"WHAT'S HOT IN JURISPRUDENCE?"

Margaret Davies*

This article was presented as a Victoria University of Wellington Centennial Lecture during Law Festival Week in 1999. The author notes the relatively recent rise to popularity of legal theory, and discusses two trends which are in part influenced by theoretical fashions, and are in part the symptoms of what is a fundamental and enduring alteration in all types of theoretical scholarship: bodies and spirits.

I PRE-INTRODUCTION

Since I have a reputation as something of a postmodernist, I have an alternative title for this talk for those who might find my primary title a little plain. It is "Performative Cartographies: (The Semiotics of) Heteronomy, Embodiment and Phantasm in the Aporia of Law". The significance of these carefully chosen words will hopefully become clearer towards the end of the talk.

II INTRODUCTION

I come to you today with the message that jurisprudence is alive and flourishing. This is doubly significant: I emphasise that not only is jurisprudence alive, but it is also flourishing. Before I continue with more such subtle legalistic distinctions, I would like to pre-empt another theme which I will pursue later in my visit to Wellington at the Australasian Law Teachers' Association Conference (ALTA). I mention this theme now by way of what I am hoping is a somewhat profound contrast to this talk's theme. Here, I illustrate that jurisprudence is alive and flourishing. In my later talk, I will proclaim its madness and decapitation. Please do not ask me in between how jurisprudence is doing.

I should say that the contradiction was somewhat forced upon me — if not by my sponsors, then by my perhaps predictable but nonetheless unavoidable response to their proposed themes. Here, I am to talk about what's hot in jurisprudence, which naturally suggests a rather lively, and even fashionable, discipline. The ALTA conference, on the other hand, is entitled "A Capital Century", which among other things I have associated rather morbidly with decapitation, or capital punishment. That is just by way of

* Senior Lecturer, Law School, Flinders University of South Australia.

explanation of how the contradiction was suggested to me. I will do no more to justify or explain at this stage, since I do not wish to detract from my message of life and wellbeing by predicting an untimely end.

III JURISPRUDENCE AND FASHION

But first a few words about the title which, as I mentioned above, suggests a lively and even fashionable discipline. It would not be overstating the case to say that both are true. Internally, jurisprudence, or legal theory (as I prefer to call it) has seen an enormous expansion over the past 20 or 30 years. This is certainly not out of keeping with what has been going on in other disciplines associated with the humanities and social sciences, and has been connected with the "theory wars" allegedly predicted by Friedrich Nietzsche late last century.[1]

Legal theory has been immensely influenced by other disciplines — it was once thought that disciplines more or less ought to keep to themselves, and that to go beyond one's own discipline illustrated either a lack of discipline on the part of the scholar, or a weakness or lack of sophistication in the discipline itself — if it needed outside assistance it could not be considered mature. Indeed the great jurist Hans Kelsen clearly thought that purity in legal theory was essential to developing and maintaining a discipline which could stand on its own, have an identifiable form, and be maintained through the growth of jurisprudentially derived knowledge about law.[2] We start and finish with law. Clearly we are not now quite so contained in our attitudes, and in fact the reverse has become true — interdisciplinarity is revered as illustrating breadth, the potential for new development, and is also extremely valuable in gaining research grants.

Once the disciplinary boundaries were breached in legal theory, the possible sources of inspiration became truly immense — consisting as they do of theory in virtually any discipline, including theory which has no clear disciplinary home. I am intending to speak about this in more detail at the ALTA Conference, but from the point of view of my talk today, what it means is that the question of what is currently in vogue in legal theory could have a multitude of answers. I could have chosen to speak about any number of topics, such as the indigenous critique of law, queer legal theory, new varieties of legal positivism, new varieties of natural law, or the preoccupation with questions of State, nationhood, and citizenship. In attempting to answer the question however, I have

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1 Nietzsche wrote of a future "when truth enters into a fight with the lies of millenia", which has been taken to be a prediction of the "theory wars" of the last decades of this century. See FW Nietzsche "Ecce Homo" in Walter Kaufmann (trans and ed) *Basic Writings of Nietzsche* (The Modern Library, New York, 1966) 783.

2 Hans Kelsen "The Pure Theory of Law: Its Method and Fundamental Concepts" (1934) LQR 475.

deliberately avoided matters which — while new to legal theory — are hopefully more than a passing fad. So although questions of gender, race, culture, and the relationship of indigenous peoples to Western law are relatively recent preoccupations of legal theory, I do not regard them as matters which are merely of the moment, but rather of enduring concern. I prefer not to speak of them as things which are currently "hot", but rather as integral to the nature of law, the resolution of which will determine the shape of law and legal institutions in future generations.

Before going on to my chosen topic, however, I would just like to make a few points about fashion in legal theory. It might appear to be rather perverse to speak of fashion in this context: after all, truth is supposed to be anything but fashionable — it is supposed to be enduring, not susceptible to mere trends. Truth is stereotypically solid and masculine, not whimsical and feminine — or at least that is how generations of philosophers have seen fit to characterise the difference between objective truth and feminine subjectivity.[3] However, since the development and widespread acceptance in some circles of the idea that truth is an effect of power and language, it is not too hard to make some kind of connection between fashion and truth. Truth is the result of the power that some groups, and some stories achieve at a moment in history.

Of course, intellectual change is not as rapid as changing tastes in clothing or music, but then nor is it as slow as geological or cosmological change. If an idea has force only for an intellectual moment, it is not necessarily less true than the political and philosophical "truths" which Nietzsche called the "lies of millenia".[4] Therefore, maybe the truth is at least in part a product of long and short term intellectual fashions just as what we wear is the product of clothing fashions. (I would not defend this comment to the death, however.)

Another development which seems to be promising for legal theory is that legal theory itself has become fashionable. Until recently, legal theory was regarded as a discrete branch of legal scholarship, but one which did not necessarily influence, for instance, ideas about the law of contract, or even constitutional law. Or, at least, the influence was there, particularly in the positivist idea that legal scholarship is about impartial description of law alone, but this influence was not explicit, and was not generally highlighted as a central feature of the works in question.

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3 See for example G W F Hegel who infamously said that "women regulate their actions not by the demands of universality but by arbitrary inclinations and opinions"; G W F Hegel *Philosophy of Right* (Oxford University Press, London, 1952) 264.

4 Nietzche, above n 1.

In contrast, legal theory has recently become much more disseminated throughout legal scholarship as a whole. The boundaries between substantive law and legal theory are breaking down and changing, as are indeed the boundaries between areas of substantive law. Earlier this century, the legal Realists brought their ideas into particular areas of law, and this tradition was continued with the Critical Legal Studies movement. However, I think it is feminist scholarship which has so far gone further than other critical theories in taking its insights into substantive law: feminism has been quite unrelenting in its detailed examination of every conceivable aspect of gender bias and discrimination. In this way, varieties of legal theory have become to some extent fashionable in substantive law. By stating that legal theory itself is more in vogue than it once was, I do not mean to degrade this development as a mere fad which will pass away with time. On the contrary, scholarship which crosses the divide between theory and practice is clearly having an effect across the range of legal research — from the "purest" and most abstract theory through to matters as practical as law reform.

Even more interesting than the trend by legal scholars to turn towards legal theory is a certain interest by non-lawyers in the question of law. I will quote just a small passage from a work by the Algerian/French philosopher Jacques Derrida to illustrate the point. In a paper devoted to deconstruction, law and justice, he said something which highlighted the centrality of law. Speaking of scholars whose work considers questions of literature, philosophy, or deconstruction in relation to law, he says: [5]

> They respond, it seems to me, to the most radical programs of a deconstruction that would like . . . not to remain enclosed in purely speculative, theoretical, academic discourses but rather . . . to aspire to something more consequential, to change things and to intervene in an efficient and responsible, though always, of course, very mediated way, not only in the profession, but in what one calls the *cité*, the *polis* and more generally in the world.

In other words, legal theory has a broad practical relevance, and holds out the promise of institutional and political change in a way which is not available to literary theory, cultural studies, or even political philosophy. It can be a fruitful terrain for academic activism. For primarily this reason, legal theory is possibly getting more attention outside its traditional disciplinary boundaries than it did when it was concerned with the more inward-looking and purely descriptive type of theory.

I have chosen two trends to discuss here which are probably in part influenced by theoretical fashions, and are in part the symptoms of what is a fundamental and enduring

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5 Jacques Derrida "Force of Law: The 'Mystical Foundation of Authority'" in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson *Deconstruction and the Possibility of Justice* (Routledge, New York, 1992) 9.

alteration in all types of theoretical scholarship. With the qualification then that I am not only talking about fads here, the rest of my talk concerns two matters — or I should say one matter and one non-matter: that is, bodies and spirits.

Clearly the preoccupation with both of these topics is indicative of a strong anti-Enlightenment stream in theory generally, not just legal theory. Where Enlightenment thought of the seventeenth century and beyond emphasised the human capacity to reach objective and universal truths through the use of reason, recent theory, including legal theory has tried to show that this is a fiction which devalues and excludes the roles of belief, language, culture, material context, and other non-rational dimensions of our beings.

Therefore, focussing on the body reminds us that the human individual does not consist simply of a disembodied mind, and explores the implications of recognising our embodied status. Similarly, the turn to spirits, spectres and shadows reminds us, rather mysteriously, that there is more to knowledge and existence than meets the eye. Therefore, although these two themes may appear to be diametrically opposed, they each in their way contribute to the overall critique of a philosophical tradition which tends to over-emphasise the role of reason.

My other qualification about these two topics is that it is not possible to say that they have been of influence in jurisprudence as a whole. As usual I speak from the point of view of one who has been involved in a certain type of legal theory — critical and postmodern. For some these trends are nothing more than just that — fashions which presumably will go away at some time after the turn of the millennium, when we will return to a more sensible, rational, and universal enquiry focussed upon truth. But as I have just indicated, although our preoccupation with bodies and spirits may well be a passing thing, both are symptomatic of something larger and fundamental: the intensity of the fashion may pass and the resulting languages become assimilated into everyday theoretical language, but the underlying issues will remain of concern.

I will briefly discuss each of these topics, and I will conclude with some observations about language and jargon, which is as important in characterising postmodern trends as any of the more popular themes.

IV BODIES

In the late 1980s until the late 1990s it was very hip to talk about bodies. Terry Eagleton wrote in the *Times Literary Supplement* in 1993 that "If you want to make it as a radical critic these days, slip the word 'body' into your title".[6] Innumerable books and articles have

6 Quoted in Alan Hyde *Bodies of Law* (Princeton University Press, Princeton (NJ), 1997) 3.

been published on the topic. These include works of fiction, such as Jeannette Winterson's *Written on the Body*, works of feminist scholarship such as Elizabeth Grosz's *Volatile Bodies* and Judith Butler's *Bodies that Matter*, and several legal theory works, such as the collection of essays entitled *Thinking Through the Body of the Law*, and Alan Hyde's *Bodies of Law*.[7] A quick glance through any of the more radical legal theory journals, such as *Law and Critique*, *Law and Society*, *The Australian Feminist Law Journal*, and *Social and Legal Studies* will reveal numbers of articles with "body" or "embodiment" in the title.

The intellectual heritage of the preoccupation with bodies is, unsurprisingly, contemporary French thought. Michel Foucault wrote a number of books in the 1950s and 1960s which seemed to foreground the way in which bodies are not — as we might previously have supposed — simply natural physical entities, but rather the result of social and legal norms or, to use the jargon normally associated with Foucault, bodies are not "presocial" and timeless, but are constructed by "networks of power" or "disciplinary regimes".

For instance, there is a very graphic section at the beginning of one of Foucault's books, *Discipline and Punish*, which describes corporal punishment in the middle ages as a writing of the sovereign's will onto the body of the criminal. Punishment was not just a way of breaking the spirit, or of imposing deterrence upon a mind making rational choices, it was an unmediated expression of the law on the human being. Foucault's book describes a movement away from this direct physical inscription of punishment towards regimes of control which were less direct but are nonetheless concerned with constructing the body — such as Bentham's well-known panopticon which disciplines the body by ordering people underneath an authoritative gaze. Before Foucault, the body had occupied the place of a natural physical entity, and scholarly interest in the body was by and large concerned with medical knowledge, archaeological studies of human development, and natural histories. Criminology was about law, morality, and ideas of punishment. Foucault's contribution was to de-naturalise the body, and to show that it was itself a product of a "political economy". For instance, he said: [8]

> we can surely accept the general proposition that, in our societies, the systems of punishment are to be situated in a certain "political economy" of the body: even if they do not make use of violent or bloody punishment, even when they use "lenient" methods involving confinement

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7 Jeannette Winterson *Written on the Body* (Vintage, London, 1992); Elizabeth Grosz *Volatile Bodies* (Allen & Unwin, New South Wales, 1994); Judith Butler *Bodies that Matter: On the Discursive Limits of Sex* (Routledge, New York, 1992); Judith Grbich, Pheng Cheah and David Fraser (eds) *Thinking Through the Body of the Law* (Allen & Unwin, New South Wales, 1996); Alan Hyde *Bodies of Law* (Princeton University Press, Princeton (NJ), 1997).

8 Michel Foucault *Discipline and Punish* (Pantheon Books, New York, 1977) 25.

> or correction, it is always the body that is at issue — the body and its forces, their utility and their docility, their distribution and their submission.

And later, he says: [9]

> the body . . . is directly involved in a political field; power relations have an immediate hold upon it; they invest it, mark it, train it, torture it, force it to carry out tasks, to perform ceremonies, to emit signs.

Similarly, in *The History of Sexuality,* Foucault wrote of the origins of the idea of sexuality, and in particular homosexuality.[10] Not a timeless category, but one which can be traced to a particular era, and which has since been imposed as an identity category upon men (in particular) and their bodies.

It has been feminist scholarship in particular which has taken up the interest in bodies. This is not surprising since, after all, it was historically women who were associated with all things natural and bodily, while men were associated with things of the mind. Women were — and, as we know, frequently still are — defined through the body, through appearance, and how well we fit into the bodily stereotypes of femininity laid down for us. So the notion of the body as an effect of social discipline and normalisation is a fertile ground for feminists wishing to debunk the idea that femininity is somehow a natural or given category. Attention to the mechanisms through which the female body is produced as feminine provides a very concrete illustration of Simone de Beauvoir's insight that we are made and not born.

Attention to bodies has also focussed upon the epistemological question of how we know, and who knowing subjects are. If as human beings we are constituted as embodied subjects at a particular time, in a particular place, and according to a particular cultural context, then the traditional rationalist idea of universal knowledge begins to look a little shaky. Knowledge does not only arise from universal reason which is the same for each person, but rather from context, including how each human body is situated within a socio-cultural environment.

As feminist critics have pointed out repeatedly, the body has traditionally been regarded as the "enemy of objectivity".[11] To speak of "embodied knowledge" — that is, knowledge which recognises location, context, and so on — can seem to be a contradiction

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9 Foucault, above n 8, 25.

10 Michel Foucault *The History of Sexuality* (Vintage Books, New York, 1980).

11 Alison Jaggar and Susan Bordo "Introduction" in Alison Jaggar and Susan Bordo (eds) *Gender/Body/Knowledge: Feminist Reconstructions of Being and Knowing* (Rutgers State University, New Brunswick, 1989) 4.

in terms because knowledge is universal, and bodies are particular. However, a double point is being made: first, that knowledge is always the result of the context within which a subject is situated; secondly, that in any case bodies are not particular because they are shaped according to communal standards, norms, and expectations. To speak of "embodied knowledge" is to make a critique of the mind/body distinction, and in particular of the primacy of minds over bodies in our existence and cognition of the world.[12]

As one of the primary mechanisms of social control, and certainly one of the most explicit, law plays a significant part in these systems, and has been subjected to the attention of feminists and other critics. For instance, Ngaire Naffine has described the ways in which the criminal law has in the past envisaged a normal male body to be encompassed by fairly rigorous boundaries, while the female body is regarded as more open, fluid, and essentially unbounded.[13] The criminality of homosexual acts and the sexual accessibility of married women to their husbands reflected and reinforced the social construction of men as autonomous owners of a bounded body, and women as non-owners of an accessible body.

There has also been a reasonable amount of attention paid to the question of legal knowledge as embodied — it was Catharine MacKinnon who stated very succinctly that "objectivity is a stance only a subject can take",[14] indicating that what passes for objective knowledge must emanate from a person with a context. Law relies upon the notion of objectivity in various ways — in interpretation and application of legal principles, in the discovery and interpretation of facts, and in giving content to "objective" tests like that of the reasonable person. Discussion of "objectivity" as a position derived from a context of personal and embodied experience is therefore of great interest to legal theory.

In a similar kind of vein is a book by Alan Hyde entitled *Bodies of Law*.[15] Hyde's is an extensive analysis of the various ways in which the body and different body parts are understood by the law. The book proceeds by arguing and demonstrating all of the different ways in which the body is constructed by law.

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12 See generally Jaggar & Bordo, above n 11.

13 Ngaire Naffine "The Body Bag" in Ngaire Naffine and Rosemary J Owens (eds) *Sexing the Subject of Law* (The Law Book Company, Sydney, 1997).

14 Catharine MacKinnon *Feminism Unmodified* (Harvard University Press, Cambridge (Mass), 1987) 55.

15 Hyde, above n 7.

V THE SPIRIT OF THE LAWS (REVISITED)

I have noticed a slight drop in the interest in bodies in the last few years. At least in some areas of legal theory, we have seen a move away from bodies towards a dimension of existence which is not reducible to either physical or purely rational processes. Many of those who raised the matter of bodies were feminists who, as I have said, were concerned to highlight the legal construction of women's bodies, and also wanted to emphasise that knowledge is embodied — that is, it comes from a subject constructed along the lines of place, culture, gender, and race. But critical theory which is not distinctly feminist has begun to tell another story: it is that we also need to take account of non-physical and non-rational determinants — things happen which are unaccountable to ordinary ways of understanding things. Law's past is full of apparitions which haunt us, and its future is available for whatever fantastic destiny we can imagine. I have called this a movement towards ghosts and spirits, but, as I will explain, it is a little more complex than that. It brings forward the question of the legal unconscious, legal myth-making, the spirit of law, and the yet-to-be-discovered potential of law.

As a brief illustration of what I am talking about, the United Kingdom Critical Legal Conference hosted in September 1999 by Birkbeck College, University of London, was entitled "Spectres of Law". (One might suspect that this title owes a debt to Derrida's fairly recent work *Spectres of Marx*.) The conference blurb, available on the internet on the Birkbeck Law homepage, starts like this: "Law is haunted by many spectres; excluded memories which retain a ghostly influence on the present". It speaks of "premonitions" of the future of critical legal studies, which is questioningly characterised as an "intellectual poltergeist". It refers to the "totems" of the critical spirit, its "phantasmatic forms" and "brave dreams of Utopia", and finishes with a plug for the location: "Bloomsbury with its occult energies and dark shadows, is the locus for this celebration of restless and creative legal thought".[16]

There appear to be a number of distinct, but related, forces operating in the recent focus on ghosts or spectres. One is the influence of psychoanalysis — law's "excluded memories" — which has a little belatedly made its way into legal theory. The second is an interest in myths, rituals, and foundational legal stories. Third, I detect a rather more nebulous interest in anything mystical, supernatural, religious, spiritual, or sacred. Fourth, Derrida's work on the slippages, gaps, and imprecision of language has led us to try to read between the lines of law, to find out what is not being said. And finally, the end of millenium flurry of critical activity is quite insistently turning to the question of "what

16 http://www.bbk.ac.uk/Departments/Law/clc99.htm>

next"? What does the future of critical theory hold, what is the future of law, and can we envisage a law which is more just?

Because time is short, I will comment only briefly on two of these matters — psychoanalysis and myth.

A Psychoanalysis and Law

We have come to expect that legal theory is chronically behind the times, and sometimes does not catch on to the trends of other disciplines. Sometimes this is fortunate, and there is a good part of me which thinks that a little psychoanalysis is not a bad thing, but a lot of it is a mind-altering substance and should be avoided. Psychoanalysis is rather like the philosophy of Hegel in that it is very difficult to enter into any discussion of it without adopting comprehensively its vision, its jargon, or its framework.

However, in the 1990s — and under the influence of many feminist writers such as Luce Irigaray, Judith Butler, and Elizabeth Gross — psychoanalysis and the critique of psychoanalysis became very popular in various genres of theory. Interestingly, it has had relatively little influence over legal feminists (with the notable exception of Drucilla Cornell), although several critical legal theorists, especially Pierre Legendre and Peter Goodrich have undertaken significant work on the topic.

There are various applications of psychoanalysis within legal theory, some of them more susceptible of a clear explanation than others. In some cases it is more a case of using the language of psychoanalytical theory, but in others a specific question is being posed. For instance, is the law we have now the result of a history of forgetting or repression? Is the legal consciousness the effect of a legal unconsciousness in which subsists all of the stories which law has conveniently forgotten in its self-construction? We have an interest in legal totems, legal taboos and all of the unspoken "forgotten" things which shape the legal mind and legal reason.

For instance in *Oedipus Lex*, Peter Goodrich considers how law has been shaped by repressing certain things. In particular, according to Goodrich, mainstream law has been hostile to metaphor and images, and it has been hostile to the feminine. In psychoanalytic theory, something which is repressed is never simply excluded and forgotten — it shapes the personality and resurfaces in unexpected ways. So Goodrich's argument is that law too has an unconscious consisting of repressed items, and that we need to pay attention to the symptoms of this repression. He says (a little mysteriously): [17]

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17 Peter Goodrich *Oedipus Lex*: *Psychoanalysis, History, Law* (University of California Press, Berkeley, 1995).

> The institution . . . constantly spills from the court and the text into life, and to trace that quiet and imperceptible crossing of boundaries requires a jurisprudence that is attentive to the little slips, repetitions and compulsion, melancholic moods or hysterical outbursts, that hint at the transgressive movement from one order to another, from conscious to unconscious law.

The interesting and possibly controversial argument underlying this kind of scholarship is that over time law develops a psychic structure which is similar to that of a person, and can therefore be subjected to psychoanalysis, and not merely the conceptual, empirical, or other types of analysis applied to non-humans.

Psychoanalysis has also been turned to the question of the construction of subjects under the law — the process of subjectification which turns human material into subjects of social laws.

B Myth and Ritual

In the early 1990s Peter Fitzpatrick wrote a book entitled *The Mythology of Modern Law*.[18] As its title suggests, the work looked at modern law as a system of beliefs founded upon myth. Fitzpatrick comments that modern Western systems of thought are built upon a rejection of myth and mythology, but that this rejection is itself a myth, in the sense of being a founding story of the Western conscience. His work, and that of others who have followed him, concerns looking for the stories upon which our law is based. Following the advice of a French sociologist to "exoticise the domestic",[19] Fitzpatrick's purpose is to show that the culture of Western law, while proclaiming that it has an objective scientific, and rationalist basis, does not eliminate the fictional, the mythical, the spiritual. Numbers of such myths are easily identifiable — myths of nation and of national law, public and private, the separation of the person from law, natural law, legal progress, myths of "pure" positive law, and of the absolute foundation of law. One of the very serious consequences of thinking about law in this way is that the distinction between Western "enlightened" rationalist knowledge, and the so-called religious, superstitious, or primitive knowledges against which Western knowledge is traditionally defined, begins to break down. Western thought does not transcend myth, it just denies and represses its mythical basis.

VI WORDS

Clearly one of the driving forces of jurisprudential creativity in recent times has been a greatly expanded vocabulary of sometimes evocative but sometimes unnecessary terms of art. For the benefit of anyone who wishes to enter, or perhaps avoid, the trendier precincts of legal theory, I thought I would finish by trying to categorise some of the jargon which is

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18 Peter Fitzpatrick *The Mythology of Modern Law* (Routledge, London, 1992).

19 Fitzpatrick, above n 18, 13.

out and about at the moment. The interest of this exercise is not only to be aware of the words which are current, but also to think about the serious philosophical trends which the language reflects and facilitates.

Many people are well aware of the kind of jargon which is frequently associated with postmodern thought: it often has to do with language — words like "symbolic", "text", "textuality", "diachronic", "synchronic", "discourse", "semiotics", "construction", "code", "inscription", "dialogue" or "dialogical" — have been very popular, as have words which indicate that truth is not transparent such as "mirror", "veil", "simulacrum", "speculum", "mask", "image". We have also seen a surplus of dramatic words like "theatre", "staging", "performative", "narrative", "storytelling", and a number of novel punctuation practices which are intended to indicate the layers of meanings available in any text. We have also become accustomed to seeing titles which begin with a dynamic-sounding present participle which show that our article or book is an up to the moment intervention in theory, not a boring restatement: therefore numerous works commence with "re-inventing", "reconstructing", "interrogating", "rethinking", "representing", "mapping", "defining", "reconceptualising" (or indeed, to take my own case, "asking" and "delimiting"). [20]

At the more self-consciously philosophical end of legal theory (and it is littered with words like "self-conscious", "reflective", and "reflexive") many words evoke the philosophical tradition. Words of the Greek tradition abound, such as "mimesis", "physis", "crisis", "phronesis", "pharmakon", "polis"; while terms translated from the German tradition are also very popular, especially if they evoke contradiction rather than naive truth: these words include Kantian terms like "antinomy" and "categorical", Hegelian words like "dialectic" and "negation", and any number associated with twentieth-century philosophy such as "phenomenological" and "existential".

A little less lofty, but nonetheless extremely convincing in the right context, are words derived from the likes of Derrida and Foucault, in particular "spectacle", "panopticon", "surveillance", "discipline", "archaeology", "genealogy", from Foucault, and "differance", "deconstruction", "plenitude", "presence", "supplement", "violence", "force", and most recently "hospitality" or "friendship" from Derrida.

A good range of spatial words have also become popular, such as "geography", "cartography", "topology", "horizon", while psychoanalysis has provided us with a bottomless vocabulary of logic-defying terms like "melancholia", "desire", "passion", "memory", "forgetting", "counter-memory", "imaginary", "madness", "insanity", "gaps", and

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20 I refer of course to M Davies *Asking the Law Question* (Law Book Company, Sydney, 1994), and M Davies *Delimiting the Law: 'Postmodernism' and the Politics of Law* (Pluto Press, London, 1996).

of course "aporia". In keeping with the recent interest in ghosts we have developed a good range of mystical words: "spectre", "ghost", "cosmos", "mourning", "sacred", "ritual", "taboo", "totem", "phantasm", to name but a few of the most popular.

To give you a flavour of the linguistic terrain which may be to come, let me quote again from the Critical Legal Conference material.[21] The panel on Utopia suggests that a new sort of utopian thinking might be in order: not one which projects an ideal society, but one which is sensitive to contextual knowledge. To illustrate this the panel convenors use a highly imaginative language which can only be described as out of this world. The material suggests that a redefined Utopia:

> can be tantamount to a voyage of cognition through the wasteland of a global (non-)society, a megalopolis floating in circular chronologies, a simulacrum of panoptical controls, or even an urban figment landed on ductile geographies...

The panel summary goes on to state that:

> law is to be contextualised in phantasmic cartographies and interdigitated chronologies, quantum dualities and chaotic subjectivities.

We can see here that in addition to drawing upon most of the categories I mentioned above, these statements also evoke the radical end of science through the use of words like "interdigitated", "quantum", and "chaotic". Is legal theory entering a realm of science fiction?

The justifications for the use of slightly obscure language like this are well known: it is supposed to be a material illustration of the impenetrability of texts, it highlights the fact that truth and fiction are not clearly distinguished, and it brings new meanings and new possibilities to scholarly thought. Now, there might be some who would reject the more extreme uses of the new terminology because it fails to communicate a clear meaning, and some would say that it fails to communicate any meaning. It is not even possible to translate such statements into something simpler. However, in my view it is important to be attentive to the dynamic possibilities of such linguistic creativity, even where meanings are impenetrable. The difficulty arises when language becomes overly stodgy, and has no creative point beyond mere jargonistic posturing — criticisms which can be equally well directed at much mainstream legal writing. Of course, whether something is stodgy or not, and whether it is possible to discern any genius in the creative use of words is very much a matter of personal opinion.

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21 Above n 16.

VII CONCLUSION

I do not have any particular conclusions to draw from these comments. I have taken the point of view of a jurisprudential fashion critic merely as a ploy to talk about a few interesting recent developments in the discipline. If there is anything I would like to emphasise it is Fitzpatrick's approach — that the task is to find out what is exotic or strange about the domestic things which surround us. By doing this we not only question our assumptions about law, but we also try to maintain a sense of wonderment about everyday life, and are prohibited from being overly arrogant that our view is the best, or the only one.