historical development, or a legal-linguistic expression, or a legal-linguistic strategy, etc.—and then dwelling in what will result of such clearing so as to let alternative possibilities emerge of being (in) place “out-there.”

For example: might it not be the case that, as it is here suggested, that particular opposition between private and public law began upon a recurrent, repeated, initial gesture of separation? If so, how would that gesture be like? Surely, that gesture would be a comparing as such—that much by now should be clear.¹¹⁶ But then—one would really need to press this question—how is each time the heartland of that gesture? How did it all come about? And what alternative if forgotten histories might upon such questioning come into sight instead?

115. So for example, in one recent opinion

five values pervade public and private law. . . . A legitimate question might be, why select these particular values? Where do they come from? . . . As far as the question why these particular values provide the focus for discussion here is concerned, the reason is that they are in practice the actual values that can be found operating in both public and private law [T]he values with which we are concerned[] are terms of art and do not have a fixed or very concrete meaning. Indeed, they are seldom analysed explicitly by the courts, and they seldom appear in terms in legislation. Yet . . . in practice respect for these values, often unarticulated, influences much of public and private law.

OLIVER, *supra* note 109, at 60.

116. *See supra* ¶ 5.

EVERYWHERE IN LAW

The question is in many cases no longer how deeply it is embedded, how deep are its roots in the soil of its country, but who has planted the roots and who cultivates the garden.¹¹⁷

18. *Space, Man and Language*. On October 3, 1964, Martin Heidegger gave a short lecture in St. Gallen—on occasion of an exhibition of works by the sculptor Bernard Heiliger, entitled *Raum, Mensch und Sprache* [Space, Man and Language].¹¹⁸ Though short, the lecture constituted a rather telling moment in the development of the existential analytics that had led Heidegger radically to criticize Western metaphysics as reifying thinking that forgets the Being of beings and especially of *Da-sein* (an intentionally vague term designating the “being-there” of human being and so, by approximation, human being tout-court) by reducing them to mute objects to be measured and dominated.¹¹⁹ But, Heidegger had argued, can anything ever be measured and dominated the way Western thinking hopes to measure it and dominate it? Can Western thinking not see how the Being of *Da-sein* as a *language* of sort—the “truth” of man as first of all language—makes any such capture illusory as well as clearly doomed? Might Western thinking not happen to be blind to the Being, to the “light” that, by contrast, each time constitutes the only “truth,” the only open horizon, the only event of each thing and of *Da-sein*? Might Western thinking not be blind, in other words, to the *light of language*?

19. *Space, Spatiality, Comparing as Such*. The answer, for Heidegger, had been “no” to the first two questions, and “yes” to the latter two. Here, let us simply recall how the initial step that had allowed Heidegger to ask those questions had been to argue, long before the 1964 lecture, in favour of the ultimate *temporality* of *Da-sein* (*Zeitlichkeit*)—to be understood as the being past and future of *Da-sein*, as well as present.¹²⁰ That initial step—from traditional concepts

117. O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 13 (1974).

118. See *infra* ¶ 5.

119. For the question of Being, see generally MARTIN HEIDEGGER, INTRODUCTION TO METAPHYSICS (Gregory Fried & Richard Polt eds., Yale Univ. Press 2000) (1935) [hereinafter HEIDEGGER, METAPHYSICS]. Heidegger did not understand Being to be a transcendental being. But in what follows, I put “Being” in the capital letter whenever I wish to stress *being* alone rather than, say, being-*there*, being-*something* or being-*somebody*.

120. See generally MARTIN HEIDEGGER, BEING AND TIME (John Stambaugh trans., State

of the subject to time—had constituted an absolute novelty in Western thinking allowing Heidegger to reconsider almost from scratch the fundamental structures of that thinking. And it had indeed been on the premise of that revolutionary proposition—that Da-sein is pre-eminently temporal, not subject (*res cogitans*), mind or even consciousness—that Heidegger had then tackled the matter of *space*. In particular, Heidegger had argued, the temporality of Da-sein—the being past, future and present of human being—suggests that space cannot be an absolute, fixed structure that is the same for everyone—like for example Descartes' *res extensa* or Kant's *a priori* space. Rather, space is best understood as *spatiality* (*Räumlichkeit*)—something that can only be given (can only be *a given*) within the temporal horizon of Da-sein.

Heidegger's central concern throughout most of his life, and certainly in the earlier years, had been the central question of ontology, why there is something rather than nothing.¹²¹ But Heidegger's ontology is, I suggest, a *radical ontology*—in that it purports to uproot traditional ontological thought as, quite literally, “metaphysical” nonsense. To that extent, Heidegger's existential analytics if carefully considered is immensely provocative—in that it may for example help mobilizing the concept of space in the normal sense (physical and institutional) and so offer one truly valuable inroad into the matter of legal experience and of legal space. We have seen in the previous pages how at one first level the matter of legal experience and of legal space is simply though crucially a comparing—a *comparing as such*.¹²² That, I would suggest, is what Heidegger's spatiality is really about. Francesco's story, however, also indicates that together with such comparing there always is something else that is everywhere at stake in legal space, as well as in artistic space. So while at one level the how of legal space might well be a spatiality that is a comparing as such, the *heartland of legal space* remains to be seen. Which then is the heartland of legal space? Better still: *how* is each time the heartland of legal space? In the previous sections I began to characterize that heartland as an *event* or series of events—but which or rather *how* might that event each time be? Building on aspects of Heidegger's analytics we should soon be able to see how the heartland of legal space might be best analyzed as an event or series of events by and large *constituting*, rather than representing, the outside world as this or

Univ. of New York Press 1996) (1953) [hereinafter HEIDEGGER, BEING].

121. See generally HEIDEGGER, METAPHYSICS, *supra* note 119.

122. See *supra* ¶ 5.

that particular legal theory or practice. In today's highly complex society, where the future of Western democracy and of the rule of law is so dramatically in doubt, that is a suggestion that might well be worthy of some consideration and of some discussion.¹²³

20. *Being-in-the-world-in-general.* Heidegger's argument is complex and his language notoriously idiosyncratic—for his own (unfinished) task was to excavate common language out and back where it could mean *logos* again—but, I would argue, that complexity and idiosyncrasy is precisely what allows Heidegger's thinking to be generally very precise and probing. We must therefore for the remainder of this section try to follow Heidegger's argument and language in what no doubt will be a rather difficult exercise of synthesis and interpretation. However, the benefits in temporarily joining Heidegger in his difficult but precise and probing thinking will eventually outdo—or so I hope—the discomfort that at first that exercise might well provoke. Then in the final section of the paper we can return to more familiar grounds and examine some instances of how space understood as a spatiality could help us think afresh the many theories and practices of law.¹²⁴

The initial step that allowed Heidegger to mobilize the normal concept of space¹²⁵ had been to shift the analysis of human existence away from the individual subject each time under scrutiny—to the temporality of *Da-sein*.¹²⁶ That is not to say, however, that therefore *Da-sein* is spaceless. All to the contrary, on analyzing *Da-sein* and its determinations Heidegger makes immediately clear how such determinations “must now be seen and understood *a priori* as grounded upon that constitution of being which we call *being-in-the-world*” (*In-der-Welt-sein*).¹²⁷ To state that human being is-in-the-world, however, is not to repeat the rather banal observation that man lives in a space-time context. Instead, being-in-the-world means that the who of one's own existence and the what of one's own world belong each time in an open structure—namely, the being-there of human being.

123. On complexity, see generally Françoise Fogelman Soulié, *Les Formalisations de la Complexité*, in *LES THÉORIES DE LA COMPLEXITÉ* 48 (Françoise Fogelman Soulié ed., 1991).

124. See *infra* ¶ 26.

125. Though not, of course, just the concept of space.

126. Again, the being past and future, as well as present, of the “being-there” of human being. See *supra* ¶ 18.

127. HEIDEGGER, *BEING*, *supra* note 120, § 12.53.

Although a wholly unified phenomenon, the phenomenal fact of being-in-the-world has several constitutive open-structural factors.¹²⁸ One is, precisely, the “being-in” of it. The others are “space” and “being.”

(i) *Human being is not “in” space like everything else.*—So, first, what does the “being-in” of Da-sein’s being-in-the-world stand for? One might be inclined to take that being-in as a *being-in-something*, like for example water *in* a glass, etc., “the relation of being that two beings extended “in” space have to each other with regard to their location in that space.”¹²⁹ In such a commonly-held view, those beings which are “in” world-space “all have the same kind of being—that of being *objectively present*—as things occurring ‘within’ the world.”¹³⁰ However, Heidegger warns, those are in fact ontological characteristics that “belong to beings whose kind of being is unlike Da-sein.”¹³¹ Human being, that is, is not present *in* space *objectively* in the same way as the other beings are.

Indeed, being-in as a constitutive open-structural factor of Da-sein is an existential that designates neither “the objective presence of a material thing (the human body) ‘in’ a being objectively present” nor “a spatial ‘in one another’ of two things objectively present.”¹³² Instead,

“In” stems from *innan-*, to live, *habitare*, to dwell. “An” means I am used to, familiar with, I take care of something. It has the meaning of *colo* in the sense of *habito* and *diligo*. . . . The expression “*bin*” is connected with “*bei*.” “*Ich bin*” (I am) means I dwell, I stay near . . . the world as something familiar in such and such a way. Being as the infinitive of “I am” . . . means to dwell near . . . , to be familiar with. . . . *Being-in is thus the formal existential expression of the being of Da-sein* which has the essential constitution of being-in-the-world.¹³³

So, to begin with, Heidegger qualifies Da-sein’s being-in-the-world as a being absorbed in the world. Thus, Da-sein “is-in” the world in the quite specific sense of *being-together-with* the world or *taking care* of it (*Besorgen*)—rather than being *in* it, in the normal sense. This move, as is clear, is important for through it Heidegger is

128. The expression “open-structural,” as opposed to Heidegger’s “structural,” is mine. By that I mean to highlight that for Heidegger any such structure is, precisely, an open structure, not a closed or fixed one.

129. HEIDEGGER, BEING, *supra* note 120, § 12.54.

130. *Id.* (emphasis added).

131. *Id.* Heidegger calls such characteristics “categorical.”

132. *Id.*

133. *Id.* (internal footnote omitted).

able to abandon space as traditionally understood by Western thinking including legal thinking (Da-sein is not “in” space in the normal sense)—while at the same time firmly characterizing Da-sein as being-in-the-world and so as being-in, that is, being-together-with or taking care of the world. But one must be careful, for

[a]s an existential, “being with” the world never means anything like the being-objectively-present-together of things that occur. There is no such thing as the “being next to each other” of a being called “Da-sein” with another called “world.” It is true that, at times, we are accustomed to express linguistically the being together of two objectively present things in such a manner: “The table stands ‘next to’ the door,” “The chair ‘touches’ the wall.” Strictly speaking, we can never talk about “touching,” not because in the last analysis we can always find a space between the chair and the wall by examining it more closely, but because in principle the chair can never touch the wall, even if the space between them amounted to nothing. The presupposition for this would be that the wall could be *encountered* “by” the chair.¹³⁴

(ii) *Insideness and spatiality.*—So, Heidegger continues, chairs for example do not usually encounter walls just as, therefore, they do not encounter Da-sein.¹³⁵ Instead, chairs like walls are objectively present in the world (Heidegger is clear about that)—though “[t]wo beings which are objectively present within the world and are, moreover, *worldless* in themselves, can never ‘touch’ each other, neither can ‘be’ ‘together with’ the other.”¹³⁶ Da-sein however can both “touch” and “be” “together with” another being—that is to say, Da-sein is subjectivity. Does that mean though that Da-sein is *pure* subjectivity? No. Rather, Da-sein’s objective presence is different from the objective presence of other, worldless beings.¹³⁷ Da-sein, that is, is *present* in the world *existentially*—while other beings are best seen to be merely *inside* it. The *spatiality* of Da-sein is therefore *existential presence*, not mere “insideness”¹³⁸ (*Innerweltlichkeit*). That is, there is here a veritable being-together-with the world.

134. *Id.* § 12.55.

135. “These other beings can only ‘meet up’ ‘with’ Da-sein because they are able to show themselves of their own accord within a *world*.” *Id.* § 12.57. Likewise, “Da-sein understands itself—and that means also its being-in-the-world—ontologically in terms of *those* beings and their being which it itself in *not*, but which it encounters ‘within’ its world.” *Id.* § 12.58.

136. *Id.* § 12.55 (emphasis added).

137. Da-sein understands its ownmost being in the sense of a certain “factual objective presence.” *Id.* And yet the “factuality” of the fact of one’s own Da-sein is ontologically totally different from the factual occurrence of a kind of stone. The factuality of the fact Da-sein, as the way in which every Da-sein actually is, we call its *facticity*. *Id.* § 12.56.

138. *Id.*

If we define being-in in this way, we are not denying to Da-sein every kind of "spatiality." On the contrary. Da-sein itself has its own "being-in-space," which in its turn is possible only *on the basis of being-in-the-world in general*. Thus, being-in cannot be clarified ontologically by an ontic characteristic, by saying for example: being-in in a world is a spiritual quality and the "spatiality" of human being is an attribute of its bodiliness which is always at the same time "based on" corporeality. Then we have again to do with a being-objectively-present-together of a spiritual thing thus constituted with a corporeal thing, and the being of the beings thus compounded is more obscure than ever.¹³⁹

So then the existential presence or spatiality of Da-sein is as such wholly different from, and prior to, the insiderness of other inner-worldly beings. That is of course crucial, for Heidegger's human being is after all pre-eminent over other beings by being "the only place where the Beingness of beings comes to presence, revealing a contextual world of meaning."¹⁴⁰ On the other hand, the existential presence or spatiality of Da-sein does of course raise a fundamental problem—the problem of *cognition*. How can Da-sein hope to know the world if it ontologically "is-together-with" that world which it seeks, legitimately perhaps yet somewhat naively, to become knowledgeable about? And, so too, how can *lawyers* including comparative lawyers ever know—and can they ever know—the world "out-there" that they so dutifully set out to represent or to compare?

(iii) *Worldliness and handiness*.—The contrast between the existential presence or spatiality of Da-sein and the insiderness of other beings raises amongst other things the question of the *world* toward which Da-sein *is*.¹⁴¹ Indeed, "which world is meant?"¹⁴² Heidegger tackles that question through an inquiry into "the worldliness of world in general"—how can *world* be accessed ontologically without somehow presupposing it in our search for it?¹⁴³ The point is important not

139. *Id.* § 12.56.

The understanding of being-in-the-world as an essential structure of Da-sein first makes possible the insight into its *existential spatiality*. This insight will keep us from failing to see this structure or from previously cancelling it out, a procedure motivated not ontologically, but 'metaphysically' in the naïve opinion that human being is initially a spiritual thing which is then subsequently placed 'in' a space.

Id.

140. LESLIE PAUL THIELE, *TIMELY MEDITATIONS* 45 (1995). "As for beings themselves, their concrete existence remains unaltered by the unique role of human being in their ontological discovery." *Id.*

141. See generally HEIDEGGER, *BEING*, *supra* note 120, § 14.

142. *Id.* § 14.64. Heidegger reviews here a series of possible meanings of the word "world." *Id.* §§ 14.64-.65.

143. "Neither the ontic description of innerworldly beings nor the ontological interpretation of the being of these beings gets as such at the phenomenon of 'world.' In both kinds of access to 'objective being,' 'world' is already 'presupposed' in various ways." *Id.* § 14.64.

only philosophically or in view of our specific inquiry on space, but also in so far as it indirectly asks the political question how is *community* possible if on reflection we find that in fact we are “in” the world existentially but not in the normal sense. To begin with, however, suffice to clarify that by “worldliness”¹⁴⁴ (*Weltlichkeit*) Heidegger means an ontological concept that “designates the structure of a constitutive factor of being-in-the-world”—so that world is ontologically “not a determination of *those* beings which Da-sein essentially is *not*, but rather a characteristic of Da-sein itself.”¹⁴⁵ That is why then, terminologically, “worldly” is a kind of being of Da-sein whereas, by contrast, “innerworldly” is a kind of being objectively present “in” the world.¹⁴⁶

The question of the worldliness of world in general, Heidegger suggests, is best tackled by looking first at the worldliness of the world surrounding Da-sein (“environmentality”).¹⁴⁷ Such a surrounding world (*Umwelt*) is not spatial in conventional ontological terms and so it is not first and foremost a matter of knowledge on the part of a *res cogitans*. All to the contrary, Heidegger argues, in our everyday being-in-the-world our closest kind of association with innerworldly beings is “a handling, using and taking care of things. . . .”¹⁴⁸ Thus, pre-thematically and pre-phenomenally, we associate with mere “things” rather than with a known world and its substantiality, materiality, extendedness, side-by-sideness. The Greeks called such “‘things’: *pragmata*, that is, that with which one has to do in taking care of things in association. . . .”¹⁴⁹ Heidegger calls them “*useful things*.”¹⁵⁰ However one might wish to call them, however, the point is that Heidegger’s analytics invites us to look at Da-sein as having a surrounding world of “things,” rather than examining those “things” as the world that surrounds Da-sein. But we must be careful. If “[i]n association we find things for writing, things for sewing, things for

By “innerworldly” being, Heidegger means the being of something objectively present “in” the world.

144. *Id.*

145. *Id.*

This does not preclude the fact that the path of the investigation of the phenomenon ‘world’ must be taken by way of innerworldly beings and their being. The task of a phenomenological ‘description’ of the world is so far from obvious that its adequate determination already requires essential ontological clarification.

Id.

146. *See id.* § 14.65.

147. *See generally id.* § 15.

148. *Id.* § 15.67.

149. *Id.* § 15.68.

150. *Id.*

working, driving, measuring”¹⁵¹—if, in other words, what we usually find is “usable material”¹⁵²—still “[s]trictly speaking, there ‘is’ no such thing as *a* useful thing. . . . A useful thing is essentially ‘something in order to. . . .’”¹⁵³ (*Zeug*).

In accordance with their character of being usable material, useful things always are *in terms of* their belonging to other useful things: writing materials, pen, ink, paper, desk blotter, table, lamp, furniture, windows, doors, room. These “things” never show themselves initially by themselves, in order then to fill out a room as a sum of real things. What we encounter as nearest to us, although we do not grasp it thematically, is the room, not as what is “in between the four walls” in a geometrical, spatial sense, but rather as material for living. . . . A totality of useful things is always already discovered *before* the “individual” useful thing.¹⁵⁴

Beings or “things” *ready at hand* that are *in terms of* other beings or “things”—the *work* they may or may not be likely to produce rather than the beings or “things” in themselves—that is according to Heidegger what we typically encounter when in our everyday being-in-the-world we encounter beings or “things” in the surrounding world.¹⁵⁵ That is to say, such beings and “things” present themselves to us as “reference”¹⁵⁶ (*Verweisung*) rather than substance. When we encounter them, we do not therefore look at them “theoretically” but with “circumspection”¹⁵⁷ (*Umsicht*)—without yet knowing how they really are. Indeed, it is only by handling, using and taking care of them that useful things reveal themselves by themselves—namely, as “‘handiness’ (*Zuhandenheit*).”¹⁵⁸ Or, which is the same, what we do *not* nor-

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* §§ 15.68-.69. Here follows the celebrated example of the hammer.

Association is geared to useful things which show themselves genuinely only in this association, that is, hammering with the hammer, neither *grasps* these beings thematically as occurring things nor does it even know of using or the structure of useful things as such. Hammering does not just have a knowledge of the useful character of the hammer; rather, it has appropriated this useful thing in the most adequate way possible. . . . The less we just stare at the thing, called hammer, the more actively we use it, the more original our relation to it becomes and the more undisguisedly it is encountered as what it is, as a useful thing. The act of hammering itself discovers the specific “handiness” of the hammer.

Id. § 15.69.

155. *Id.* §§ 15.69-.70.

156. *Id.* § 15.69.

157. *Id.*

158. *Id.* § 15.71.

mally see in our everyday being-in-the-world is what those beings or “things” are *in themselves*.¹⁵⁹

The same, of course, must be true of lawyers including comparative lawyers. They too must normally encounter law’s many domains as “useful things” (in the Heideggerian sense). And so they too must encounter that world *other than on its own terms*.

21. *Of Worldly Space and the Spatiality of Da-sein.* But if according to Heidegger’s analysis Da-sein is in the world *existentially* and, conversely, world is other than some sort of larger or total being “in” which Da-sein is—if, in other words, world is a constitutive open-structural factor of Da-sein’s being-in-the-world—where does that leave us in our investigation of space—both the space of human being and, in particular, legal space?

(i) *Nearness.*—Let us first look at worldly space—the space characteristic of Da-sein’s surrounding world (or innerworldly beings). Initially Da-sein encounters such beings as “things” at hand and that, Heidegger now notes, means that Da-sein encounters certain beings first—namely, those beings to which it is *near(er)*. Thus a fundamental characteristic of the being-in-the-world of Da-sein is that human being is near other beings. Obvious though that observation might sound at first, the point is that such a nearness has in fact nothing to do with a measuring of distances between human being and the surrounding world—it has nothing to do, in short, with traditional concepts of space hitherto embraced by Western thinking including legal thinking. Rather, “[t]he structured nearness of useful things means that they do not simply have a place in space, objectively present somewhere, but as useful things are essentially installed, put in their place, set up, and put in order.”¹⁶⁰ That is interesting—for the suggestion here is that for human beings *innerworldly beings are put into place, or else they “lie around”*—but they do not simply occur in space (they do not simply lie “in” space).

So then legal space—the physical or institutional space defined by the many theories and practices of law (contract, murder, citizenship, war, etc.)—can never be properly grasped and measured as being “in” or surrounded “by” or taking hold “of” some sort of absolute space that, by being thus secured to it and being therefore capable of securing the world to it, will then allow for both the infinite repetition and the insuperable evidence of that same legal space that is each time in

159. *Id.*

160. *Id.* § 22.102.

question—theory or practice that it might be. That long-standing “metaphysical” concept of legal space would on closer inspection simply not do. Rather, legal space would be more genuinely understood as what each time may or may not have been referred to as such upon the *being near* of Da-sein to other beings—what contract, murder, etc. such nearness may or may not have each time *made* of the surrounding world understood as “useful things.” Legal space, in particular, would on this view be whatever lawyers including comparative lawyers might circumspectly make of “things” each time “at hand” and “around”—before, that is, seeing them theoretically as “contracts,” “murders,” etc. Indeed that and only that would I suggest be the matter of legal space, both the how and the heartland of it all: that is, *the being near, or nearness, of human beings to other beings*.¹⁶¹ It is upon dealing with a specific promise—better still, with the non-honoring of it by one party—that the “binding-ness” of that promise as a “natural obligation” or a “gift” or a “contract,” etc. will first come out and be thematized as such.¹⁶² It is upon dealing with violent death that “death-ness” will be seen to amount to the suppression of life and then “murder” or, for example, an emancipatory if no less answerable “theory” of sort (think once again of Raskol’nikov’s deed in *Crime and Punishment*). It is upon dealing with the abandonment of home that “belong-ness” and then, for example, “citizenship” will become apparent. And, finally, it is upon the breaking-down of similarity or indeed of difference that sameness and otherness will emerge by way of what would be a veritable *comparison from without*.¹⁶³ Legal space, in sum, would be better grasped as *a place that lawyers including comparative lawyers regularly constitute (rather than merely imitate or create) on first being-near to that which, by being usefully at hand, they later on set out to represent or to compare*. Again, this is not to say that natural obligation, gift, contract, murder, citizenship, etc. are a purely subjective affair. That could not be so—if only because one, by contrast, typically tends to thematize them as objective.¹⁶⁴ Rather, what that means is that, first of all, legal space is *temporal*—it is each time a *possibility* as well as a particular legal theory or practice.¹⁶⁵ Secondly, legal space is a *being-*

161. On my definition of the “matter” of legal space, see *supra* ¶ 3.

162. I say “binding-ness” to stress that for Heidegger what would be at stake would be the *being* binding of the promise, rather than the binding *character* of it.

163. See *supra* ¶ 5.

164. There are of course other reasons—like for example the directionality of Da-sein’s spatiality. See *infra* ¶ 20(iii).

165. See *infra* ¶ 22.

near that need not be a being physically close—though by no means there is here a distant place. Nor need it be a solitary, atomistic place—walled, as it were, within its own unconquerable walls. Instead, legal space is always a being near “in terms of a totality of the interconnected places of the context of useful things at hand in the surrounding world.”¹⁶⁶ That is, such being near has the open-structure of reference and so can be precisely pinned-down—in that at least there is always here “the definite ‘over there’ and the ‘there’ of a useful thing *belonging there*.”¹⁶⁷ That is to say, legal space is *situated*.

Finally, on having a place—on being near to *Da-sein*—beings already always belong in a “region.”¹⁶⁸ “Something akin to a region must already be discovered if there is to be any possibility of referring and finding the places of a totality of useful things available to circumspection.”¹⁶⁹ This regional orientation of the various places of beings in the surrounding world is what constitutes their *aroundness*, “the being around us of beings encountered initially in the surrounding world.”¹⁷⁰ The inconspicuous familiarity of what is around us is such that regions are rarely accessible. Nevertheless, what is clear for Heidegger is that such a surrounding world does not arrange itself in a prior space, but rather its being worldly gives meaning to the place, or being near, of beings—it “articulates in its significance the relevant context of an actual totality of places.”¹⁷¹ That is why the legal space that is each time instituted by a particular legal text or context would be better analyzed, I suggest, as each time an *event*—or set of events—constituting that text or context within what one might call the horizon of the matter of legal space.¹⁷²

(ii) *De-distancing*.—Let us now turn to the spatiality of *Da-sein* itself. This too is “essentially not objective presence . . . neither something like being found in a position in ‘world space’ nor being at hand

166. HEIDEGGER, BEING, *supra* note 120, § 22.102.

167. *Id.*

168. *Id.* § 22.103.

“In the region of” means not only “in the direction of,” but also in the orbit of something that lies in that direction. The kind of place which is constituted by direction and remoteness—nearness is only a mode of the latter—is already oriented toward a region and within that region. Something akin to a region must already be discovered if there is to be any possibility of referring and finding the places of a totality of useful things available to circumspection.

Id.

169. *Id.*

170. *Id.*

171. *Id.* § 22.104.

172. *See supra* ¶ 10.

in a place.”¹⁷³ Instead, the spatiality of Da-sein marks “a familiar and heedful association” with the surrounding world that can only be possible on the basis of the being-in of Da-sein.¹⁷⁴ However, the point now is that such an existential spatiality of Da-sein is characterized by what Heidegger calls “de-distancing” (*Ent-fernung*) and “directionality” (*Ausrichtung*).¹⁷⁵

By de-distancing as a kind of being of Da-sein with regard to its being-in-the-world, we do not understand anything like remoteness (nearness) or even being at a distance. . . . De-distancing means making distance disappear, making the being at a distance of something disappear, bringing it near. Da-sein is essentially de-distancing. As the being that it is, it lets beings be encountered in nearness. De-distancing discovers remoteness. Remoteness, like distance, is a categorial determination of beings unlike Da-sein. . . . Only because beings in general are discovered by Da-sein in their remoteness, do “distances” and intervals among innerworldly beings become accessible in relation to other things.¹⁷⁶

De-distancing is the other end, so to speak, of being near. Da-sein is-near to beings and world upon continually de-distancing itself from them. Thus the approaching of Da-sein, the bringing near understood as a supplying, as a preparing, as a having at hand—all that is Da-sein geared as it is toward nearness. But—while Da-sein is everywhere always a de-distancing (especially in today’s highly sophisticated times)—such a de-distancing does not, once again, imply any explicit measurement of what farness there might be with the things at hand. Instead, de-distancing is about getting so close to distance that distance itself can then be put safely way. No doubt, “[i]n the calculative sense these estimations may be imprecise and variable, but they have their *own* thoroughly intelligible *definiteness* in the everydayness of Da-sein.”¹⁷⁷ That is why such a de-distancing has nothing to do with arbitrariness or with subjective conceptions of what is around us. By contrast, de-distancing is a discovering of things in themselves, that is, a discovery of beings “*with which Da-sein as existing is always already together.*”¹⁷⁸

173. HEIDEGGER, BEING, *supra* note 120, § 22.104.

174. *Id.*

175. *Id.*

176. *Id.* § 23.105. “Two points are as little remote from each other as two things in general because neither of these things can de-distance in accordance with its kind of being. They merely have a measurable distance between them which is encountered in de-distancing.” *Id.*

177. *Id.*

178. *Id.* § 23.106 (emphasis added).

(iii) *Directionality*.—Thus Heidegger's conception of the spatiality of Da-sein—the existential spatiality characteristic of the being-in-the-world of human being—comes finally and firmly into view. Human being is, first of all, *near* beings and world, in the sense of being in the range of what is initially around us for us to associate with it. Secondly, human being occupies a *place*—but it does so in a radically different way from just being in a measurable, physical or institutional space.¹⁷⁹ That is, “Da-sein understands its here in terms of the over there of the surrounding world”—so much so that “Da-sein is initially never here, but over there.”¹⁸⁰ Or, one might say, the space of human being is really a place that can only be pin-pointed by difference. Third, human being is always a de-distancing yet it can never by-pass the current range of its de-distancings, crossing over what farness there is between itself and what is at hand—though, of course, it may well be able to vary them along the way. In other words, human being is *continually* de-distancing—and that won't change (for it is an existential)—though such continuous de-distancing does change as human being moves on to ever new de-distancings.¹⁸¹ Finally, however, the spatiality of human being is also characterized by *directionality*. “Every bringing near has always taken a direction in a region beforehand from which what is de-distanced approaches so that it can be discovered with regard to its place.”¹⁸² In that sense, useful things are seen by Heidegger as signs which “take over the giving of directions in a way which is explicit and easily handled”—so that in the event one can say that “[i]f Da-sein is, it always already has directing and de-distancing, its discovered region.”¹⁸³

179. *Id.* § 23.107. That is, in a radically different way from just “being at hand at a place in terms of a region. Occupying a place must be understood as de-distancing what is at hand in the surrounding world in a region previously discovered circumspectly beforehand.” *Id.*

180. *Id.*

181.

As being-in-the-world, Da-sein essentially dwells in de-distancing. This de-distancing, the farness from itself of what is at hand, is something that Da-sein can *never cross over*. It is true that Da-sein can take the remoteness of something at hand to be distance if that remoteness is determined in relation to a thing which is thought of as being objectively present at a place which Da-sein has already occupied. Da-sein can subsequently traverse the “between” of this distance, but only in such a way that the distance itself becomes de-distanced. So little has Da-sein crossed over its de-distancing that it rather has taken it along and continues to do so *because it is essentially de-distancing, that is, it is spatial*. Da-sein cannot wander around in the current range of its de-distancings, it can only change them.

Id. § 23.108.

182. *Id.*

183. *Id.*

22. *Making Room.* What the existential spatiality of being-in-the-world clarifies—what Heidegger’s notions of *nearness*, *placeness*, *de-distancing* and *directionality* mean—is, for example, how as being-in-the-world human being “has always already discovered a ‘world.’”¹⁸⁴ Such spatiality, moreover, also accounts for how specifically will all else in the surrounding world be encountered. So on the one hand the “[s]pace that is disclosed with the worldliness of the world does not yet have the characteristic of a pure manifold of three dimensions.”¹⁸⁵ On the other hand, however, “[l]etting innerworldly beings be encountered, which is constitutive for being-in-the-world” must be understood as a “giving space” (*Raum-geben*).¹⁸⁶ Thus, again, Heidegger’s decisive move from space to spatiality permits an understanding of space as something much more capacious than our current, far too reductive equation of it with mere Newtonian space. Space including legal space can never be an absolute, fixed, neutral structure. Rather, space is an open possibility, a continually re-organizing giving-space. That is to say, *space* can only really speak of human beings (lawyers and comparative lawyers included) as beings who always already have a surrounding world to which *they*, however, give space as they continually de-distance themselves in directions that, as such, are each time already there. So really that giving-space, which is a “making room” (*Einräumen*), “frees things at hand for their spatiality.”¹⁸⁷ Or, which is the same, beings and world can only be *in* space—they can only be in place—in so far as human beings give them space, or put them in place. Existentially, giving space is thus a way of discovering and presenting a possible totality of places, a way of making orientation possible, and so change things around, remove them or make room for them. But then what that space understood as a spatiality also says is how because space is initially discovered in that spatiality upon being-in-the-world, it is only on the basis of that discovery that “space itself becomes accessible to cognition.”¹⁸⁸

It is spatiality, in short, that allows for the discovery of space within the world—not the other way around.

184. *Id.* § 24.110.

185. *Id.* Instead, “[i]n this nearest disclosedness, space is still hidden as the pure wherein in which points are ordered by measurement and the positions of things are determined.” *Id.*

186. *Id.* § 24.111.

187. *Id.*

188. *Id.*

23. *The Temporality of Da-sein's Spatiality.* In Division Two of *Being and Time*, Heidegger sets out to verify temporality phenomenologically by, as it were, temporalizing temporality (*Zeitigung*).¹⁸⁹ Accordingly, in paragraph 70 he returns on the spatiality of Da-sein—so as to review it from the perspective of temporality.

Da-sein's spatiality, Heidegger had anticipated in Division One, is grounded in temporality—in the being past and future as well as present of Da-sein. Does that mean that space can be deduced from, or else be resolved in, time? No.¹⁹⁰ Does the temporality of spatiality, then, have anything to do with say Kantian priority of time over space? Again, no.¹⁹¹ Instead, Da-sein is spatial and so temporal as “care”—in the specific sense of a “factually entangled existing.”¹⁹² As such, “Da-sein is never objectively present in space, not even initially.”¹⁹³ Instead, it “takes space in.”¹⁹⁴ Nor, for that matter, is Da-sein spatial in that it “*knows* about space.”¹⁹⁵ All to the contrary, it is the making room of Da-sein that allows for any particular representation—and not vice versa. Even less, finally, can the temporality of Da-sein's spatiality have anything to do with the sorrow whereabouts of one's own spirit bogged down by an all too encumbering physical body.¹⁹⁶ But if that is so, how then is the temporality of Da-sein's spatiality?

To begin with, Da-sein's spatiality is grounded in temporality in the sense that, Heidegger reminds us, making room is constituted by directionality and de-distancing.¹⁹⁷ What that means is that making room is related in some eminent way to the discovery of something like a proximate region,¹⁹⁸ so that “[w]henver one comes across use-

189. *Id.* § 45.

190. *Id.* § 70.367.

191. *Id.*

That the empirical representations of what is objectively present “in space” occur as physical events “in time,” so that the “physical” also occurs indirectly “in time,” is not to give an existential and ontological interpretation of space as a form of sensibility, but rather to ascertain ontically that what is physically objectively present runs its course “in time.”

Id.

192. *Id.*

193. *Id.* at 70.368.

194. *Id.*

195. *Id.* Indeed, “[m]aking room is so far from identical with the ‘representation’ of something spatial that the latter presupposes the former.” *Id.*

196. Instead, “because Da-sein is ‘spiritual,’ and only because it is spiritual, it can be spatial in a way that essentially remains impossible for an extended corporeal being.” *Id.*

197. See *supra* ¶ 20.

198. “[T]he whereto of the possible belonging somewhere of useful things at hand in the

ful things, handles them, moves them around, or out of the way, a region has already been discovered.”¹⁹⁹ Therefore, on the one hand, “[b]eing-in-the-world that takes care of things is directed, directing itself.”²⁰⁰ On the other hand, there must thus always be a relation between the taking care of things and the things taken care of—a *relation of relevance* that, however, goes beyond the mere domain of text or context while, at the same time, being each time intelligible only in the “horizon of a disclosed world,” that is to say, in the horizon of a world of text or context.²⁰¹ The very nature of any such relation of relevance (“horizontal”), in fact, not only makes possible the specific horizon each time in question,²⁰² but also allows for a de-distancing, a continuous and continuing bringing-near of things at hand and objectively present.²⁰³ In other words, such relation of relevance quite literally makes any such thing present.²⁰⁴

In the making present of things at hand, however, “making present loses itself in itself, and forgets the over there”—hence, the illusion of only a thing being initially objectively present, in space.²⁰⁵ Still, again, the central point here is that only temporality as the being past and future as well as present of Da-sein allows Da-sein “to break into space”—so that the world cannot be said to be objectively present in space while, on the other hand, it is only within a world that space can be discovered by Da-sein.²⁰⁶ Hence, the independence of space from time but also, at the same time, the dependency of Da-sein upon space.²⁰⁷ Such a dependency, Heidegger then concludes, shows itself in the matter of self-interpretation and of the significance of language—dominated as they are by spatial representations. Yet, the priority of the spatial in both significations and concepts is grounded

surrounding world.” HEIDEGGER, BEING, *supra* note 120, § 70.368.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* “The self-directive discovering of a region is grounded in an ecstatically retentive awaiting of the possible hither and wither.” *Id.*

203. *Id.* “As a directed awaiting of region, making room is equiprimordially a bringing-near (or de-distancing) of things at hand and objectively present.” *Id.* §§ 70.368-369.

204. “Bringing-near and the estimating and measurement of distances within what is objectively present within the de-distanced world are grounded in a making-present that belongs to the unity of temporality in which directionality is possible, too.” *Id.* § 70.369.

205. *Id.*

206. *Id.*

207. *Id.* “The ecstatic temporality of the spatiality of Da-sein make it intelligible that space is independent of time, but on the other hand this same temporality makes intelligible also the ‘dependency’ of Da-sein upon space. . . .” *Id.*

“not in some specific power of space, but rather in the kind of being of Da-sein.”²⁰⁸

24. *The Paradox of Language.* The initial move from subjectivity to temporality had allowed Heidegger to highlight the question of Being and to conduct a formidable analysis of Being-in-the-world. That was of immense importance, for Heidegger could thus finally mobilize what essentialist or “metaphysical” views of the subject—and of space—Western ontological thinking, including legal thinking, had traditionally entertained. But on using time for that purpose, Heidegger had also realized that he could do just that—and go no further.²⁰⁹ In a 1962 lecture, entitled “Time and Being” [*Zeit und Sein*],²¹⁰ Heidegger described as “untenable” his own attempt in *Being and Time* ultimately to ground spatiality on temporality.²¹¹ That being the background, the short St. Gallen conference held by Heidegger in 1964 and entitled *Raum, Mensch und Sprache*²¹² has been seen as an attempt to reintroduce space as an element independent, as it were, from temporality.²¹³

208. *Id.*

209. One of the problems with the foundational approach that characterized *Being and Time* is the relationship between temporality and care. According to one view, temporality should be understood as encompassing, but not equating to, care. See generally Graeme Nicholson, *Ekstatic Temporality in Sein und Zeit*, in *A COMPANION TO MARTIN HEIDEGGER'S "BEING AND TIME"* 208 (Joseph J. Kockelmans ed., 1986). According to another view, however, “[t]he structure of temporality should be treated as an abstraction from Da-sein’s Being-in-the-world, specifically from care.” See Yoko Arisaka, *Spatiality, Temporality, and the Problem of Foundation in Being and Time*, 40 *PHIL. TODAY* 36 (1996), <http://www.arisaka.org/heidegger.html>. In other words, temporality should, in that second view, be reduced to care. But then

if this is the case . . . temporality does not found spatiality, except perhaps in the trivial sense that spatiality is built into the notion of care which is identified with temporality. . . . The addition of temporal dimensions does indeed complete the discussion of spatiality, which is abstracted from time. But this completion, while it better articulates the whole of Being-in-the-world, does not show that temporality is more fundamental.

Id.

210. M. HEIDEGGER, *ON TIME AND BEING* (Joan Stambaugh trans., 2002) [hereinafter HEIDEGGER, *ON TIME*].

211. *Id.* at 23.

212. See *supra* ¶ 18. The lecture was to be published a few years later under the title “Die Kunst und der Raum.” MARTIN HEIDEGGER, *DIE KUNST UND DER RAUM*, [Lecture at the St. Gallen Conference] (1964). Today, it can be found in HEIDEGGER, *GESAMTAUSGABE supra* note 41, at 203-10.

213. On this, see EUGENIO MAZZARELLA, *TECNICA E METAFISICA: SAGGIO SU HEIDEGGER* pt. 1, cap. 3 (1981); MARTIN HEIDEGGER, *L’ARTE E LO SPAZIO* 7-13 (Carlo Angelino trans., *Il Melangolo* 1979) (n.d.).

Meanwhile, however, Heidegger had long begun to explore the role of *language* in the question of Being. In a soon-to-become famous response to a letter from Jean Beaufret, a response later to be published as *Letter on Humanism (Über den Humanismus)*, Heidegger had in 1946 argued how language is best seen as the “House of Being.”²¹⁴ By that time, in other words, Heidegger had turned to the investigation of the proximate relation of Being and language—rather than Being and temporality. In the following years, Heidegger would then build on the project initially outlined in the *Letter on Humanism*—by distinguishing “calculating thinking” and “meditating thinking”; by separating what language allows man to exist, from ordinary language (a “challenging”; a “regulating”; and a “securing”); by observing that language names and naming calls; by stressing the importance of non-representational “poetry” as that “which lets us dwell”; by clarifying how difference is *the* dimension, insofar as it measures out, apportions, world and thing, each to its own’; and so on.

I discussed elsewhere the relevance of Heidegger’s thinking on language in relation to law and, in particular, to what I suggested to call “meditating” or “poetic” comparisons and the “question of comparative law.”²¹⁵ Much more would need to be said in relation to that. However, let us now simply recall how Heidegger’s work, it seems to me, invites us to treat law’s many theories and practices as linguistic “techniques” whereby—and that is really the point—what is at stake is something rather more intriguing than the mere practice of language in the normal sense, original and expansive though that might well be. For, Heidegger points out, language belongs to man and yet, just as importantly, man belongs to language.²¹⁶

To say that man belongs to language, in particular, highlights the foundational paradox of language—and, indeed, the very sense of its originality.²¹⁷ The paradox of language, in particular, is that language is a *threshold*—both the center and the threshold of thinking.²¹⁸ That

214. The response by Heidegger had been initially published, in a shorter version, by the journal *Fontaine*, with an introductory essay by Beaufret. See Jean Beaufret, *Heidegger et le Problème de la Vérité*, 63 FONTAINE 758 (1947). A new version by Heidegger was then published at the end of Martin Heidegger, PLATONS LEHRE VON DER WAHRHEIT—MIT EINEM BRIEF ÜBER DEN «HUMANISMUS» 53-119 (1947). See HEIDEGGER, *Letter on Humanism*, in BASIC WRITINGS, *supra* note 35, at 213.

215. See generally Stramignoni, *King’s Eyes*, *supra* note 104; Igor Stramignoni, *Meditating Comparisons, or the Question of Comparative Law*, 4 SAN DIEGO INT’L L.J. 57 (2003) [hereinafter Stramignoni, *Meditating Comparisons*].

216. Stramignoni, *King’s Eyes*, *supra* note 104, at 762.

217. Stramignoni, *Meditating Comparisons*, *supra* note 215, at 67-71.

218. *Id.* at 69.

paradox, it seems to me, is foundational—in that language rather than temporality is now, in Heidegger’s own words, “the relation of all relations.”²¹⁹ But if that is so, what then can be the matter of legal space—what can be the matter of legal experience—if not language, some “other-language,” the “house” in Heidegger’s sense that language continuously lays-out for us to inhabit and to say? And if the matter of legal space is language, some other-language, then that particular space as each time a particular legal theory or practice will always hold in itself the possibility of some other-law, of some radically different theory or practice—though not, in that sense, the possibility of anything other *than* law.

25. *Eventful Spatialities.* To recap. The story of Francesco and his devilish Venus suggests that lawyers, like painters, have comparing as such as the true matter of their doing.²²⁰ Such is each time the how of their experience—at least, in one first important sense.²²¹ Accordingly, space—here, the space of legal representations as well as the space of legal comparisons—is best understood as much more than merely physical space²²² or even institutional space.²²³ Nor can space be any longer seen as merely absolute, Newtonian, instrumental space.²²⁴ Indeed, the odd story of Francesco’s picture and its excess clearly suggests how it is precisely another space that might be each time at stake in the art of law as well as in the art of painting.²²⁵ Which space? A space that is an event or set of events through which Francesco’s story can, quite literally, take place²²⁶—in short, an eventful spatiality through which legal representations and legal comparisons can, they too, take place. But how precisely would that eventful spatiality—that other-space—be? One possibility that can be suggested by developing parts of the complex yet powerful, lucid thinking of Martin Heidegger is that, neither just text nor simply context, the eventful spatiality that is at stake in the art of law might be each time a comparing as such but also, in a deeper sense, *a language each*

219. 12 MARTIN HEIDEGGER, *Das Wesen der Sprache* (The Nature of Language), in GESAMTAUSGABE 25 (1985). The English version of the quoted excerpt is taken from MARTIN HEIDEGGER, *ON THE WAY TO LANGUAGE* (1971).

220. *See supra* ¶ 5.

221. *See supra* ¶ 5.

222. *See supra* ¶ 7.

223. *See supra* ¶ 8.

224. *See supra* ¶¶ 11-12.

225. *See supra* ¶ 10.

226. *See supra* ¶ 10.

time amounting to a nearness, a placeness, a de-distancing and a directionality.²²⁷ That, I have suggested in this section, might be the heartland of legal space—the place of law’s most original imagination.²²⁸

But then, if that is what a post-Heideggerian understanding of space would look like, what might that language be if not, in some intriguing sense, a threshold between what will thus be each time duly disclosed and what will then remain, by contrast, each time utterly concealed?

HISTORIES

Civilizations, vast or otherwise, can always be located on a map To discuss civilization is to discuss space, land and its contours.²²⁹

Non c’è più spazio per alcuna pittura.²³⁰

26. *The Paradox of Space.* In the previous sections, I have argued that modern Western jurisdictions explicitly or implicitly rely on a rather specific concept of space—which they seem to consider as largely unproblematic (when they consider it at all). Just like Hoffmann’s towns, monasteries or canvasses, Western legal jurisdictions normally return a linear, ultimately calculable concept of neutral, universal space that may be real or may be fictional, yet it is always represented and representable as a physical or institutional “thing” of sorts. As such, space is then understood as a structure, or function thereof, that is each time marked, as it were, by some height, depth and width, or lack thereof. Like Francesco’s canvas, moreover, such a

227. See *supra* ¶ 19.

228. See *supra* ¶ 16.

229. FERNAND BRAUDEL, *A HISTORY OF CIVILIZATIONS* 9 (Richard Mayne trans., Penguin Group 1995) (1963).

230. “There is no space left for any painting,” GEORGES DIDI-HUBERMAN, *GÉNIE DU NON-LIEU: AIR, POUSSIÈRE, EMPREINTE, HANTISE* 30 (2001) (quoting C. Parmiggiani, *Dialogo* [avec V. Castellani], in PARMIGGIANI 29 (C. Vatimo & V. Castellani eds., 1998)) (author’s translation).

thing is then deemed to be empty (like a “blank” canvas or a “void” contract), or else to be surrounded or occupied by bodies or other structures (“figures,” “persons,” etc.). Yet the point is that, for all its apparent neutrality and universality, there is on such a view a rather confined, confining “space” all the same—a thing of the subject that is thus in the subject’s own exceptional domain.

The frailty of the common concept of space is however a relatively recent discovery—one that only occurred well into modernity. Long by and large uninterested in the space they thought they had mastered by evacuating it (in other words, by ignoring it or abandoning it as mere “absolute” space), Western legal jurisdictions now suddenly hope to be able to capture that space again. But then *however might one take hold of a vacant space* (a space that is no longer what we always took it to be)? That in a nutshell is I suggest one of the most daunting paradoxes of many of today’s legal theories and practices—the paradox, that is, of legal space.

(i) On inspection, Heidegger’s work offers—no ready-made solutions but—one radically articulated hindsight into that space that, it seems to me, is worth debating.²³¹ If one turns (or returns) to Heidegger’s critical ontology as an analytical reservoir, then any relationship between say law, history, politics and space as we may typically know it today and as is typically evidenced by what counts today as contract, murder, citizenship or war—may turn out to be quite unlike what any such relationship is usually explained to be. In particular, one might discover that—caught between the increasingly obvious emptiness of law and the puzzling laws of an obvious emptiness—Western legal jurisdictions might need to re-think in terms of “language” the instructions that by now have come to count fundamentally²³² or functionally²³³ as law.

231. A post-Heideggerian understanding of legal space, such as the one I try to sketch in this paper, would no doubt greatly benefit from the reading of other works by Heidegger. See MARTIN HEIDEGGER, *HOLZWEGE* (1950); MARTIN HEIDEGGER, *VORTRÄGE UND AUFSÄTZE* (1954).

232. A good example of this would be the institutional structuralism adopted by Geoffrey Samuel. See generally Geoffrey Samuel, *Comparative Law as a Core Subject* 21 *LEGAL STUD.* 444 (2001).

233. For diverse and sophisticated versions of legal functionalism, see generally NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* (1993); KARL-HEINZ LADEUR, *POSTMODERNE RECHTSTHEORIE* (1992); and GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (Anne Bankowska & Ruth Adler trans., Zenon Bankowski ed., 1993). For a defense of Luhmann as a “theorist[] of the banal,” see W.T. MURPHY, *THE OLDEST SOCIAL SCIENCE?* 34 (1997). For alternative critiques, see generally Peter Goodrich, *Anti-Teubner: Autopoiesis, Paradox, and the Theory of Law*, 13 *SOC. EPISTEMOLOGY* 197 (1999); and Anton Schütz, *Thinking the Law with and Against Luhmann, Legendre, Agamben*, 11 *L. & CRITIQUE* 107 (2000). On two

(ii) Turning to *language*—one might object—would hardly be a novelty as such. In a post-Heideggerian understanding of space, however, “language” would not be simply what everyday or even professional language may be each time characteristic of our many everyday or professional concerns. Turning to language, that is, would hardly be turning to our supposedly superior linguistic ability to communicate. Instead, there would be here at stake what *logos* or relation each of us might each time originally belong to, individually or collectively.²³⁴ And it would be precisely the role of any such language as *logos* or relation that would need to be carefully uncovered in a post-Heideggerian understanding of space.

(iii) Accordingly, the various legal *instructions* with which we are typically familiar could prove to be not so much about the actual language that they are (for example, the legal language of contract, murder, citizenship or war)—but, more problematically, a *threshold* between typically unnoticed relations that are neither metaphysical nor transcendent nor exclusively causal or structural nor, for that matter, exclusively functional. Indeed, it would be the whole concept of a “relation” that would need to be thought afresh, in a post-Heideggerian understanding of legal space as “language.” In particular, one might for example discover that what is normally seen and then set aside as being merely “space” is each time a different *eventful spatiality*—something like a *heartland*—rather than just space in the normal sense. In that case, our post-Heideggerian understanding of space would really be (as drawing from Heidegger I would suggest) about nearness, placeness, de-distancing and directionality—rather than about measuring or calculating in the linear-historical, linear-functional or linear-structural sense of any such activity.

(iv) A move from space to language to *logos* or relation, however, would also mean that legal space could no longer be seen (somewhat optimistically) as a *neutral, universal* functional network, structure, social system, etc. That move, instead, would invite us to regard legal space as a rather particular, exceptional set of validated, rather than valid, *in-structions*—quite literally, *in-structures*, or structures of sort that are, quite literally, *from within*. No doubt earlier on absolute, Newtonian space helped Western jurisdictions stabilize themselves.

somewhat opposite instances of functionalism in comparative law, compare K. ZWEIFERT & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW (3d ed. 1998) with Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998) (where comparisons are intrinsic to the reduction of reality operated by the legal system).

234. See *supra* ¶ 24.

Now, however, that same space might be at the root of their greatest instability. But what by contrast would that instability look like once we think of legal space as of the “language” of those who make the law and that the law, recursively, contributes to make?²³⁵

(v) In a post-Heideggerian analytics of space, language would indeed be where we would want to start from in an attempt fruitfully to capture and then to respond to some of the more puzzling complexities of today’s Western societies—beginning, of course, with those concerning democracy and the rule of law. For example, what elsewhere I have called *poetic comparisons of law* would indeed start just there: they would start by thinking afresh the complex relationships between law, space, history and politics as mainstream comparative law normally knows them, so that eventually the legal texts and institutional contexts of mainstream comparative law can begin to be seen for what they truly seem to be—that is, the result of a heartland more than the source of functional networks, structures, etc.²³⁶ Poetic comparisons of law, that is, would want to tackle what is, quite literally, the matter of legal space and see what difference does it make.

(vi) To think legal space in terms of language as *logos* or relation is a large task that must be undertaken imaginatively, as well as incrementally and with circumspection. In what follows, then, I can only fugitively note the sort of questions that might arise from moving from space to spatiality. Such notations are therefore preliminary, incomplete and hardly representative of what else could be done if one were to move from space to language—but that, I think, is good, for the point of any such poetics would be precisely to open up or mobilize legal space rather than marking down new legal frontiers.

In what follows, then, I suggest that it would be fruitful to consider afresh certain written legal texts or certain specific legal institutions that can be typically found in the official maps of Western legal history and of Western comparative law. In particular, one might begin by considering how legal institutions, rules, regulations, procedures, etc. seem to have emerged in modernity as a multiple, open series of legal spaces that lie at the very core of, and recursively deploy,

235. That must be what Otto Kahn-Freund meant by saying that “[t]he question is in many cases no longer how deeply it is embedded, how deep are its roots in the soil of its country, but who has planted the roots and who cultivates the garden.” O. Kahn-Freund, *supra* note 117. A post-Heideggerian understanding of space, however, would focus on the more radical consequences of Kahn-Freund’s intuition.

236. I have begun to articulate the task of what I have called “poetic comparisons of law” in Stramignoni, *King’s Eyes*, *supra* note 104, and Stramignoni, *Meditating Comparisons*, *supra* note 215.

the Western citadel of law. As such, those spaces have been typically seen to be everywhere *in absolute*, Newtonian space—and there is where lawyers including comparative lawyers normally set out to find them.

But then, the question is, how did it all happen? And what may be the significance of it all? My suggestion would be that the discovery in modernity of absolute, Newtonian space must have had the effect of stabilizing the legal spaces of the West as, strictly speaking, its *legal territories* or closely guarded if apparently no longer inaccessible precincts—but then, one feels, the transformation of legal spaces into the legal territories of modernity is still to be properly traced in legal history and in comparative law alike.

27. *Legal Territories.* So, I would like to suggest, it is precisely around the problem of regulating space as each time a different legal territory of the West that modern Western law began to develop.²³⁷ And it is within those legal territories that later on in modernity a major shift was set to occur. Thus in modernity Western law seems to have slowly evolved from a sort of multiple “machinery” that, by that time, had emerged from premodern spatializations of law’s many domains—into some sort of reflexive, increasingly sophisticated “dispositif” that had now to convert, or re-colonize, modern legal territories into increasingly more specialized, that is abstract, inner and outer fractions of legal space.²³⁸

28. *Premodern Spatializations.* Forgotten within the interstices of both legal history and comparative law, what is today commonly understood by legal space may not have been there all along—according to the history of legal space that I would like here to encourage. Legal historians can of course be seen as having always concerned themselves with histories of legal places *in space* as well as *in time*—with the histories, that is, of certain legal decisions, rules, offices and procedures. Comparative lawyers, on the other hand, can be seen to have been just as regularly concerned with the comparison of those legal places *in space and time*—preferably, nowadays, with the

237. In the following pages, I shall refer to “space” meaning both physical and institutional space.

238. Not everywhere the political-legal machinery of early modernity has been successful. One, for example, can easily see how the “*question Basque*” is but a piece of live-flesh evidence of what that early machinery was up to but did not, in that case, manage to achieve (so far). See *La Question Basque—Confins, Violence, Confinement*, 56 LES TEMPS MODERNES 614 (Juin-Juillet-Aout 2001).

general or particular functions that those places might be perceived to be serving. Nevertheless, it seems to me that a story still to be told would be, for example, the story (the innumerable different stories) of the transformation of premodern legal spaces into the legal territories of modernity—in fact a story, I suggest, with no clear beginning and so, therefore, no linear, progressive development.

Then the problem of course would be to decide where to start tracing back the inauguration of modern legal space as each time a different legal territory of modernity. One obvious possibility would be to start before it all became the way it did in early modernity. But where might that time be—where might that non-linear, non-chronological *incipit* lie? Or, indeed, *how* did it all begin?

A history of modern legal space could start, for example (but this is only an example), with the observation that modernity—here, the emergence in the West of the nation state and the rule of law—seems to have brought to an end an infinite set of multiple, asymmetric processes that could be broadly described as *premodern spatializations* of law's many domains. Such observation is worth for what it is—a mere, rather arbitrary point of departure for a story still largely to be uncovered. Moreover, that observation would need probably to be accompanied by several qualifications. For example, one might wish to point out that while historically and philosophically modernity seems to have had a linear-chronological beginning somewhere around the sixteenth century or seventeenth century²³⁹—it was not until much later that modernity came to be thematized as a new way of thinking and, in particular, a new way of producing knowledge.²⁴⁰ Therefore, one might say, modernity may have not properly “begun” until the eighteenth century or even the nineteenth century (but this would of course also depend on the particular field of inquiry concerned).²⁴¹

239. What *historically* may or may not count as “modernity” is debatable and, indeed, there seem to be no general consensus among the historians on this point. The year 1660 has been suggested as a suitable starting point for what is here understood as (early) modernity, for it is at that time that Europe enters a new, prolonged period of peace after half a century of violent convulsions. See generally WILLIAM DOYLE, *THE OLD EUROPEAN ORDER 1660-1800* (J.M. Roberts ed., 1978). *Philosophically*, by contrast, many would say that modernity begins with the *cogito ergo sum* of René Descartes. See generally RENE DESCARTES, *Discourse on the Method of Rightly Conducting the Reason and Seeking the Truth in the Sciences*, in *FRENCH AND ENGLISH PHILOSOPHERS 13* (Charles W. Elliot ed., P.F. Collier & Son Co. 1910) (1889).

240. That is course a point made by JÜRGEN HABERMAS, *DER PHILOSOPHISCHE DISKURS DER MODERNE* (1985).

241. *Id.* at 7-33. For an alternative view, locating the passage to modernity into the eighteenth century rise of statistic and probabilistic positivities, see MURPHY, *supra* note 233, at 149 n.136.

Additionally, it should be noted that what multiple spatializations there may have been in premodern Europe—there must have been, in fact, a far more fragmented and slow process than any characterization of them might ever be likely to convey (a process, again, marked by innumerable fits and starts rather than a fixed beginning). In some cases, moreover, that process was clearly felt to have come to completion earlier and fuller. In others, it was felt to have come to maturity much later on, or else never accomplished in full. Nevertheless, even as these and other qualifications may be necessary in order to avoid misunderstandings, as well as to signal how history seems to be really an open, intricate web of individual and collective stories—for the purpose of these pages we can safely refer to a “modernity” of legal space, as well as to a “premodern” period and, then, to a “late modern” period of it. Additionally, we can speak, in these initial sketches for a legal history of space, of *premodern spatializations* of law’s many domains, as against *modern territorialized laws* and then *modern re-spatializations*. In one word, the main aspect of law’s premodern spatializations would be that they seem to have had, as it were, rather little to do with legal space as normally understood today.

So, then, how may those earlier, premodern spatializations of law’s many domains have actually occurred? How may premodern legal spaces have become the legal territories of modernity? And what sort of places would those spaces be like? Here, one could only but hint to that quite fascinating story—not so much because that story could never be told in full unless one digs out further historical evidence (though that of course must be done),²⁴² but really because that story has been literally forgotten, so that either we think and do legal history, as well as comparative law, in some radically new way, or it will never be possible to re-memorize what has been, quite literally, “blotted-out.”²⁴³

Let us then begin simply by suggesting how in premodern Europe—here, in the period between the long aftermath of the demise of imperial Rome and the eventual emergence of the modern nation states²⁴⁴—what one day would be collectively known as the West had

242. See, e.g., J.H. BAKER, WHY THE HISTORY OF ENGLISH LAW HAS NOT BEEN FINISHED (1998).

243. For a development of this point, see generally Igor Stramignoni, *At the Margins of the History of English Law: The Institutional, the Socio-Political and the ‘Blotted-Out,’* 22 LEGAL STUD. 420 (2002) [hereinafter Stramignoni, *Margins*].

244. Officially, it is not until 476 A.D. that Odoacer puts an end to the ailing Roman Empire by sending the imperial insignia off to Zenon in Byzantium. However, the giving way of imperial Rome had begun long before then. In 212 A.D. Antoninus Caracalla had promul-

clearly to regain some space—what space had by then fallen back into the world “outside,” a world out of which Rome had once, quite literally, called it into presence.²⁴⁵ The point, though, is that precisely because by the 4th-5th century A.D. any correspondence of that Rome with an outside world had largely gone astray, and because that outside world had in turn become a bigger and more open place than had been previously the case—the remains of what had been before had first and foremost to take place again, and to do so as what new space could now be claimed between that bigger, more open world (and its multiple voices and demands) and, at the other end, the East, where by 395 A.D. a new Rome had been finally acknowledged to have been born instead.²⁴⁶ Such new space, though, had in my view only little to do with what one day would be understood by legal space. In particular, what seems to me began in the period under consideration was the multiple, uncertain at first, but more and more insistent spatialization of *bare, situated space*—a space, therefore, quite unlike the physical, natural or institutional space of modernity.²⁴⁷ The outside world, in

gated the *Constitutio Antoniniana*, whose principal effect had been to turn all the residents of the empire into Roman citizens. By the end of the third century, however, Diocletian was to separate the empire in two parts, and by the beginning of the following century Byzantium had become the new capital of the Eastern part of the empire. Meanwhile, several Germanic people had been pushing southwards, along and across the northern frontiers of the empire, while by 376 A.D. the Visigoths had been able to defeat the Eastern Romans at Adrianople, not too far from Byzantium. By 410 A.D., the Visigoths had also managed to turn West, sack Rome and finally, by 442 A.D., successfully install themselves in Gaul. See generally I A.H.M. JONES, *THE LATER ROMAN EMPIRE 284-602* [A.D.] (Univ. Oklahoma Press 1964).

245. For example, Benveniste reminds us how “*ius* en tant que «droit» est inconnu de l’ensemble des dialectes indo-européens hors du latin”—so much so that “même à l’intérieur de l’italique, la notion est désignée par un radical différent.” 2 ÉMILE BENVENISTE, *LE VOCABULAIRE DES INSTITUTIONS INDO-EUROPÉENNES: POUVOIR, DROIT, RELIGION* 123 (1969).

246. 395 A.D. is the date of the death of Theodosius and the formal division of an Eastern from a Western empire. “This severance of the mainly Greek-speaking east from the Latin west was to have momentous consequences in later centuries. It is still significant in marking the areas of Latin culture in the west from those of Greek, later to be replaced by Slav culture, in the east.” PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 23 (Cambridge Univ. Press 1999) (1996).

247. Take for example the case of the forests and the way they came under the jurisdiction of the law. As Robert Harrison points out, the Latin term itself (*foresta*) from which the modern “forest” derives does not itself appear until the Merovingian period, in particular, in the laws of the Longobards and the capitularies of Charlemagne, and even then the term only refers to royal game preserves. The provenance of the Latin term is uncertain, but *forestare* means “to keep out,” “to keep off limits,” “to exclude.” ROBERT POGUE HARRISON, *FORESTS: THE SHADOW OF CIVILIZATION* 69 (1992).

In effect, during the Merovingian period in which the word *foresta* entered the lexicon, kings had taken it upon themselves to place public bans on vast tracts of woodlands in order to insure the survival of their wildlife, which in turn would insure the survival of a fundamental royal ritual—the hunt.

A “forest,” then, was originally a juridical term referring to land that had been

that sense, was still felt in premodern times to be once more and largely what it seemed—the organic, at times enigmatic appearance of the visible rather than, as it were, the presence thereof—when people, as Queen Gertrude will later on remind Hamlet, began to live in it rather than with it.

Thou know'st 'tis common; all that lives must die,
Passing through nature to eternity.²⁴⁸

So, then, what would be repeatedly at stake in the West, prior to modernity, could only improperly be regarded to be the continuation in space or in time, in the modern sense, of the old Roman Empire and its particular laws. That Rome had gone for good and what future attempts of resurrecting her there were going to be—for example, the Justinian one in the 6th century, or the Carolingian one of the 8th-9th century—may have had, in fact, very little to do with that particular Rome.²⁴⁹ The remains of that Rome and of its laws were, of course, still at hand, fragments ready to be loosely reassembled according to particular needs (the Justinian codification of the 6th century being a clear instance of that type of process).²⁵⁰ However, what all that seems to indicate is that it was whatever Rome as a language of sorts, as an organizing space or a heartland—Rome as a multiple overarching set of perceptions and conceptions—might have previously meant and, in particular, the Roman meaning of law as both *lex* and *consue-*

placed off limits by a royal decree. Once a region had been “afforested,” or declared a forest, it could not be cultivated, exploited, or encroached upon. It lay outside the public domain, reserved for the king’s pleasure and recreation. In England, it also lay outside the common juridical sphere. Offenders were not punishable by the common law but rather by a set of very specific “forest laws.” The royal forests lay “outside” in another sense as well, for the space enclosed by the walls of a royal garden was sometimes called *silva*, or wood. *Forestis silva* meant the unenclosed woods “outside” the walls.

Id.

248. WILLIAM SHAKESPEARE, *Hamlet*, in THE COMPLETE WORKS OF WILLIAM SHAKESPEARE 597, 600 (W.G. Clark & W. Aldis Wright eds., n.d.).

249. Justinian, for example, “was determined to restore the former *glory* of the Empire by reconquering Africa from the Vandals and Italy from the Ostrogoths, and in particular by recovering the city of Rome, but his work in restoring Rome’s *legal glories* was largely independent of these military ventures.” O.F. ROBINSON ET AL., EUROPEAN LEGAL HISTORY 2 (3d ed. 2000) (emphasis added). During the Carolingian renaissance, on the other hand, “[t]here was a conscious attempt to revive the civilized past; there was a school at Charlemagne’s palace, and others were founded, attached to cathedrals or monasteries.” *Id.* at 18.

250. Another had been the *Codex Theodosianus* published in 438 A.D. Though, unlike the subsequent codification by Justinian, the *Codex Theodosianus* was merely a collection of imperial enactments. The writing down of existing customary law, for example, that which was ordered by Charlemagne at the end of the eighth century, can too be taken to be an exercise in the same direction.

*tudo*²⁵¹—it was Rome and that law that had, in due course, to reconstitute themselves in some way or another, along partly new and interlocking trajectories.²⁵² No one of course—no single person, office or event—could have possibly achieved that huge and elusive task alone. Nevertheless that, it would seem, was what had to be done and that, I suggest, was what eventually was done.²⁵³

Thus the role of legal space in current accounts of premodern Europe may have to be carefully reconsidered. So, for example, in the early Middle Ages Rome and her laws were to become mainly the domain and the law—the *justitia*—of the Judaic-Christian *ecclesia*.²⁵⁴

251. By the beginning of the fourth century A.D., the term *lex* had generally come to replace that of *constitution*, the imperial act of legislation referred to by Gaius in the second century. See generally G. INST. 1.5. As to custom, the so-called *consuetudines loci* had had great importance in those large areas of the world that the Romans had come to occupy. So much so that by the end of the third century A.D. many had become seriously concerned about the penetration of that custom into Roman law. However, the term *consuetudo* is found selectively during the early Middle Ages, in fact almost exclusively where rents and taxes were concerned. JEAN GAUDEMET, *LES NAISSANCES DU DROIT LE TEMP: LE POUVOIR ET LA SCIENCE AU SERVICE DU DROIT* ch. 3, § 2, at 28-31 (Editions Montchrestien, E.J.A., 1997).

252. A fresh outlook on this distant and rich period of the history of Western law is offered by Maurizio Lupoi, highlighting, amongst other things, the complex interplay in the early Middle Ages of a written culture (the Roman culture) moving towards orality with, on the other hand, oral cultures (what in the past has been often if loosely referred to as “Germanic law”) moving by contrast towards writing. MAURIZIO LUPOI, *THE ORIGINS OF THE EUROPEAN LEGAL ORDER* ch. 2, § 6, at 41 (Adrian Belton trans., Cambridge Univ. Press 2000) (1994).

253. Thus Roscoe Pound once famously observed how, in fact, “[l]aw was not made to order to an eternal pattern. It grew. But it grew by the inherent power of the idea to unfold or realize itself, and so in a fixed course which could not be affected by conscious attempts at lawmaking.” Pound, *Comparative*, *supra* note 60, at 77. Foucault expressed something very similar when he rejected (standard concepts of) originality for regularity and novelty. MICHEL FOUCAULT, *L’ARCHÉOLOGIE DU SAVOIR* pt. 4, ch. 2 (1969) [hereinafter FOUCAULT, *L’ARCHÉOLOGIE*].

254.

The Church of Rome was an indefatigable legislator throughout the early Middle Ages: by the eighth century it had produced an immense and impenetrable mass of law. In the decrees of councils and synods, pontifical epistles, works of authority, penitentials, the Church perpetuated the administrative style of Roman empire—the use of the written word. As the Church came in to contact with predominantly oral societies, it made the necessary adjustments to the way it disseminated the Christian message, using sermons and pictures. . . . But it made few adjustments to its laws.

LUPOI, *supra* note 252, at 270 (internal citations omitted). Indeed,

[t]he Church performed a role that subverted the previous order. Subversive, by definition, was canonical legislation against the centuries-old customs of the new people, which were now treated as pagan practices—or against new customs, although these were widely practiced and even sanctioned by law. Tolerance of the traditions of newly converted people was extremely short-lived: silence in a priest, wrote Alcuin, is harmful to the people. Towards the end of the early medieval period the same sentiments were reiterated, and a central aspect of Church life was revived.

Id. at 271 (internal citations omitted). For an interesting explanation of the meaning of *iusti-*

Indeed,

[t]he fourth century was crucial in the establishment of a structured organization in the Church which enabled it not only to play a vital role in legal history in the distant future, but also to do so in the fifth century when the western provinces were invaded by German tribes from across the frontiers, settled by them, and step-by-step withdrawn from imperial control.²⁵⁵

However, a comparison for example between the earlier Roman laws and the later canon law of the Church, whether based on the available texts or on their institutional context—would be, it seems to me, insufficient.²⁵⁶ A more fruitful comparison, by contrast, would start probably by asking: how was it that that *justitia* could eventually (quite literally) take place? How did it all begin? Did it really all begin with Constantine, the first emperor to become a Christian—as many current legal histories continue to tell us? And if so, in what sense? We will return to this in due course, but the point here is that so far lawyers seem to have paid relatively little attention to such questions—though they are by no means trivial. As Jean Gaudemet notices, the New Testament, the first text of Christianity, was hardly a legal pronouncement in the same sense of the Sinai text(s).²⁵⁷ Nor were the early Christian texts law in the normal sense of that word. That is to say, the first Christians had, as such, little interest in the law, Roman or otherwise—for the simple reason that they already had one, the law of the Jewish people.²⁵⁸ By 49 A.D., moreover, the Council of Jerusalem had of course opened up to the non-Jewish. So clearly,

[s]orties du cadre juif, comptant de plus en plus de païens convertis, les communautés chrétiennes durent s'organiser. La vie municipale offrait un exemple avec ses magistrats et l'assemblée des citoyens. . . . [Mais] [i]l fallait aller plus loin, régler la pratique cultuelle, guider les fidèles dans leur vie quotidienne . . . arbitrer les litiges. Des usages se formèrent, des instructions furent données. Un droit naissait.²⁵⁹

But again how precisely did that nascent law—a law that was no longer the old Mosaic law or the Roman *lex* or *consuetudo* while, on

tia in that period, see *id.* at ch. 12 & ch. 13, § 5.

255. O.F. ROBINSON ET AL., *supra* note 249, at 4-5.

256. An early attempt was that of the *Collatio legum Mosaicarum et Romanarum* “in which excerpts from the classical Roman jurists are set against the laws of Moses, presumably with the aim of furthering Christian belief by showing that Roman and biblical law were similar.” ZWIGERT & KOTZ, *supra* note 233, at 49.

257. GAUDEMET, *supra* note 251, at 115.

258. *Id.* at 116.

259. *Id.* at 116-117.

the other hand, not being proper *justitia* either—how did that nascent law manage to take place—to take the place, eventually, of the law of imperial Rome?

The taking place of a Judaic-Christian *justitia* would be but one instance of the sort of pervasive, insistent, unauthorized spatializations that concerns us here (unauthorized for being both largely at odds with the established authority—*sine auctoritate*—and not closely linked to any specific agent—*sine auctore*). Slow and uneven as any such spatialization would be,²⁶⁰ the point here is that from around the fourth century A.D. onwards, in the place left vacant by the final demise of imperial Rome and of her multiple dimensions, endless fractions of bare, situated space, people or offices, etc. must get together again, somehow—and, then, they must be given a name, they must be called “Europe” and then the “West.”²⁶¹ Once more, that could have hardly been a matter of legal texts or their institutional context alone—it could not have been merely a question of origins or causation or function or structure in the ordinary, linear-chronological sense of those terms.²⁶² More to the point, there must have been the matter of non-

260. The uncertainty characterizing the post-imperial Rome period was, apparently, considerable.

Uncertainty pervaded the legal system of the early Middle Ages. If there is an expression that typifies documents in every part of Europe throughout the period in question, it is the two adjectives *firma et stabilis*, which were used either jointly (constituting a hendiadys), or separately in every significant circumstance. . . . They appear in both laws and private deeds, in both promulgatory and defining clauses, to enjoy compliance with agreements and identify their force. The diversity of the formulas in which this expression appears, and its geographical and chronological persistence, reveal a desire that the law was unable to satisfy completely: a desire for certainty.

LUPOLI, *supra* note 252, at 42. However, “the uncertainty over the law and its practical implementation was reduced by consensus.” *Id.* at 44. On consensus, see *id.* at chs. 7-8.

261. This seems to me the limit of it is pointed out, “[w]hat gave shape, relevance and duration to the notion of Europe from the early seventh century onwards was Rome, or rather the Roman church and its head, the papacy.” Karl J. Leyser, *Concepts of Europe in the Early and High Middle Ages*, 137 *PAST AND PRESENT* 25, 30 (1992).

262. This seems to me the limit of professor Alan Watson’s otherwise generally sound position on the significance of legal transplants. As is well known, Professor Watson recognizes that “[l]aw is inconceivable without society” and, yet, he also argues:

[A]n exceptionally good and even the best approach to understanding and knowing law, what it does and what is demanded from it[,] is through the history of the rules, their origin, development and transformation, above all when the same or a historically related rule can be observed in different systems. When several systems borrow a rule from the same source, and the course of development varies from one system to another—in one perhaps no alteration occurs at all—the factors which produce the changes can be isolated and evaluated. The precise role of economic and political circumstances, the influence of individuals whether lawyers or not, the part played by tradition, the moral ideas of the society and so on can be plotted in detail.

linear space, non-chronological time.²⁶³ On each occasion there must have been, in particular, the matter of an event or series of events or of a language—in short, the matter of legal space.

To mention a second example—by the eleventh century the early Middle Ages come largely to an end, and that includes the laws of that period.²⁶⁴ However, by the middle of the following century Justinian's Digest suddenly reappears (or, shall we say, it makes its multiple and mutually conflicting appearances)—after a long period of near-oblivion.²⁶⁵ In the earlier form of the *littera Bononiensia*, the Digest will appear and then be studied as, first, the *Digestum vetus* (circa 1090), then the *Digestum novum* (circa 1093-1094) and finally the *Infortiatum* and the *Tres Partes* (after 1140).²⁶⁶ In the different and, some say, truer form of the *littera Pisana*, it won't be in circulation until half a century later.²⁶⁷ Nevertheless, the point is that the return of the Digest, both wholly accidental and largely arbitrary,²⁶⁸ seems to have inaugurated new spatializations of law's many domains such as, for example, the *littera Pisana* herself (which soon turned into an object of veneration and liturgy)—some of which traveled a long way, well into the threshold of modernity. No doubt, such multiple spatializations were to be each time very different from one another.²⁶⁹ Yet

Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313, 313, 316 (1978). In my view, by contrast, what is at stake here is something deeper than, merely, the history of legal rules in the linear-historical sense advocated by this author. See generally Stramignoni, *Margins*, *supra* note 243.

263. See generally *id.*

264. For example, it is noted, suggestively, how “[d]ès la fin du IX^e siècle, plus encore au X^e, la loi du roi (les Capitulaires) ne se fait guère entendre. Assoupie ou lointaine, privée de relais efficaces pour se faire connaître et imposer son respect, elle laisse un vide qu'il faut combler.” GAUDEMET, *supra* note 251, at 32.

265.

There is . . . no doubt that there survived in Italy the memory, and some knowledge, of Justinian's Code in an epitomized version, and of some of his Novels; the Institutions were also known. . . . The canonists had been searching the ancient authorities since at least the beginning of the eleventh century, and making use of what they found; the lawyers in Pavia and elsewhere were jurists reading their authorities critically and developing the law. When men came upon the Digest they knew what it was and, far more important, they had acquired the intellectual expertise to make use of it.

O.F. ROBINSON ET AL., *supra* note 249, at 24-25.

266. Wolfgang P. Müller, *The Recovery of the Justinian Digest in the Middle Age*, 20 BULL. OF MEDIEVAL CANON LAW 1 *passim* (1990).

267. *Id.*

268. I say accidental in the sense that the return of the Digest was somewhat unexpected. However, the spin given to the recovery of the Digest, once this had actually happened, served well the ongoing confrontation between canonists and imperialists, as well as the study and teaching of the Justinian *Corpus*. See O.F. ROBINSON ET AL., *supra* note 249, at 42-43.

269. See generally Helmut Coing, *The Roman Law as Ius Commune on the Continent*,

their range and quality would be not so much the issue here²⁷⁰—as, by contrast, there would be their outer quality, their being from “with-out,”²⁷¹ both *sine auctoritate* and *sine auctore*. Once again, they could rely on bare, situated space for their being there but they would not, as such, be understood to be rooted *in* space the way they would later on be seen to be, in modernity. In that sense, legal-historical and legal-comparative research on those spatializations is still relatively scant—and what has been noted has been sometimes misunderstood.

Take—to mention one more example—the emergence of a stronger and stronger royal justice that, in centuries to come, would increasingly but steadily replace local laws and customs, Roman-Byzantine law and, significantly, the justice of the Church of Rome. But, again, the so far little-considered question is: *how* precisely did those spatializations actually occur? What was each time their meaning? What was that each time allowed them to take place? It might be worth noting, for example, how initially many such spatializations continued to be coached in the language of Rome and of her laws—albeit in the various medieval and renaissance versions of the *jus commune*.²⁷² Later on in modernity, by contrast, there will develop the

89 L.Q. REV. 505 (1973).

270. I mean “inner” quality in a broad sense, pertaining to the actual text or else the institutional context of the Digest and generally the Roman law that was being rediscovered. R.C. van Caenegem explains what he describes as the “hi-jack of medieval European law by Justinian’s *Corpus iuris*” by reference to the intrinsic quality of the *Corpus*, R.C. VAN CAENEGEM, EUROPEAN LAW IN THE PAST AND THE FUTURE: UNITY AND DIVERSITY OVER TWO MILLENNIA 73 (2002) (the book “contained the best the Romans, the most gifted jurists the world had ever seen, had written down . . . the sheer quality of the Digest was bound to dazzle people who were looking for the best law available. . . . To people who were used to parochialism, the universality of Roman law must have been impressive.”), *id.* at 74; “the political will of those in power . . . provided intellectual ammunition to the ecclesiastical and secular leaders who were building modern, centralized power structures,” *id.* at 75, favoring “a centralized and hierarchical state and an organized, streamlined bureaucracy,” *id.* at 76, the fact of the twelfth century being “indeed a great intellectual century,” *id.* at 79;

[G]reat was the admiration for the newly discovered revelations from Antiquity. . . treated as absolute authorities. . . . Truth was discovered, not through observation but through correct understanding of the Ancients. . . . It was no difference in jurisprudence. Here also one great authority from Antiquity contained the ultimate perfection in legal science, so the best way to become a jurist was to assimilate the timeless revelation of the *Corpus iuris*,

id. at 79-80; the economic setting (“The *Corpus iuris* was the product of a highly developed cosmopolitan economy and was clearly more suited to the emerging West of the later Middle Ages than the customs of the closed agricultural and manorial world of the motte-and-bailey castle.”), *id.* at 81; and, finally, opportunistic causes (“the fact that soon after the surfacing of the Digest in northern Italy advocates and judges began quoting from it in order to win their cases or to justify their judgments.”), *id.* at 83.

271. I borrow here Roscoe Pound’s fortunate expression. ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 212 (Transaction Publishers 1999) (1963).

272. On *jus commune*, O.F. ROBINSON ET AL., *supra* note 249, at 107-24.

more uniform language of the nation states and of the rule of law. But how was it that initially at least the language of Justinian (as many times reinterpreted by glossators, post-glossators and commentators) could emerge as the very grammar of the nation states and the rule of law? According to one intriguing suggestion:

With Dante, Byzantine sovereignty becomes not only an epic but a gospel. It is Justinian himself who appears in glory to Dante and Beatrice, sings the splendour of the Roman Empire, and admonishes those who would seek to derogate from its unified preeminence. . . . As there must be one God of the universe, one Christ of the Church, one head of the family, so there must be one sovereign ruler, and one only, of every human society. More—there must be one leader of the whole world; and for that task the Roman people is destined not only by the will of God, manifested in many ways, but by the human right of conquest. When all allowance has been made for nationalistic bias and poetic fervour, Dante's exaltation of the unitary sovereign was no mere figment. In its spiritual or ecclesiastical manifestation, it still holds sway; in its temporal aspect, it embodied what was to be, for Europe, a long context between absolutism and individual liberty.²⁷³

If Justinian was Dante's hero, then Roman-Byzantine law could probably present itself to Dante and to his readers as the ideal grammar for the exercise of power absolutely. But Justinian's influence on Dante, or Dante's influence on his readers may never be properly explained—unless, that is, one goes beyond a mere textual or contextual analysis of the written sources at hand (legal and otherwise).

In sum, the advent of a Judaic-Christian *justitia*, the reappearance of the Justinian Digest and the emergence of a royal justice throughout much of Western Europe seem to have been, each time and to a large extent, different focal points of certain on-going, multiple transformations of what had once counted as *lex* or *consuetudo*. One could think of many more such points of transformation that, however, cannot be discussed here. But perhaps one last consideration worth making here is that such on-going, multiple transformations seem often to be premised on a *break* rather than on a linear-chronological sequence of events—the break, for example, from imperial Rome, or the break from the uncertainties of the early Middle Ages or, else, the break from the prison house of the “second” Roman law, and its authority. Put differently, “*ex integro nascitur ordo*” (order proceeds from, or breaks out of, wholeness) seems to be a properly tragic intuition of early antiquity that is first “baptized” by Christianity and then recursively evoked by the West as a no longer tragic, yet still wholly trau-

273. SIR CARLETON KEMP ALLEN, *LAW IN THE MAKING* 9 (6th ed. 1958).

matic political and legal template—in a renewed effort of giving space, from post-imperial Rome onwards, to what on each occasion was out for grabs. And what also seems worthy of notice is precisely how, in the long period of time that eventually led to the emergence of the modern nation states, what laws there were to be dealt with (whether godly, customary, or positive) had first to be given space—in *the very sense of both making them happen and making them “real” again as, each time, a legal territory of the West.* In short, law had, quite literally, to take place each time, over and over again. Premodern West thus seems to be a time of cyclical, multiple, asymmetric spatializations of law’s many domains—think, for example, of the *justiciae errantes* under the Plantagenets in England,²⁷⁴ where “*errantes*” conveys well the cyclical, multiple, asymmetric quality of their doing, both in fact and in the appearance thereof.²⁷⁵ Irregular though they actually happened to be, such premodern spatializations of law’s many domains were, in that sense and in many cases, first and foremost quasi-military invasions and occupations of what bare, situated space there might be there each time to be apprehended—a veritable “*lex terrae*” or ordering of the land in the most straightforward of ways.²⁷⁶ In the different regions of Europe those invasions and occupations occurred each time in different ways, at different times and with different fortunes—yet, there were true spatializations nonetheless, chiefly designed to colonize bare, situated space, people and offices, etc. as legal places for the exercise of a rather immediate, un-mediated form of sovereignty.

274. See generally ALLEN HARDING, *THE LAW COURTS OF MEDIEVAL ENGLAND* 53-54 (G.R. Elton ed., 1973); R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* (2d ed. 1988).

275. J.H. BAKER, *AN INTRODUCTION TO LEGAL HISTORY* 19 (3d ed. 1990). So, for example, the *justiciae errantes* constituted what could hardly be seen as *just* a law court (general eyes). Indeed,

[T]hey were a way of supervising local government. . . . They begat fear and awe in the entire population. The justices did not always proceed according to modern standards of probity or fairness: contemporaries complained that the justices were apt to be *errantes* metaphorically as well as literally. Indeed, we read of complaints that the eyre of 1198 reduced the whole kingdom to poverty from coast to coast, and we learn of Cornishmen fleeing to the woods to escape the eyre of 1233. Counties might pay fines for lenient treatment, or even buy off an eyre altogether. Popular reaction to such heavy-handedness was to kill the general eyre before the middle of the fourteenth century. Yet it was the strength, the severity even, of Angevin government which incidentally gave England a body of national law unique in Europe.

Id. (internal citations omitted).

276. PETER GOODRICH, *LANGUAGES OF LAW—FROM LOGICS OF MEMORY TO NOMADIC MASKS* (1990), esp 213 ff.

29. *The Birth of Modern Space: Other Mappings, Other Spatializations.* With modernity and the final appearance of the nation state, a deep if at first rather subtle shift begins to take place. The shift coincides with what can be generally described as the start of a progressively more intense, linear-chronological discovery of the *other*, whereby the other was to be found, it now seemed, in the world “out-there”—along the gaze, each time, of a re-nascent local or national identity.

The outside world and the other within it had of course always been there—a constant presence in the shared imaginary of any premodern community. The point though is that in premodern Europe such a presence would typically sit latent in the background—ready if need be to be used as a true instrument of war (evoking either the enemy or the unfaithful, or both), or else as an equally useful instrument of trade.²⁷⁷

By contrast, at around the time here under consideration nation states start, one after the other one, to reach out of their many, newly formed territories—*actively* to engage with the other (as opposed to, so to speak, *passively* using it) and so effectively expand into newer, both outer and inner dimensions, constituting as well as constituted by a wealth of new, ever more rapidly circulating information about the world “out-there.”²⁷⁸ The appearance, in the public imaginary and straight out of the legal proceedings and demonology treatises of the fifteenth, sixteenth and seventeenth centuries, of such thing as the witches’ Sabbath (a place “out-there”—a *sagarum synagoga*, or *strigiarum conventus*, etc.—where witches and other such characters are said to gather for all sorts feasts, orgies and similar fun)—would be a good case in point.²⁷⁹ The emergence between the 18th and the 19th century of a distinctive concept of “Englishness”²⁸⁰—a curiosity

277. For a good case of this somewhat “disengaged” relationship between trade and the “other,” see, for example, the interesting study by Consuelo Varela on the Florentine entourage of Christopher Columbus in Seville at the time of the “discovery” of America. See generally CONSUELO VARELA, *COLÓN Y LOS FLORENTINOS* (1988).

278. In the period of time under consideration, the actual boundaries of the nation states were set to change quite often. However, what in this paper interests me most is the taking roots and then the fairly rapid “dispersion” of the nation state as the privileged space of legal modernity.

279. CARLO GINZBURG, *I BENANDANTI: STREGONERIA E CULTI AGRARI TRA CINQUECENTO E SEICENTO* (Giulio Einaudi ed., 1966); CARLO GINZBURG, *STORIA NOTTURNA: UNA DECIFRAZIONE DEL SABBA* xiii (Giulio Einaudi ed., 1989).

280. PAUL LANGFORD, *ENGLISHNESS IDENTIFIED: MANNERS AND CHARACTER 1650-1850*, 1 (2000).

when not a true fascination by the non-English with certain supposedly quintessentially English qualities, for example, order, practicality, separateness, propriety and eccentricity—could be another.²⁸¹

The very fact of stepping out of one's own territories actively to engage with the outside world and the other within it was bound to have innumerable long-lasting effects for the nation states concerned. An especially eminent one was of course the truly amazing orientalist discovery of the Orient.²⁸² Another one, by contrast, was the discovery or else the normalization of the various "official," local or national identities.²⁸³ Alexander Pope both anticipates and brilliantly sums this up in an amusing description of how his character Cornelius Scriblerus ensures that his son is dressed in a way that could fully reflect the received wisdom of the time:

He invented for him a geographical suit of clothes, which might give him some hints of that science, and likewise some knowledge of the commerce of the different nations. He had a French hat with an African feather, Holland shirts and Flanders lace, English cloth lined with Indian silk; his gloves were Italian, and his shoes were Spanish. He was made to observe this, and daily catechised thereupon, which his father was wont to call "travelling at home."²⁸⁴

As to the legal jurisdictions of the time, one interesting effect of the discovery of an outside world and of the other within it was precisely what could be generally described as the brief appearance and then the progressive disappearance of "natural" or physical space—progressive because firmly premised on the linear-chronological gaze of the jurisdiction each time concerned.²⁸⁵ Like in general with the outside world and the other within it, so too bare, situated space had

281. *See generally id.*

282. *See generally* EDWARD W. SAID, *ORIENTALISM* (Penguin Group 2003) (1978).

Under the general heading . . . of the Orient, and within the umbrella of Western hegemony over the Orient during the period from the end of the eighteenth century, there emerged a complex Orient suitable for study in the academy, for display into the museum, for reconstruction in the colonial office, for theoretical illustration in anthropological, biological, linguistic, racial, and historical theses about mankind and the universe, for instances of economic and sociological theories of development, revolution, cultural personality, national or religious character.

Id. at 7-8.

283. For example, it has been argued how the discovery of the "other" helped the British stabilize their own national identity. *See generally* LINDA COLLEY, *BRITONS: FORGING THE NATION 1707-1837* (1992).

284. ALEXANDER POPE & JOHN ARBUTHNOT, *MEMOIRS OF THE EXTRAORDINARY LIFE, WORKS AND DISCOVERIES OF MARTINUS SCRIBLERUS* 23 (Hesperus Press, Ltd. 2002) (1741).

285. *See generally* CAROLYN MERCHANT, *THE DEATH OF NATURE* (Harper San Francisco 1989).

been there all along, in and of the normal legal practice. As it has been recently noted, in the Middle Ages law's many domains had been in fact a truly radical, rooted reality; that is to say, a reality with "the deepest thinkable roots."²⁸⁶ However, what begins by the early modernity is a slow turning of legal places—so far so very immediately related to bare, situated space as to be largely indistinguishable from it—into increasingly more abstract legal spaces, or territories, of a now much more engaged and thus no longer indistinguishable legal control. But of course the constitution of modern legal space could only take place upon a prior discovery of some other space—namely, natural or physical space—and then the abandonment of that space into the background as absolute, universal space. The process had been, once again, slow and uneven. Nevertheless, the insistent separation of natural or physical space did allow early modernity to visualize what, from now on, should count as pure legal space (the space of legal rules, sanctions, people and institutions)—while at the same time appearing to eliminate "impure" or "factual" natural space from its multiple, ever more probing, ever more abstract gaze.

(i) The gradual constitution of legal space beginning with early modernity had a twofold aspect.

So, on the one hand, there now begins a series of *outer mappings* of what, this time, is thought to be lying beyond or outside the nation state—a discovery, one might say, of one's own "without," in space as well as in law. But what might be each time the character of such discovery? No doubt, that discovery was a *territorialization* in that, on closer examination, it clearly belonged to the gaze of the nation state each time involved. Indeed, other legal spaces—other legal jurisdictions—could only be really envisioned as such in so far as they would each time have already made their way into the gazer's particular cosmology. And that, in turn, meant that the original space of the gazer would itself expand (as it were) into a progressively more capacious territory in each case defined by its ever more searching, ever more optimistic gaze. On the other hand, however, such outer mapping would be of a very different nature from premodern spatializa-

286. PAOLO GROSSI, *MITOLOGIE GIURIDICHE DELLA MODERNITÀ* 23 (2001) (author's translation).

Il diritto . . . è qui realtà radicale, cioè di radici, cioè di radici le più profonde pensabili; è realtà di fondazioni di tutto un edificio di civiltà, e come tale intimamente collegato con i grandi fatti primordiali fondanti quell'edificio; fatti fisici e sociali a un tempo, appartenenti alla natura cosmica ma assunti a fondamento ultimo e primo di tutta la costruzione sociale.

Id.

tions—in that, unlike what had been the case before, there now begins a representation, a *mise-en-scène*, of legal space more than an attempt however successful to capture it—a *replacement* rather than an *occupation*. Legal space, that is, suddenly more available to experience than it had ever been before when all space was merely bare, situated space—is now increasingly represented as having certain specific characteristics rather than simply if naively assumed to be just there, in the largely disengaged fashion of premodern times—think for example of William Camden’s *Britannia* subtitled, significantly, *Chorographica Descriptio*.²⁸⁷ In the sense suggested in the previous sections, such a modern discovery, or passage from occupation to replacement, each time emerges from a *heartland* as an increasingly complex “language” or “*dispositif*”—as what multiplicity of “vectors” each time there happen to appear, producing visibility, language, power and, ultimately, subjectivization.²⁸⁸

It is important to note, however, that such a language or *dispositif* required the other to appear to be standing alone—it required the subject to appear to be free from the original gaze. Thus, for example, at around this time Vitoria, Suarez, Gentili and Grotius put their minds to the world “out-there”—the world that at that time was being discovered to be lying beyond the correspondently smaller and smaller dimensions of the nation state—so contributing, eventually, to the setting out of the future discipline of international law. But how was, each time, that foundational gesture possible? Take Grotius’ *De jure praedae*—published anonymously in 1609 as *Mare Liberum*. An attempt made on commission and so, it is worth noting, somewhat accidental²⁸⁹ to justify and protect Dutch trade in the East Indies against the traditional but often ineffective monopoly by the Portuguese, the book argued that nobody should be permitted to acquire *dominium* over the sea.²⁹⁰ The argument, albeit not new, was interesting on several counts. One important effect of it, however—besides that of ensuring that the sea could not be successfully claimed to fall within the lawful domain of any particular nation state—was that, somewhat

287. I am grateful to Peter Goodrich for pointing this out to me.

288. See FOUCAULT, L’ARCHÉOLOGIE, *supra* note 253. See also Gilles Deleuze, *Qu’est-ce qu’un dispositif?*, in MICHEL FOUCAULT PHILOSOPHE 185 (Paris 1989).

289. See C.G. Roelofsen, *Grotius and International Law: An Introduction to Some Themes in the Field of the Grotian Studies*, in GROTIUS READER 5 (L.E. van Holk & C.G. Roelofsen eds., 1983) (“It is an uncomfortable thought that Grotius’ connection with the Law of the Sea should have been the result of an accident, rather than a matter of his deliberate choice. Yet it is a conclusion from which is hard to escape.”).

290. See HUGO GROTIUS, THE FREEDOM OF THE SEAS (Ralph Van Deman Magoffin trans., James Brown Scott ed., Oxford Univ. Press 1916) (1633).

paradoxically, it contributed to separate or identify the sea as a legal space.²⁹¹ As a consequence, not only does the sea emerge for modern subjects and rulers alike as an object that can now be even more easily *visualized, managed* and *discussed* than ever before, but also the sea is contextually freed as a hitherto unseen, now self-standing space—susceptible of future, thus far unthought-of, still-to-be-conceived forms of *regulation*. Later on—from Kant to the League of Nations—the language of peace and commerce and civility and rights will increasingly appear to have finally triumphed over traditional acts of direct political and legal imposition normally associated with the nation state and the rule of law.²⁹² Yet, here, the point is that in the passage from a largely disengaged pre-modernity to a generally engaged and engaging modernity so many legal domains continued to be possible (in most cases and with many exceptions) precisely upon veritable, sustained outer mappings and replacements from within. And it was mainly on the basis of such earlier, multiple outer mappings and replacements from within that future territorializations would be in due course firmly based. For what is, say, international law if not—originally—a highly sophisticated if no doubt often accidental set of pre-occupations by the West over what is thought to lie in the world “out-there”?²⁹³

(ii) As mentioned, the constitution of legal space that began in the early modern period was a slow, twofold process. Parallel to the innumerable outer mappings and replacements from within that have been just described, there also starts in the period under consideration a progressive but inner series of spatializations of each nation’s own “within.” That is, inside the nation state’s legal rules, people and locations slowly begin to turn reflexively inwards. The humanists’ insistence on “pure” rights in the place of the previous reliance by Roman lawyers, glossators and commentators alike on factual phenomena

291. “The most striking characteristic of *Mare liberum* is its boldness. In a small compass very far-reaching theses are developed. It is not only the Portuguese title to the Indian Ocean, but all pretensions to sovereignty over the sea, which have to be rejected according to Grotius.” Roelofsen, *supra* note 289, at 11.

292. Take, for example, the many difficult problems surrounding the implementation of the fundamental rights of man. See generally COSTAS DOUZINAS, *THE END OF HUMAN RIGHTS* (2000); Umberto Igor A. Stramignoni, *Soggetto di Diritto e Diritti (Fondamentali) del Soggetto: Autonomia, Linguaggio e Diritto Comparato*, XX-2 RIVISTA CRITICA DEL DIRITTO PRIVATO 223 (2002).

293. This theme—what one could describe as the “imagination” of international law—might be worthy of a more robust discussion than it seems to be currently the case in some international law circles. For an instructive review of the more recent debates in international law, see generally Deborah Z. Cass, *Navigating the Newstream: Recent Critical Scholarship in International Law*, 65 NORDIC J. INT’L L. 341 (1996).

seen to have, each time, certain legal consequences—provides one early example of this new, inward-looking awareness.²⁹⁴ The enactment of the Statute of Frauds and Perjuries in order to support the emergence of *assumpsit*—would be another example.²⁹⁵ What must be stressed, however, is that such a new awareness required a more specific concept of space than, simply, natural or physical space—while, at the same time, inviting a rapid distancing from natural or physical space as, apparently, objective, universal space. Put differently, *discipline* (e.g., the discipline of rights; the discipline of the enforceable oral promise; etc.) begins gradually to replace direct coercion²⁹⁶—while the emerging importance of the various disciplinary *fields of knowledge* slowly if largely inadvertently sets the premises for future transformations of existing legal procedures (and, in England, the traditional forms of action) from an outward element of the legal world (an element meant to symbolize, warn or regulate in an immediate, un-mediated form) into an inward, internal requirement of a much more complex legal language or *dispositif* (where legal procedure is only one aspect of the functioning of that language or *dispositif*). In this largely reflexive move from procedure to *proceduralization*, no longer can law's many domains stand proudly in isolation, like they used to do before—either confronting one another or else

294. “Already in Donellus . . . the emphasis of the institutional system has changed from what it was even in Justinian’s compilation. There it was still based on factual phenomena whose differences had legal consequences. Now the subject matter is exclusively legal phenomena—different kinds of rights.” PETER STEIN, *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS* 76 (1988).

295. I have argued this in one specific case study concerned with the history of the equitable doctrine of part performance. Igor Stramignoni, *When Law Stands Still: Land Contracts in English Law and Law’s “Abandonment” of Everyday Life*, 12 L. & CRITIQUE 105, 114-16 (2001).

296. MICHEL FOUCAULT, *SURVEILLER ET PUNIR: NAISSANCE DE LA PRISON* pt. III, at 135 (Editions Gallimard, 1975) (contains a prime instance of this argument). Note that the inner if problematic relationship existing between sovereignty, law and what can be called bare force seems to be inscribed from the start in the legal culture of the West. Compare, for example, the very language with which Justinian’s *Institutiones* begin: “Imperatoriam maiestatem non solum armis decoratam, sed etiam *legibus* oportet esse *armatam*, ut utrumque tempus et bellorum et pacis recte possit *gubernari* et princeps Romanus *victor existat* non solum in hostilibus proeliis, sed etiam per legitimos tramites calumniantium iniquitates expellens, et fiat tam iuris religiosissimus quam victis hostibus triumphator.” IMPERATOR CAESAR FLAVIUS IUSTINIANUS, *Institutiones*, in *JUSTINIAN’S INSTITUTES* 32 (Peter Birks & Grant McLeod trans., Paul Krueger Latin text ed., 1987) (emphasis added).

Imperial Majesty should not only be graced with arms but also armed with laws, so that good government may prevail in time of war and peace alike. The head of the Roman state can then stand victorious not only over enemies in war but also over trouble-makers, driving out their wickedness through the paths of law, and can triumph as much for his devotion to the law as for his conquests in battle.

EMPEROR CAESAR FLAVIUS IUSTINIAN, *Institutes*, in *JUSTINIAN’S INSTITUTES*, *supra*, at 33.

oblivious of one another. Instead, the effort must now be that of simply but more effectively marking-out one another's field of operation from within—as well as of searching, in earnest at first, for one's own specific, different origins in “time” and “space.”

(iii) Thus at the beginning of modernity law's recently formed, many domains—the new legal places of a unifying and increasingly unified Western legal machinery—had come to be, inside the national boundaries, the ever more organized central courts, tribunals, prisons, schools and professional associations, etc.²⁹⁷ Again, the past of such places where they had existed had often been one of obstinate indifference or, alternatively, of keen but ultimately undifferentiated confrontation. In England, for example, many future lawyers and judges would gather from all over the country to the Inns of Courts in London, as that was the place where they could be taught the common law.²⁹⁸ If, however, they wanted to learn the Roman civil law or (until 1535) the canon law, they had to go elsewhere—to Oxford or to Cambridge. The result, in most cases, had been to breed and then to feed into society two very different sorts of lawyers—neither of which was very much interested in one another's existence, other than at times of clash. With the outbreak of modernity, however, and with the discovery of the outside world and of the other within it, such state of affairs was set to change considerably—as the encounter with the other was to trigger the need of a sharper if not necessarily more accurate description of both one's own without *and one's own within*, as well as—inevitably—the ensuing, inner schism between the two. Similarly, in Italy what has been called the medieval “*Respublica iurisconsultorum*” of glossators and commentators begins slowly to give way to the Supreme Courts of the various states of the peninsula.²⁹⁹ Such

297. This extended well beyond the physical precincts of legal institutions.

From early on in its history, the court was not geographically limited to the courtroom. It was a “place” and it was to be protected as such: that is to say, in its other offices, in its chambers, in the Inns of Court, in the chancelleries, the libraries and all the other sacred hiding places (*sacramentorum latibula*) and treasure chests in which the records and the writs of the law were either forged or kept.

GOODRICH, *supra* note 276, at 229. See also P. Raffield, *Reformation, Regulation and the Image: Sumptuary Legislation and the Subject of Law*, 13 L. & CRITIQUE 127-50 (2002).

298. A.W.B. Simpson, *The Early Constitution of the Inns of Court*, 28 CAMBRIDGE L.J. 241, 242 (C.J. Hamson ed., 1970); See generally WILFRID R. PREST, *THE INNS OF COURT UNDER ELIZABETH I AND THE EARLY STUARTS 1590-1640* (1972); W.C. RICHARDSON, *A HISTORY OF THE INNS OF COURT: WITH SPECIAL REFERENCE TO THE PERIOD OF THE RENAISSANCE* (n.d.).

299. See GINO GORLA, *DIRITTO COMPARATO E DIRITTO COMUNE EUROPEO* cap. 20, at 543-619 (1981) (citing DE GENNARO, *RESPUBLICA JURISCONSULTORUM* (1st ediz., Napoli, 1731)), *id.* at 555 n.20.

an eventful proceduralization of existing protocols—while no doubt serving well the external purpose of centralization and state-formation—was bound to create in due course both inner and outer complexities leading, as it would later on appear, to a constant, insuperable asymmetry or short-circuit between actual operations and official pronouncements as to what and how might the law really, that is legally, *be* or *function*.

What is worth noting here is that initially each legal space—for example, the law school, the court, the legal profession, etc.—is deployed and designed to look, as it were, proudly onwards—a powerful symbol and a signal of a newly established, and long fought-for, political and legal legitimacy (in England, that of the courts of common law over competing jurisdictions).³⁰⁰ It will later become apparent how, conceived for the white, Christian, middle class, male heterosexual, the new legal machinery of a young proud politics had constituted itself into a rather *particular, private, indeed exceptional* set of places within Western law's ever expanding yet no less particular, private, exceptional domains. The reflexive turn of the various legal places of the legal machinery of the West remains, to this day, largely uncharted in legal history and comparative law. And just as uncharted remains the contextual emergence of the various outer trajectories—of the various languages or "*dispositifs*"—that in each case were both constitutive and a result of that reflexive turn. Yet, clearly, the brief appearance of natural or physical space within the horizon of law's many domains must have played a crucial, stabilizing role in such outer and inner movement from within. For instance, in the British isles, where physical space had been visible from time immemorial, such outer mappings and inner spatializations came to maturity earlier than elsewhere and, in particular, before the later and final establishment of a truly modern national state—at least, in so far as the hegemony thus

300. Consider the sumptuary legislation of sixteenth century England:

The representational power of clothes and their capacity to embody institutional authority, while simultaneously delineating societal status, was of particular concern to sixteenth century English legislators, as the nation-state supplanted the feudal model of society. The legitimacy of the medieval legal system had been predicated upon the lawful authority of immutable hierarchy; the image of which was the visible elucidation of rank, provided by costume . . . Sumptuary legislation effects the manipulation of the image so as to enforce a particular vision of order and reason. . . . The injunction is that the common lawyer should "frame" himself; he must create an image of himself, or reconstitute himself as a semblance so that the subject, looking at the image, recognizes the self as other.

Raffield, *supra* note 297, at 129-36.

established by ever more central over ever more peripheral legal domains was concerned.³⁰¹ It seems to me that the reasons for this have never been fully explored—yet it would be interesting to do so in a history of legal space. Likewise in continental Europe where, by contrast, natural or physical space had always appeared as much more fragmented than in the British isles, those outer and inner movements from within were slower to develop and slower to replace the modern machinery of law—making Metternich, for example, (in)famously if significantly refer to Italy as of little more than a mere “geographical expression” of Europe.³⁰²

30. *Comparing Law in Space.* The inner spatializations of early modernity making space within established legal places would—once we think space in terms of the spatiality of an eventful language rather than as some sort of absolute, Newtonian space—be in some important sense similar to what outer mappings and replacements from within were to develop, as it turned out, via the fragile language of peace, commerce, civility or rights.

To begin with, neither of those two aspects of the modern turn were, unlike what might seem at first, any longer a matter wholly or even principally concerned, in Europe, with the exercise of some immediate, un-mediated form of legal sovereignty—that is, a problem like in the past of making bare, situated space happen as yet another legal territory of this or that particular community and, collectively, of Europe and the West. By contrast, the constitution of legal space in modernity allowed traditional legal territories both to grow more independent of space, and to mobilize that space for their own specific and often shifting ends. In particular, legal territories could grow independent of space in so far as that space could now be easily set aside as a merely factual, natural element belonging to the background of legal representations. At the same time, legal territories could now mobilize space as never before, in so far as the withdrawal of law from that space meant that, from now on, what space there remained nevertheless still available—factual, natural space—could be, as it were, replaced almost at will. That is to say, on law’s many and ever multiplying modern maps natural frontiers and natural alliances could be more easily shifted (so to speak)—initially, through the contempla-

301. R.C. VAN CAENEGEM, *JUDGES, LEGISLATORS AND PROFESSORS: CHAPTERS IN EUROPEAN LEGAL HISTORY* 113-26 (1987).

302. On the impact of geography on the political history of Italy, see DENIS MACK SMITH, *MODERN ITALY: A POLITICAL HISTORY* ch. 1 (Yale Univ. Press 1997) (1959).

tion of contract, for example, or of marriage or of citizenship, etc.—having less and less consideration for traditional concerns such as some clear geographical proximity, the existence of common, situated roots or for example a common, situated faith.

In that sense, the difference between pre-modernity and modernity could hardly be overstated. Surely, immediate, un-mediated legal sovereignty would continue to be the case in a number of specific instances and, then, all the more so the further one looks away from the heart of Western Europe. Yet within Europe that old form of sovereignty becomes rapidly unsustainable—for a number of reasons but not least because to engage with the other involved, in itself, an often reluctant but always necessary, prior awareness of that other as being, in some fundamental way, *related* to the gazer, as much spatially (by virtue of one's closeness or distance) as otherwise. The constitution of space, in other words, gives previously unnoticed space to both the gazed and the gazer—but, then, space itself becomes progressively elusive (it becomes increasingly difficult to distinguish it from any Other space) until it later on begins, quite literally, to disappear. That is, suddenly there is more and more space that gazed and gazer have in common, can exclude and even forget but neither can really any longer appropriate—except, that is, indirectly through provisional exchanges treating one's own association with that space as a sort of currency for the exercise in some new form of “non-territorial” national sovereignty or “non-territorial” private property vis-à-vis the other (or both). So, for example, it has been doubted that the English common law was ever in danger—as Maitland once suggested—of being overcome by the Roman Civil law.³⁰³ Yet, that hypothesis becomes much more understandable if one reframes it in terms of the initial discomfort and following negotiations that the somewhat sudden awareness of the existence of a powerful, legally other so close in space as well

303. See generally FREDERIC WILLIAM MAITLAND, *English Law and the Renaissance*, in SELECTED HISTORICAL ESSAYS OF F.W. MAITLAND 135 (Helen M. Cam ed., 1957) (1907). For a institutional re-assessment of Maitland's theory, see William Searle Holdsworth, *The Reception of Roman Law in the Sixteenth Century*, 28 L.Q. REV. 131 (1912), thus

[w]e cannot think . . . that the defects in the substantive and adjective rules of the common law, great thought they were, rendered the Reception of Roman Law, as actually administered on the continent, probable, even if it had been possible. But it is quite true that it was these defects which made the jurisdiction of the new courts and councils of this period absolutely necessary in the interests both of good government and of legal development.

Id. at 139. For a re-assessment of Maitland's theory highlighting changes in the intellectual history of English law, see J.H. Baker, *English law and the Renaissance*, 1985 CAMBRIDGE L.J. 44, 46-61.

as otherwise must have determined amongst the common lawyers and their age-old yet not untroubled institutions.

Secondly, and just as importantly, both those outer mappings and replacements from within *and* those inner spatializations of law's many domains, ultimately led to a veritable obsession with identity and origins—cumulatively, an obsession with the identity and origins of the West as a whole. Or, to put it differently, there started in early modernity a rather momentous shift from the earlier taking place of the nation state and of the rule of law through bare, situated space immediately at hand, to a now somewhat more abstract thinking and then representing of it either from within or from without—yet, still largely as a space lying “out-there” and so, reflexively, from the viewpoint of the subject.³⁰⁴ The spatial metaphors of which Descartes' famous *Discourse on Method* was replete seem a good example of the change, heightened role of space at the threshold of modernity—as well as of its elusiveness and promise.

It is true that we have no example of people demolishing all the houses in town for the sole purpose of rebuilding them in a different way to make the streets more beautiful; but one does see many people knock down their own in order to rebuild them, and that even in some cases they have to do this because the houses are in danger of falling down and the foundations are insecure. With this example in mind, I felt convinced that it would be unreasonable for an individual to conceive the plan of reforming a State by changing everything from the foundations up and by overthrowing it in order to set it up again, or even to reform the body of sciences or the order established in our schools for teaching it, but that, on the other hand . . . I could not do better than undertake once and for all to be rid of them in order to replace them afterwards either by better ones, or even by the same, once I had adjusted them by the plumb-line of reason. And I firmly believed that, by this means, I would succeed in ordering my life much better than if I built only on old foundations and leaned on principles inculcated in me in youth without having ever examined them to see if they were true.³⁰⁵

304. See generally Barbara J. Shapiro, *Law and Science in Seventeenth-Century England*, 21 STAN. L. REV. 727 (1968).

305. RENE DESCARTES, *Discourse on the Method of Rightly Conducting the Reason and Seeking the Truth in the Sciences*, in FRENCH AND ENGLISH PHILOSOPHERS 13, Discourse 2 (Charles W. Elliot ed., P.F. Collier & Son Co. 1910) (1889).

For, although I could see several difficulties in this course, they were not all totally irremediable, nor are they comparable to those which arise in the reformation of the least things affecting the State. These great bodies are too difficult to raise up again, once knocked down, or even to hold up, once shaken, and their fall can only be heavy. Then, as for their imperfections, if they have any, and the mere diversity among them suffices to assure us that many of them have imperfections, usage had doubtless softened many of them considerably, and had even insensibly averted or corrected many which one could not have so well remedied by prudence. Finally, these imperfections are almost always more bearable than changing them would

Now, to the extent that representations of legal places evoked space largely to replace it with its particular reflections,³⁰⁶ in the long run that shift was bound to destroy space while reifying its many reflections as the true if interchangeable matter of those representations. Within national boundaries, for example, premodern spatializations are now replaced by progressively open, multiple and ever-multiplying disciplinary territorializations that, as increasingly abstract legal representations, at first seemed rather harmless, yet later on would help implode the collective body of the modern. We must leave to another occasion an examination of that third stage in this proposed history of legal space. Here, suffice only to stress that, at first, legal modernity seems to be progressively made up, in Europe, by continually re-defined yet clearly marked-out networks or bodies—legal territories—each of which would be regarded, at first at least, as being *superiorem non recognoscens*. However—born of repeated if largely asymmetric and often entirely accidental struggles leading to the making of the nation state and of the rule of law—such legal networks or bodies now claimed a name and a place of birth—an identity—capable of providing them with a sharper sense of what they might be, and where they might have come originally from. But how might an identity ever be found—whether within or without the nation state and the rule of law—if its name and place turn out to be, as later in modernity they did in fact turn out to be, a silent name and an empty place?

Unsurprisingly, the emergence of the nation state and of the rule of law—their taking place, their taking roots—and the subsequent outer mappings, replacements from within and inner spatializations of the new legal machinery leading to more and more abstract legal *dispositifs*—were to have a considerable impact on the art of comparison, and its use of space.³⁰⁷ A move, in particular, is now set to occur from

be, in the same way that the high roads which wind round between mountains become gradually so smooth and convenient by dint of being much used, that it is much better to follow them than to undertake to go more directly by scrambling up rocks and going down to the very foot of precipices.

Id.

306. This is still the case today when, for example, the police will have been on the scene of an accident, but the court will have simply heard of it; or a contract made in London will be held to be valid in Paris without, however, having to be made a second time; etc.

307. It has been suggested how “[t]he complete recognition of the new branch of legal science may best be dated from the year 1869. In that same year the Society of Comparative Legislation was founded in Paris, and Sir Henry Maine was appointed the first Professor of Historical and Comparative Jurisprudence at Oxford.” Sir Frederick Pollock, *The History of Comparative Jurisprudence*, 5 J. SOC’Y COMP. LEGIS. 74, 86 (1903).

earlier, more parochial legal concerns, whereby the art of comparison was mainly employed to supplement or to clarify the local law compared³⁰⁸—to newer, more cosmopolitan preoccupations whereby, apparently, comparisons can now be fruitfully employed to discover—*elsewhere*—the legally *other*, what they looked like and what they were up to and—from there—what, in turn, the *gazers* themselves might look like, and might be up to. Comparisons, that is, could suddenly be of great use—but on closer inspection their use was more in the return of the Same (whether after or at the end of it) than in the advent of the truly Other. And, of course, the take-off of industrialization and of colonization was bound to intensify the need for such specific, professional knowledge. But, again, how may that move have become possible, in the first place?

To begin with, the art of legal comparison was bound to reflect, and then to radicalize, what rather specific concept of natural-physical space had been gaining visibility within.³⁰⁹ That is, if inside the nation state and the rule of law physical, natural space becomes rapidly marginal in what process there occurred of self-reflexive, inner spatializations of the legal territories of modernity, in the outside world physical, natural space remains crucial for it is capable of inaugurating and maintaining difference. Thus Montesquieu famously argued that it is only after engaging with the physical, natural environment that one can properly capture the precise workings of the institutions under scrutiny—yet the sense of that argument may be different from what it has been normally understood to be.³¹⁰ Outside one's own nation state and one's own rule of law, physical, natural space becomes crucial in

308. In England, for an example of these premodern comparisons, *see, e.g.*, Sir John Fortescue, *De Laudibus Legum Anglie*, in CLASSICS OF ENGLISH LEGAL HISTORY IN THE MODERN ERA ix (S.B. Chrimes ed. & trans., Garland Publ'g, Inc. 1979) (1942); SIR JOHN FORTESCUE, THE GOVERNANCE OF ENGLAND (Lawbook Exchange, Ltd. 1999); CHRISTOPHER ST. GERMAIN, DOCTOR AND STUDENT (T.F.T. Plucknett & J.L. Barton eds., Seldon Society 1975) (1531).

309. *See supra* ¶ 5.

310. So, for example, it is

[I]a bonté des terres d'un pays y établit naturellement la dépendance. Les gens de la campagne, qui y font la principale partie du peuple, ne sont pas si jaloux de leur liberté; ils sont trop occupés et trop pleins de leurs affaires particulières. Une campagne qui regorge de biens craint le pillage, elle craint une armée. . . .

Ainsi, le gouvernement d'un seul se trouve plus souvent dans les pays fertiles, et le gouvernement de plusieurs dans les pays qui ne le sont pas: ce qui est quelquefois un dédommagement

MONTESQUIEU, *L'Esprit des Loix: et la Querelle de L'esprit des Loix 1748-1750*, in ŒUVRES COMPLÈTES 527, 632 (1964).

that it helps naturalizing what is effectively internal legal space as “foreign” legal space—thus making it naturally foreign. Radicalizing physical, natural space—giving physical, natural space roots on which legal space can hang—also makes it legitimate to keep that foreign legal space separate and so available for comparison (in the fashion of much natural school thinking) or, in a mirror-like gesture, separate but *unavailable* for comparison (like by contrast historicism would be inclined to object). Thus, Montesquieu for example argued, laws are strictly related to the particular environment where people live and sustain themselves.³¹¹

The representation of comparisons’ many spaces based on a spatial matrix available within—developed around several different trajectories. Internally, for example, the very emergence, for example, of a law of contract and then a law of tort out of an all-encompassing property law (this is, for example, what happened in England)—could not but encourage the newly born discipline of comparative law to adopt for the outside what virtually identical, spatially structured, conceptual legal tools and practices could be found to lie at the very core of each particular new legal discipline available within. Take—to mention another example—the case of continental comparative lawyers, whereby by the time the modern discipline of comparative law is finally born, the complex debates generated around the nineteenth century movements for codification had succeeded to produce or to reproduce a large reservoir of theoretical and practical experiences to which comparative lawyers in search of the legally other would be easily drawn. On the other hand, however, it is interesting to note that the newly born discipline of comparative law never managed, it has been argued, to create its own, specific conceptual grids.³¹²

311.

Les lois ont un très grand rapport avec la façon dont les divers peuples se procurent la subsistance. Il faut un code de lois plus étendu pour un peuple qui s’attache au commerce et à la mer, que pour un peuple qui se contente de cultiver ses terres. Il en faut un plus grand pour celui-ci que pour un peuple qui vit de ses troupeaux. Il en faut un plus grand pour ce dernier que pour un peuple qui vit de la chasse.

Id. at 634.

312. See generally David J. Gerber, *System Dynamics: Toward a Language of Comparative Law?*, 46 AM. J. COMP. L. 719 (1998). Thus, in noting how “a developmental disjuncture has occurred in the relationship between [comparative law’s] objectives and methods,” so that [c]ertain ‘traditional’ objectives of those thinking about and using comparative law have shaped its current methods, but new objectives have emerged and others have become more pressing, and current methods often have limited value for achieving them. . . . Comparative law [it is argued] has no language! It can point to a small set of specialized nouns as its own, but nouns do not make a language. A language

One other consequence of that move was that what more inward-looking concerns there continue to be, will now become the almost exclusive hunting grounds of “national” lawyers—who will then become increasingly keen to keep the more cosmopolitan lawyers at bay. Accordingly, any newer, outer preoccupation correspondently if somewhat briefly becomes the more and more specialized preserve of *public international law* and of *private comparative law* proper. Again, the separation between public international law and private comparative law is best seen as a separation “from within”—from within the privateness of Western law in general.³¹³ However, the internal specificity of those two fields of knowledge would be thematized as lying in that, while public international law directs its gaze to the *public other*—that is, the foreign nation state seen as an official—comparative law, by contrast, looks at the *private other*—that is, to each nation’s particular *legal past* (from which the legal present can now be clearly and proudly distinguished), *legal future* (the legal ends that, by comparison, can be found to belong to the various national laws compared) or *legal self* (the logical, analytical core of each nation’s own legal universe). It is now, for example, that in England what one may call the “Civil law hypothesis” begins to gain lasting if often somewhat undeserved credit amongst English common lawyers. The point however is that in so doing legal comparisons become crucial in quietly setting out, quietly maintaining and then quietly dismissing the different legal domains under scrutiny, in their own “essential,” “innermost” or even “functional” or “structural” being. No surprise then that comparative law’s new legal places—the past, the future and the self seen from without—will one day prove to have been, right from the start, the latest, most subtle and, on occasion, even pernicious set of, in fact, inward-looking, reflexive spatializations of some newly acquired territorial, even imperial, geographical, religious, political and symbolic general identity.

31. *Space(s) of Exception*. Things will change yet again later in modernity. As tribunals, prisons, schools, etc. begin slowly to turn outwards and inwards at the same time—it becomes increasingly ap-

develops where members of a community seek to explain aspects of the data or reality with which they deal. Physics has a language; sociology has perhaps more than one. I suggest that the comparative law community has no language because its members seldom pursue objectives that could generate such a language, and that there is much to be gained by pursuing objectives that are likely to do so.

Id. at 7-8.

313. See *supra* ¶ 4.

parent how they had been, all along, at once places of prior spaces (individually and collectively, the territories of the nation state and the rule of law) and spaces of future places. But, then, how is the legal space of late modernity? Might it be the case perhaps that in law, like it has been said of Francesco's art, "there is no space left for any painting"?³¹⁴ Should that be so, then a problem I suggest would be perhaps not so much, or not immediately, that of identifying which those late modern spaces might be, or what they might have become, or what they might be there for. That would be to insist on mere calculating, instrumental thinking—one that in the present circumstances would probably, recursively lead to further, increasingly imponderable complexities.³¹⁵ Meditating thinking, by contrast, would be seeking to capture how those spaces might be in today's increasingly unconventional world.³¹⁶ What for example may the "exceptional" legislation following events such as the terrorist attack on the Twin Towers, the war in Afghanistan, the second war in Iraq and the marches that have sought to oppose those events—what may that legislation tell us of the matter of legal space? We can of course choose merely to condemn that legislation, or analyze it in its particular text or even as part and parcel of an institutional context that is available for (legal) reading, measuring and calculating—but it is doubtful that any of those strategies would lead us very far.³¹⁷ Much more productively, by contrast, one could try to capture that legislation in some of its deeper, more revealing implications—might we be, for example, before one of Deleuze's *symptoms*, or one of Lyotard's *figures*, or even one of Derrida's *archives*—thus hopefully re-enabling ourselves to resist, endure or perhaps even exit those events as we think it best?³¹⁸ Baudrillard, for example, has suggested that in today's world of generalized exchange such events show how "[o]nly symbolic violence is generative of singularity."³¹⁹ Is that really so? What then would that tell us of the how and of the heartland of late modern legal space? Like in the

314. DIDI-HUBERMAN, *supra* note 230 ("Non c'è più spazio per alcuna pittura.") (author's translation).

315. On calculating, instrumental thinking, see *supra* ¶ 3.

316. On meditating thinking, see Stramignoni, *Meditating Comparisons*, *supra* note 215.

317. One central problem would be the increasing emptiness of the language being employed in and around such legislation. See generally COLLATERAL LANGUAGE (John Collins & Ross Glover eds., 2002), showing the ambiguity with which terms such as "evil," "freedom," "justice," or "terrorism" are being employed in recent years.

318. For a recent, imaginative attempt at "exodus" from modernity, see generally HARDT & NEGRI, *supra* note 42. For a critique, see generally DEBATING EMPIRE (Gopal Balakrishnan ed., 2003).

319. JEAN BAUDRILLARD, *THE SPIRIT OF TERRORISM* 29 (Chris Turner trans., Verso 2003).

case of pre-modern and then modern legal space, the answer might be far from obvious—nor could it be properly tackled at once. So here the point has been simply yet resolutely to invite meditating, non-instrumental thinking—that is to say, to suspend judgment—and highlight how the complex and largely hidden interplay in law between what is normally understood by legal space and “other-spaces” (events that are, quite literally, the heartland of legal space) is generally ignored by lawyers. Could that interplay be brought out in sight? And what might that help one see? Neither a solution for any of the very specific problems that absorb everyday legal practice, nor a theory that could never alone account for the very historicity of it all³²⁰—Francesco’s story, it seems to me, could nevertheless be one good starting point to think about that crucial interplay, as and when that story speaks of struggle, separation, resolution, reform and then the re-emergence of one’s own history as the matter of artistic space. In particular, I argued, many modern theories and practices of law would be most fruitfully seen in their deeper, eventful relation with the histories of those who think them, discuss them or put them in practice—histories that should not, however, be seen merely by reference to their legal texts or institutional contexts but should be investigated on their own terms, by trying to bring out the heartland that is always, though always in different ways, the *incipit* of them all. We might thus make sense of them and of the matter they represent in ways that have gone so far unnoticed. Heidegger’s analytics, in particular—the radical ontology of the *Da-sein* of law—provide, so my argument goes, a series of powerful insights into those histories—especially when such analytics invite us to reconsider absolute, universal space as a spatiality or “language” of sorts. Understood in the spatiality of their eventful language, legal theories and practices (the legal space they institute and rule) suddenly materialize as the evidence of their politics, the evidence of their histories, inseparable from their heartland. Like for Francesco’s unsuccessful attempts to paint the *face* of a pious St Rosalia that appears on the canvas but is so very foreign to his own personal history—so too the heartland of legal space is always there though it may be impossible to measure it, compare it or trace it in the normal way. Each time the excess of one’s own individual or collective theories, the excess of one’s own individual or collective practices—*that* heartland is, in brief, the excess of the art of law and, as such, is and remains beyond control, comparison or his-

320. Indeed, Heidegger asks, how could mere theory care for the “light in which a seeing, as a *theoria*, can first live and move?” HEIDEGGER, BASIC WRITINGS, *supra* note 35, ch. 5.

tory as these are normally understood. And it is that heartland—it is that incontrollable, incomparable, untimely excess—that, it seems to me, may be truly at stake in many of today’s most difficult questions about the future of Western democracy and the rule of law.

Several after Heidegger have taken up that groundbreaking move, at least implicitly—the move, that is, from space to spatiality to language—and they have then developed analytics of their own that could further help us understand the matter of legal space as this presents itself to us nowadays. Yet not enough *lawyers* have yet given those post-Heideggerian analytics some serious consideration. While there is hardly any doubt that absolute, universal legal space helped modernity stabilize itself—might it not be the case that, at this point, that same absolute, universal space has become one eminent reason why today we feel so overwhelmed by events that appear to be bigger than our institutions, legal or otherwise, can possibly handle? Is there really no way out—if not necessarily forward—of modernity’s widening discontents? And on the other hand can anyone in their right state of mind afford to disregard such discontents? To the extent that legal representations are, as I have suggested, a comparing as such that lawyers *make* from a *heartland* rather than being universal truths or universal conventions about the world we inhabit—we might have to consider carefully whether, whatever the legal theory or practice each time in question, the legal space that such theory or practice institutes and rules may not be little more than just an exceptional place, in the precise sense of being a true place of exception—the exception, that is, of Western law.