
Routledge Handbook of Law and Theory

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Introduction

The *and* of law and theory

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Why this volume

The *Routledge Handbook of Law and Theory* attempts to reconceptualise legal theory in a material, socially contextualised, affectively engaged and politically radical way. Its main purpose is to offer a new collective approach to the theory of law, unbound by the grand legal abstractions of pure textuality, strict normativity, universalised judgement, abstract political thinking, theoretically poor doctrinal or empirical work, and decontextualised philosophical inquiry. This volume distinguishes itself from positivist legal theory, most strands of traditional philosophy of law (e.g., Coyle, 2017; Golding and Edmundson, 2004), but also from most forms of by now more or less normalised sociolegal or critical legal theory. This is because the volume represents an attempt to escape the often superficial veneer of interdisciplinarity in legal theory, and seriously situate legal thinking in the open plane of other disciplines as well as non-disciplines (namely, boundaries between disciplines, conceptual advancements that belong to many disciplines at the same time and ethical calls for not settling in a discipline), determined by such new parameters as the post/nonhuman, the anthropocenic, the material, the ontological, the ecological and so on. To this effect, the volume engages with supradisciplinary debates on the areas of spatiality, temporality, materiality, corporeality and sensorial studies, anticipating and perhaps even shaping in this way future developments of current legal theory.

This collection does not emerge in a vacuum. There is a plethora of accounts of law that engage seriously with the above considerations. These accounts have been variously originating in gender studies (e.g., Cooper, 2013; Drakopoulou, 2009; Motha, 2007), law and space (e.g., Blomley, 2003; Delaney, 2010; Mulcahy, 2010; Dahlberg, 2012), law and time (Douglas, 2011; Lefebvre, 2008; Valverde, 2014), law and the (racialised/queer/marginalised/controlled) body (Hirvonen, 2012; Manderson, 2015; Cooper et al., 2008; Bhandar, 2012; Hanafin, 2007; Bainham et al., 2002), law and

the senses (Bently and Flynn, 1996; Mandic et al., 2013), animal studies (Braverman, 2012; Otomo and Mussawir, 2013), art and law (Goodrich, 2014; Ben-Dor, 2011; Bruncevic, 2017; Hirvonen, 2012; Young, 2013; Leiboff, 2007), law and the postcolonial (Haldar, 2007; Bhandar, 2014; Fitzpatrick, 2008), governmentality and issues of limits of resistance (Lindahl, 2013; Douzinas, 2012; Guardiola-Rivera, 2008; Zartaloudis, 2015; Leung, 2013), and law and broadly critical economics and development (Alessandrini, 2013; Macmillan, 2009; Bedford, 2010). There has also been an increased engagement with authors such as Deleuze, Foucault, Butler, Braidotti, Latour, Luhmann, Bennett, Malabou and several others who, although not originating in law, have managed to find their way in contemporary legal thinking. Of interest is the fact that a considerable amount of these studies successfully balance rigorous theoretical engagement and grounded, contextualised work. This is not always easy when serious interdisciplinary work is undertaken. The demands are high on both law and whatever other discipline(s) is involved; and while it is understood that one returns to the law and its discipline when one undertakes interdisciplinary *legal* research, the texts produced might be too demanding, theoretical and abstract, or too concrete and technical for the more settled legal readership. It is not uncommon for theoretically inclined legal research to move too deep into terminological and conceptual abstraction of, say, anthropology, art or literary studies; or for empirically inclined legal research to delve too wholeheartedly into the technicalities of, say, the pharmaceutical industry, principles of architecture, or neurology. For the above reasons, a guiding criterion for the kind of pieces commissioned for this volume is the balance of the theoretical and the broadly understood applied.

Another equally important guiding criterion, intimately connected to the exigencies of balanced interdisciplinary work, is that the work included here precipitates a collapse of the long-accepted distinction between critical legal studies on the one hand and sociolegal studies on the other.¹ It is the position of this volume (and its editor) that the above distinction (and others along the lines of ‘high theory’ versus grounded thought, concreteness versus abstraction, utopia versus pragmatism and so on) has outlived its usefulness and even relevance. Sadly, these distinctions are still weaponised in order to perpetuate obscurely motivated scholarly classifications and turf-preservations. One of the unfortunate consequences of this polarisation is the marginalisation (or at best the begrudging acceptance) of a burgeoning number of scholars in the last decade or so, who have resisted such hardlines and who have produced work that theorises practice and applies theory, if not in equal measure, at least without falling into an old-fashioned binary.²

There is little doubt that several theoretical research publications pay scant attention to how theory is translated into practice, and how, more broadly, theory can make a difference; likewise, a considerable amount of applied research is barely interested in the benefits that more extensive theorisation brings in terms of diagonal, creative and unhinged thinking. A return, however, to the distinction between critical and sociolegal would not be useful. Likewise, it is perhaps time to understand that the pertinent categorisation can no longer be ‘high’ (and therefore, what? unconnected? theological? immaterial?) and ‘low’ (dirty? *too* applied? too low-brow?) theory. There

is good legal thinking that is aware of its potential effect on reality and works on this in order to give direction to its theoretical development. And then, there is not so good legal thinking that remains unconnected to reality and deliberately ignores its own transformative potential. Unless broadly understood as contextualisation, affective engagement and personal involvement, neither empirical studies nor mere theoretical work have a monopoly on reality.

One of the main purposes of this volume is to leave these distinctions behind, and offer instead a new bridging mode of legal theoretical thinking: what the title of the book refers to as 'law and theory'.

Turning points

The context in which this volume emerges is a broader sense of urgency for a new legal theoretical approach. This is testified by the recent abundance of publications that aim to do precisely that (see, e.g., Stone et al., 2012; Banakar and Travers, 2013; Del Mar and Goodrich, 2014; Christodoulidis et al., forthcoming) and attest to a turning point in legal theory, a point of fumbling amongst various novel developments both in law and in the wider spectrum of knowledge. Even the more conservative attempts to restore, retain and reinforce the traditional boundaries of the discipline, with the usual recourse to definitions (e.g., what is law/regulation/normativity) and categorisations (e.g., doctrinal/sociolegal/theoretical research), are no longer imperious to at least some of the forays made by more adventurous theoretical enquiries. Thus, feminist legal studies, deconstruction and systems theory, to mention just a few examples, even if not yet part of the canon, tend to put an appearance in most legal theory books that aim to offer a survey (often for educational reasons) of the currents of legal thought. Needless to say, they are usually squeezed into the final chapter of the book, often for completion's sake than for their perceived actual relevance.

Such books would probably fail to recognise some of the chapters in this volume as belonging to the area of 'philosophy of law' or even the broader term 'legal theory'. It is a compliment of sorts, then, to think of this volume as a collection of 'last chapters', lines that trail off an otherwise solid structure, threads that have been left unstitched. It shows that the contributors to the volume keep up with the times that demand alternative, minoritarian thinking (a process of theorising that Bottomley and Moore in this volume find that is "working always in-between the materiality of becoming"); they are in contact with what really matters in law and beyond law; and they act in full awareness of their limited possibility to suggest supposedly solid solutions. In that sense, the contributions here, despite the frequent political utopianism, supradisciplinary material, methodological adventurousness and free-thinking legalities, are much more realistic and in touch with the world at large than are most accounts of traditional philosophy of law and quite a few of the more standard socio-legal and critical theoretical endeavours.

This is because this volume is traversed by a perhaps uncomfortable understanding: to pretend that, at this stage of planetary turning, the law and its theory can offer anything different, more solid or definitive than a space of openness and receptivity of

thought, is delusional at best and dishonest at worst. At risk of sounding apocalyptic, I would enumerate the following three factors that contribute to this planetary turning: the epoch of the Anthropocene; the renewed attention on nonhuman agents and the consequent reimagining of the human; and the current global politics of intense material instability. We are in trouble if any legal scholar is still asking ‘what’s this got to do with law?’ – a seemingly innocent yet haunting question that has clipped many a daring wing that might have been trying to think of other laws and other societies. It is time, therefore, to acknowledge what the world has to do with the law, and the law with the world. The geological epoch of the Anthropocene, which recognises human presence and anthropogenic change as geologically measurable, can be defined legally as enhanced human responsibility towards the earth (Kotzé, 2017; Philippopoulos-Mihalopoulos, 2017). This has obviously more than just an ecological dimension: it is, properly speaking, a geophilosophical opening that understands legal responsibility (and human responsibility for that matter, denuded from human suprematism and metaphysical privilege) as part of an intricate continuum between human and nonhuman, organic and inorganic, personal and political. This requires of the law a reconceptualisation, not only of the nonhuman (including the inorganic) agent and its capacity for legal action, but also a reconceptualisation of the human in ways previously unthinkable for the legal science of consciousness and legal capacity. Rather than considering these emergent agencies as merely exacerbating the current and ongoing global political, financial, religious, social and environmental instability (an instability that has become too stable to talk about crisis anymore), legal theory is now called to think imaginatively on how to include them as tools against the instability. In other words, how to use strategically such abstractions (or at least things that were so far considered abstractions for law, such as objects, animals, insects, senses, atmospheres, quanta and so on) in order to resist the ongoing instability and its potential lethal planetary results.

In this sense, this volume pushes the boundaries of legal theoretical thinking towards an even more intimate connection between the law and the world at large, and tries to conceive of the legal in its interfolding, not only with the political as it has been happening overwhelmingly in most of the more radical legal theoretical collections, but also with the corporeal, the spatiotemporal, the material and immaterial, and the ontological.

Law and theory

The decision to call this volume *Law and Theory*, and not Legal Theory, Theory of Law, Philosophy of Law, Jurisprudence, Law and Humanities, and so on, has been determined by three factors. The first is the humble realisation that we are not there yet: we, as legal scholars, have not managed to link successfully law and other disciplines in a way that would allow not only law to be guided by the findings of other disciplines (this is more or less achieved), but significantly, to also allow law and its theory to spread outside its disciplinary boundaries and be read, thought and actively used by other disciplines. The non-legal academics who read and actively engage

with legal theory are certainly a growing number, largely because of the indefatigable efforts of such publishers as Routledge's Glasshouse. Yet, they are still not on par with say, non-geographers who read geography, non-philosophers who read philosophy or even non-economists who read economics. Without serious elaboration, law is regularly substituted in the non-legal literature by a generic idea of rights, democracy or behavioural patterns – but even they come under the explicit umbrella of politics rather than law. This of course occurs for good reasons: political theory has traditionally been a natural bedfellow for legal theory. But this blurring is no longer productive. Non-legal theory misses out on a vast amount of nuances, ways of thinking and avenues of acting, if law is constantly supplanted by politics. Issues such as democracy, human rights, popular resistance or revolution, while as important today as earlier, need to be combined with a material, emplaced and embodied, yet equally theorised, understanding of the law, if we want law to be making the difference that it is capable of, especially with regards to other disciplines.

In short, law has not yet carved a suitably open supradisciplinary space for itself in which to move freely and become the object of debate by other disciplines. For this realisation, *Law and Theory* invites other disciplines by opening up to them. Thus, the second reason for the choice of title is that the theory used here is not legal theory. It might become legal theory, and in some cases has been well integrated in existing legal theory; yet so far it retains a freshness, an angularity and perhaps even certain estranging traits that still have the capacity of throwing us out of kilter. Rather than enclosing the theory within law, *Law and Theory* retains the parallelism between law on the one hand, and (legal/non-legal) theory on the other, encouraging in this way productive friction and creative mispairings.

Finally, the third reason is this astonishingly simple word *and*, and the vast openings that offers. Derrida's writing on this is instructive: "and at the beginning, there is the *and*" (Derrida, 2004: 21, my translation). This beginning (that never properly begins) tells us that the starting *and* augurs the end of origin: there has never been an origin to the word, to the law, to this very sentence. Nothing is 'the' origin since there is always something that precedes the initial *and*. We might as well be done with our (peculiarly legal) obsession for origin. Allowing the *and* to begin and further to connect makes no promises other than an attempt to put together two or more things that might not fit together. Derrida refers to *and* as both association and dissociation, conjunction and collection. When talking of Foucault's *and* that appears on the title of the latter's book *Les Mots et les Choses*,³ Derrida plays with us by saying that

between the words *and* the things, there cannot be a conjunction or a homogeneous collection, no enumeration or simple addition etc. The words and the things neither add up nor follow each other in the same series. . . . Except . . . if we consider, which is not altogether illegitimate, that the words are and the words and the things.

(2004: 22, my translation)

Or, in the case of this volume, that the law is and the law and the theory.

To this, I feel the need to add something that comes from a seemingly very different source: Deleuze's stuttering, full of glottal stops and tremolos, allows the language itself to stutter:

the disjunctions become included or inclusive, and the connections, reflexive. . . . Every word is divided, but into itself; and every word is combined, but with itself. It is as if the entire language started to roll from right to left, and to pitch backward and forward: the two stutters.

(Deleuze, 1997: 110)

This is clearly not the place for an analysis of the connection between Deleuzian stuttering and Derridean *and*, but I would like to keep one thing from all this: that the *and* of this volume's title encourages us to think at the same time of a parallelism and a continuum between law and theory. Parallelism in the sense that the two are not the same, and that space is needed for both to develop their ambit away from the other; and continuum because just as the law is and the law and the theory, in the same way the theory is and the law and the theory. And since the *and* at the beginning disrobes us of any illusion of origin, we need to start at the only place we can: "Creative stuttering is what makes language grow from the middle, like grass" (Deleuze, 1997: 111). Let's grow from the middle then, right in the middle of law and theory, at the locus of this little *and* word.

There is little point in denying that this volume is also a personal project – and not just because of the choice of title, but that too: when some years ago I had to choose my own professorial title (which was accepted, after some institutional haggling mainly attributed to uncertainty – "are you sure you do not mean professor of legal theory?"), I felt attracted to this stuttering of the *and*, and the difficulty that caused to some people (academics or not) to remember it. But it often generated questions, which I was only too happy to think along with the people who were asking, trying to understand, even I, what this choice of title meant. In a way, the same wondering mood also permeates this volume. The fact that it has been personally commissioned by Routledge has given me somewhat shameless license to experiment with the contributions, the topics and even the arrangement of the parts. My editorial touch has been mostly light, since the ideas proffered by the authors were so strong that my role was reduced to that of a feverishly enthusiastic reader. It is my conviction that the contributors in this collection have produced work that holds a radiant promise for the future of law and theory.

Parts and chapters

The division of the volume in parts is largely arbitrary, since most of the chapters deal with most or indeed all the areas. It would be absurd to expect that the spatiotemporal, the body, sense, text and matter will not be intimately connected and cross-pollinated when it comes to a new material, emplaced, embodied understanding of law and theory. What I tried to do, however, with this division and order is to tease

Notes

- * I am indebted to Routledge for the trust, to the multiple reviewers for their invaluable comments during the long process of editing of this work, to the handbook advisors Davina Cooper, Margaret Davies and Peter Goodrich, and to Maria Javed for her precious editorial and administrative assistance.
- 1 In that sense, this volume tries to move more in the direction of law and humanities, while retaining both a strong continental theoretical tradition and a materially oriented attitude to law.
- 2 As examples, the work of authors such as Perry-Kessaris, 2017; Grabham, 2016; Bottomley and Wong, 2009, and so on, has been instrumental in moving beyond such distinctions.
- 3 Which, in its English translation of Foucault (1970) 2002, lost this little abyss between its words and its things, and had it replaced it with a grand ‘order’, which apparently was the original wish of the author.

Bibliography

- Alessandrini, Donatella, ‘A Social Provisioning Employer of Last Resort: Post-Keynesianism Meets Feminist Economics’, *World Review of Political Economy*, 4, 230–254, 2013.
- Bainham, Andrew, Sclater, Shelley Day and Richards, Martin (eds), *Body Lore and Laws Essays on Law and the Human Body*, Oxford: Hart, 2002.
- Banakar, Reza and Travers, Max (eds), *Law and Social Theory*, Oxford: Hart, 2013.
- Bedford, Kate, ‘Doing Business with the Ladies: Gender, Legal Reform, and Entrepreneurship in the International Finance Corporation’, *Labor, Capital and Society*, 42, 2010.
- Ben-Dor, Oren (ed.), *Law and Art: Justice, Ethics and Aesthetics*, London: Routledge, 2011.
- Bently, Lionel and Flynn, Leo (eds), *Law and the Senses: Sensational Jurisprudence*, London: Pluto Press, 1996.
- Bhandar, Brenna, ‘Dis-assembling Legal Form: Ownership and the Racial Body’, in M. Stone, I. Wall and C. Douzinas (eds), *New Critical Legal Thinking: Law and the Political*, London: Routledge, 2012.
- Bhandar, Brenna, ‘Property, Law, and Race: Modes of Abstraction’, *UC Irvine Law Review*, 1(4), 203–218, 2014.
- Blomley, Nicholas, *Unsettling the City: Urban Land and the Politics of Property*, London: Routledge, 2003.
- Bottomley, Anne and Wong, Simone (eds), *Changing Contours of Domestic Life, Family and Law: Caring and Sharing*, Oxford: Hart Publishing, 2009.
- Braverman, Iru, *Zooland: The Institution of Captivity*, Stanford: Stanford University Press, 2012.
- Bruncevic, Merima, *Law, Art and the Commons*, London: Routledge, 2017.
- Christodoulidis, Emiliós, Dukes, Ruth and Goldoni, Marco (eds), *Research Handbook on Critical Legal Theory*, Cheltenham, UK: Edward Elgar, forthcoming 2019.
- Cooper, Davina, Grabham, Emily and Krishnadas, Jane (eds), *Law, Power and the Politics of Subjectivity: Intersectionality and Beyond*, London: Routledge, 2008.
- Cooper, Davina, *Everyday Utopias: The Conceptual Life of Promising Spaces*, Durham: Duke, 2013.
- Coyle, Sean, *Modern Jurisprudence: A Philosophical Guide*, Oxford: Hart, 2017.
- Dahlberg, Leif, *Spacing Law and Politics: The Constitution and Representation of the Juridical*, London: Routledge, 2012.
- Delaney, David, *The Spatial, the Legal and the Pragmatics of World-Making: Nomospheric Investigations*, London: Routledge, 2010.
- Deleuze, Gilles, *Essays Critical and Clinical*, trans. Daniel W. Smith and Michael A. Greco, Minneapolis: University of Minnesota Press, 1997.
- Del Mar, Maksymilian and Goodrich, Peter (eds), *Legal Theory and the Humanities*, Aldershot: Ashgate, 2014.

- Derrida, Jacques, 'Et cetera. . . (and so on, und so weiter, and so forth, et ainsi de suite, und so überall, etc.)', in Marie-Louise Mallet and Ginette Michaud (eds), *Derrida, L'Herne*, Paris: Editions de L'Herne, 2004.
- Douglas, Stacy, 'Between Mo(nu)ments: Memorialising Past, Present and Future at the District Six Museum and Constitution Hill', *Law and Critique*, 22(2), 177–187, 2011.
- Douzinas, Costas, 'Stasis Syntagma: The Names and Types of Resistance', in M. Stone, I. Wall and C. Douzinas (eds), *New Critical Legal Thinking: Law and the Political*, London: Routledge, 2012.
- Drakopoulou, Maria, 'The Ethic of Care, Female Subjectivity and Feminist Legal Scholarship' in Joanne Conaghan (ed.), *Feminist Legal Studies*, London: Routledge, 2009.
- Fitzpatrick, Peter, *Law as Resistance: Modernism, Imperialism, Legalism*, Aldershot: Ashgate, 2008.
- Foucault, Michel, *The Order of Things: An Archaeology of the Human Sciences*, unknown trans., London: Routledge, 2002.
- Golding, Martin and Edmundson, William (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Hoboken, NJ: Wiley-Blackwell, 2004.
- Goodrich, Peter, *Legal Emblems and the Art of Law: Obiter Depicta as the Vision of Governance*, Cambridge: Cambridge University Press, 2014.
- Grabham, Emily, *Brewing Legal Times: Things, Form and the Enactment of Law*, Toronto: University of Toronto Press, 2016.
- Guardiola-Rivera, Oscar, *Being Against the World: Rebellion and Constitution*, London: Routledge, 2008.
- Haldar, Piya, *Law, Orientalism and Postcolonialism: The Jurisdiction of the Lotus-Eaters*, London: Routledge, 2007.
- Hanafin, Patrick, *Conceiving Life: Reproductive Politics and the Law in Contemporary Italy*, Aldershot: Ashgate, 2007.
- Hirvonen, Ari, 'Body Politics: Normative Gaze, Carnal Intimacy and Touching Pain in Vanessa Beecroft's Art', in Leif Dahlberg (ed.), *Visualizing Law and Authority: Essays on Legal Aesthetics*, Berlin & Boston: de Gruyter, Vol 23, 141–163, 2012.
- Kotzé, Louis (ed.), *Environmental Law and Governance for the Anthropocene*, Oxford: Hart, 2017.
- Leiboff, Marett, *Creative Practice and the Law*, Rozelle NSW: Thompson, 2007.
- Lefebvre, Alexander, *The Image of Law: Deleuze, Bergson, Spinoza*, Stanford: Stanford University Press, 2008.
- Leung, Gilbert, 'Breach of the Peace or Violence and/of Silence', in Elena Loizidou (ed.), *Disobedience*, London: Routledge, 2013.
- Lindahl, Hans, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*, Oxford: Oxford University Press, 2013.
- Macmillan, Fiona, 'Development, Cultural Self-Determination, and the World Trade Organization', in Amanda Perry-Kessaris (ed.), *Law in Pursuit of Development: Principles into Practice?* London: Routledge, 2009.
- Manderson, Desmond, 'Bodies in the Water: On Reading Images More Sensibly', *Law and Literature*, 27(2), 279–293, 2015.
- Mandic, Danilo, Nirta, Caterina, Pavoni, Andrea and Philippopoulos-Mihalopoulos, Andreas (eds), *Law and the Senses Series*, www.westminster.ac.uk/westminster-law-and-theory-lab/publications/the-westminster-law-and-the-senses-series, 2013–present.
- Mol, Annemarie, *The Body Multiple: Ontology in Medical Practice*, Durham: Duke University Press, 2003.
- Moran, Les, 'Lesbian and Gay Bodies of Law', in D. Richardson and V. Seidman (eds), *Handbook of Lesbian and Gay Studies*, London: Sage, 2002.
- Motha, Stewart, 'Veiled Women and the Affect of Religion in Democracy', *Journal of Law and Society*, 34(1), 139–162, 2007.

- Mulcahy, Linda, *Legal Architecture: Justice, Due Process and the Place of Law*, London: Routledge, 2010.
- Otomo, Yoriko and Mussawir, Edward (eds), *Law and the Question of the Animal*, London: Routledge, 2013.
- Perry-Kessaris, Amanda, 'The Pop-up Museum of Legal Objects Project: An Experiment in "sociolegal design"', *Northern Ireland Legal Quarterly*, ISSN 0029-3105, 2017.
- Philippopoulos-Mihalopoulos, Andreas, 'Critical Environmental Law as Method in the Anthropocene' in A. Philippopoulos-Mihalopoulos and V. Brooks (eds), *Research Methods in Environmental Law: A Handbook*, Cheltenham: Edward Elgar, 2017.
- Stone, Matthew, Wall, Illan and Douzinas, Costas (eds), *New Critical Legal Thinking: Law and the Political*, London: Routledge, 2012.
- Valverde, Mariana, *Chronotopes of Law: Jurisdiction, Scale and Governance*, London: Routledge, 2014.
- Young, Alison, *Street Art, Public City: Law, Crime and the Urban Imagination*, London: Routledge, 2013.
- Zartaloudis, Thanos, 'Violence Without Law? On Pure Violence as a Destituent Power', in B. Moran and C. Salzani (eds), *Towards the Critique of Violence – Walter Benjamin and Giorgio Agamben*, London: Bloomsbury, 2015.