

The Materiality of What?

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A singularly influential sense of 'material worlds' has been developed by actor-network theories of science and technology, which trace out the kind of social action that emerges from encounters between 'humans' and 'non-humans'. What happens when this approach to materiality takes on the question of law? One answer is suggested by Bruno Latour's recent ethnography of law making in France's Conseil d'Etat. Interestingly, this study turns out to be not so much an actor-network theory of law as occasion to add a new dimension to the material worlds of actor-networks, namely, the communicative dimension of 'regimes of enunciation'. My hypothesis is that this distinction between the sociality of actor-networks and the logic of enunciation is problematic because it uncritically adopts the premise that there is an institution such as 'law' that has to be explained or materialized by social science, thereby diminishing the critical energy that the theory of actor-networks or of dispositifs might bring to the study of law.

For some time now, social studies of science have explored the involvement of material things in the fabrication and reproduction of scientific knowledge. This material agency has been construed or schematized in different ways, and materialities have gone by different names, but the broad effect has been to develop an extraordinarily productive critique of the assumption that scientific or technological knowledge is a product of human agency or intentionality alone, or an effect of compromise between purely human institutions or collectivities. Bruno Latour's choreographies of human and non-humans, or of hybrid actants, now pitched as an 'ecological' or 'compositionist'¹ politics, have popularized the idea that any mode of

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1 B. Latour, 'An attempt at a compositionist manifesto' (2010) 41 *New Literary History* 471–90.

analysis has to include the agency of artefacts in its dramatization of the social. This sense of the materiality of ‘material worlds’ suggests one possible script for a conversation between science studies and ‘law studies’. The fabrication of legal knowledge also involves materialities of various kinds² – space, bodily *hexis*, archives, databases or archaic loose-leaf binders,³ forensic models, files, sketches, inscriptions – which have become the focus of a number of studies. Two notable examples are Thomas Scheffer’s microsociology of the criminal trial and Cornelia Vismann’s historical studies of forensic and bureaucratic media.⁴ So the central question in this conversation might be whether law has any technologies at all, in the sense of material agencies that inflect or ‘shift’ human action, or whether, as Latour suggests, law has only discursive materialities of various kinds, and, if so, what the agency of these scriptural or semantic media actually is. Is law a ‘material world’ in the same sense as science or technology?

First, what do we mean by ‘materiality’? Most studies of material agency in science begin in the midst of things, with a close ethnography or detailed text-based reconstruction of the density, conformation, disposition, and operability of technical media or devices, and of the gestures, perspectival axes, and textual traces that unfold around these material agents or ‘non-humans’. The point is to begin with the actors themselves, these being such things as spectrometers, micropipettes, electrophoresis gels, or neuronal tissues, as much as human agents or intellects. But what really matters is not the simple materiality of these things – their mass, density, or spatial definition – but rather ‘materiality’ as the kind of agency that is afforded by, elicited from, or ascribed to them. Indeed, material agency is not an innate quality of these artefacts. Bruno Latour’s notion of hybrid actants makes it clear that agency is not inherently either human or non-human; it is an emergent effect of the composition of humans and non-humans, or of their reciprocal engagement or co-variation as moments in the unfolding of an actor-network. Things or artefacts – scientific or technical materialities – point beyond themselves to contingent processes of ‘sociality’. In other words, ‘materialities’, as the points in which the transition of these processes become visible and traceable, become ciphers for ‘materiality’ as a kind of

2 For some studies of these legal or forensic materialities, see, for example, A. Pottage, ‘Law machines: scale models, forensic materiality, and the making of modern patent law’ (2011) 41 *Social Studies of Science* 621–43; A. Riles, ‘Introduction: In response’ in *Documents: Artifacts of Modern Knowledge*, ed. A. Riles (2006) 1–38; T. Scheffer, ‘Materialities of legal proceedings’ (2004) 17 *International J. for the Semiotics of Law* 365–89; C. Vismann, *Files. Law and Media Technology* (2008); E. Weizman, ‘Forensic Architecture: Only the Criminal Can Solve the Crime’ (2010, Nov/Dec) *Radical Philosophy* 9–24.

3 See H.T. Senzel, ‘Looseleafing the Flow: An Anecdotal History of One Technology for Updating’ (2000) 44 *Am. J. of Legal History* 115–97.

4 See, respectively, T. Scheffer, *Adversarial Case-Making. An ethnography of the English Crown Court* (2011) and C. Vismann, *Medien der rechtsprechung* (2011).

dynamic condition of existence. Hence the proposition that ‘materiality is sociality’,⁵ or that ‘to rematerialize is to resocialize, to resocialize is to rematerialize’.⁶ Ultimately, ‘materiality’ becomes a signifier of contingency, of ‘*ce qui fait que tout se fait*’.⁷

Perhaps because law’s materialities – essentially, enunciations articulated into a limited range of media – are relatively unglamorous, studies have evolved a somewhat more plural, exploratory, and open-ended approach to the question of material agency. For example, Thomas Scheffer’s study of the role of inscriptions and narratives in the preparatory phases of a criminal trial mobilizes a broad range of theoretical idioms or perspectives to trace out the complexity of material agencies. Michel Foucault’s figure of the *énoncé*, as a discursive form which is material because it affords certain possibilities of ‘reinscription and transcription’,⁸ captures the material agency of stories or narratives as emergent framings of encounters in the trial process, Gilles Deleuze’s theme of ‘becoming’ informs the apprehension of files or texts as ‘relative becomings’, or as forms that are materialized temporally, and Niklas Luhmann’s theory of ‘materialities’ as structural redundancies or as correlates of observation⁹ functions as a kind of ‘control’ on other senses of materiality. This kind of approach – which invokes no big signifiers and offers no ecumenical politics – has the virtue of recognizing materiality as a technical, semiotic, mediatic, phenomenological, cybernetic, and temporal complex.¹⁰ Taken in this way, materiality is a theme with considerable critical potential, which gives us the resources to dissolve and recompose the premises or taken-for-granted categories that intervene before analysis gets under way.

This is precisely what Latour’s actor-network theory achieved in the context of science studies, by introducing artefacts – non-humans – into the

- 5 B. Latour and V. Lépinay, *L'économie, science des intérêts passionnés* (2008) 47.
- 6 B. Latour, ‘Les baleines et la forêt amazonienne. Gabriel Tarde et la cosmopolitique’ (interview with Erin Manning and Brian Massumi) (2009) 3 *Inflexions* 1–16, at 10.
- 7 H. Bergson, cited in M. Lazzarato, ‘Pour redéfinition du concept de biopolitique’ (1997), at <<http://multitudes.samizdat.net/Pour-une-redefinition-du-concept>>.
- 8 Scheffer, op. cit., n. 2, especially at p. 380:
[A story might be] employed several times during the pre-trial: in the police interview, the primary disclosure, the defence statement, the brief to counsel, the barrister’s notes, plea bargaining, etc. Every employment triggers the story’s re-appearance and modification, and hence, continuation and imposition.
See, also, generally, M. Foucault, *L’archéologie du savoir* (1972).
- 9 See, generally, N. Luhmann, *Social Systems* (1995). For systems theorists, materialities have to include their own observation; materiality only exists as a referent of communications, which necessarily presuppose an observer or an idiom of observation.
- 10 One might say the same of the approach taken by Cornelia Vismann, whose work has obvious affinities with Friedrich Kittler’s historical analysis of communications and, in particular, the medial schemata that constitute the ‘historical’ or ‘anthropological a priori’ for the existence of ‘so-called Man’ (see F. Kittler, *Gramophone, Film, Typewriter* (1990) 29 and 117, respectively), but also incorporates perspectives in everything from psychoanalytical theory to actor-network theory.

understanding of science and technology, and by introducing the energy of Deleuzian assemblages into a largely instrumentalist representation of artefacts and their politics. But, instead of folding law into the dynamism of actor-network sociality, Latour takes it as the occasion to unveil a new dimension of his compositionist politics, namely, the dimension of regimes of enunciation or modes of existence. Regimes of enunciation precipitate from the sociality of actor-networks, almost as second-order commentaries on this 'original' mode of sociality, and they unfold according to the principles of discursive engineering that hold together such things as statements, speech acts, and shifters. Although law as a regime of enunciation is supposed to emerge from the sociality of actor-networks, it is not clear by what means a regime of enunciation that construes itself as autonomous actually (re)engages with what systems theorist would call its 'environment'. Indeed, Latour's analysis of law often proceeds as though there were actually nothing more to law than a process of enunciation. The effect is to suggest that law is not a material world in the same sense as science or technology; or, perhaps, that the study of law reveals a dimension of society that should now be reintroduced into our apprehension of technoscientific sociality. My argument is that this representation of law as a regime of enunciation is too indulgent of the lawyer's sense of law, and gives too narrow a sense of the rhizomatic *dispositifs* in which legal forms or materiality are implicated. Instead of seeking to materialize or substantiate 'law' as a kind of universal category, why not mobilize materialities to develop alternative and more plausible ways of tracing out these implications?

LAW AS ENUNCIATION

Latour observes of the Conseil d'Etat that 'he [the ethnographer] had never participated in an institution that had so little concern at being studied, or that was so indifferent to external observation'.¹¹ But the indifference of the institution turned out to have a methodological virtue, which was to reveal the Conseil as 'an ideal way into the legal mode of veridiction'.¹² The ethnographer could then go on to distinguish law as a regime of enunciation or veridiction from the institution in which it was articulated:

I extracted the work of law from the institution in much the same way as a physiologist might have extracted the spinal cord of a dog, knowing perfectly well that it was not the whole animal.¹³

So, whereas the study of, for example, the Aramis project took Latour into design laboratories, manufacturing workshops, and the offices of politicians

11 B. Latour, *La fabrique du droit: Une ethnologie du Conseil d'Etat* (2002) 268.

12 *id.*, p. 271.

13 *id.*

and administrators,¹⁴ the study of law in the Conseil was focused exclusively on transactions within the chambers of the Palais-Royal. Law making was reduced to what could be observed from the margins of this ‘cold’ institution; namely, a set of transactions in gesture, speech and text, the material processes of compiling and circulating files, and some effects of architecture and posture. On this basis Latour suggests that instead of imagining law as a corpus of rules that actually has the capacity to bind people or events in the world, we should construe law as the art of binding – or concatenating – statements or communications:

The set of functions that permit one to relay, retrace, hold together, attach, suture, or stitch back together what it is in the very nature of enunciation to separate or distinguish, belong to the technique of attachment which our western tradition celebrates as law.¹⁵

How does the classic actor-network sense of materiality-sociality figure in this analysis of law as a technique of enunciation?

One answer is that the study of law makes the same turn away from the ‘society’ of sociologists as did the study of science:

if the study of science and technology compelled us to abandon the sociology of the social in favor of the sociology of association, then the analysis of law encourages us even further in that direction.¹⁶

One of the objects of Latour’s studies of science was to get away from the assumption of ‘society’, with its configurations of structures, forces, fields, or systems, as a pre-existing frame or landscape for social action, and to open up instead the idea of a sociality of association, in which networks are an emergent product of the association between actors whose competences are themselves emergent effects of association. If ‘society’ is ‘the reciprocal possession of one by many, and many by one [*la possession réciproque, sous des formes extrêmement variées, de tous par chacun*],’¹⁷ then it is not a ‘whole’ with pre-ordered ‘parts’ but a multiplicity in which the ‘whole’ circulates only as the diffracted set of representations that each monadic individual has of it. In any case, the sociality of legal enunciation is not quite like the sociality of science; it is not just another variation on the same modes of ‘associative’ materialization. In science, association is an effect of relations of irritation, inflection, surprise, or recalcitrance that emerge from the ‘technological’ engagements of humans and non-humans, and, according to Latour, law has no technologies of this kind:

14 See, generally, B. Latour, *Aramis, or the love of technology* (1996).

15 B. Latour, ‘Note brève sur l’écologie du droit saisie comme énonciation’ in *Pratiques cosmopolitiques du droit*, eds. F. Audren and L. de Sutter (2005) 34–40, at 34.

16 Latour, op. cit., n. 11, p. 280.

17 See B. Latour, ‘La possession. Une preuve par orchestre’ in *Anthologies de la possession*, ed. D. Debaise (forthcoming).

[E]ven the most humble technology – a lamp, an ashtray, a paperclip – mingles periods, places, entirely heterogeneous materials, folds them into a single black box, and prompts those who use it to act by inflecting their course of action. Law is not capable of doing this. It is the least technological [*technique*] of all forms of enunciation.¹⁸

One might counter that law is a technology in the sense that ancient rhetoric was a *techné* – an art of producing things that could as well be as not be¹⁹ – but, for Latour, this would a *techné* of the time-space of text rather than the time-space of material worlds.²⁰ Law's rhetorical or enunciative mode of articulation does not have the most basic ingredients of 'association' as revealed by the study of science.

In fact, Latour's study of law inaugurates a second phase of what has come to be presented as an 'ecological' or 'compositionist' politics. The question for this politics is 'first, to define the beings that we have to assemble so as to make them compatible with one another, and, second, to distinguish the different ways in which they are assembled'.²¹ The beings in question are defined by the sociality of actor-networks, as the association of actants, monads, humans or non-humans that is revealed by the study of technoscientific networks, but their modes of assembly involve a very different mode of agency or association, one that ultimately has to do with the of linguistic or discursive media. Latour adopts an appropriately materialist metaphor to characterize this difference:

We can agree that institutions such as Science, Religion, and Law are mingled indistinctly, rather like the veined marble panels of the Basilica di San Marco in Venice, in which no figure is clearly recognizable (indeed, the intuitions of actor-network theory were first prompted by this kind of commingling). But this does not answer the question of their truth criteria and their respective felicity conditions, because one particular regime always plays the role of a

18 Latour, op. cit., n. 11, p. 293.

19 See R. Barthes, 'L'ancienne rhétorique' (1970) 16 *Communications* 172–223.

20 B. Latour, 'Where are the missing masses? The sociology of a few mundane artifacts' in *Shaping Technology/Building Society: Studies in Sociotechnical Change*, eds. W.E. Bijker and J. Law (1992) 225–58, at 239:

Engineers constantly shift out characters in other spaces and other times, devise positions for human and nonhuman users, break down competences that they then redistribute to many different actors, and build complicated narrative programs and subprograms that are evaluated and judged by their ability to stave off antiprograms. . . . Instead of sending the listener of a story into a different world, the technical shifting-out inscribes the words into another matter.

It might be, however, that the space-time of text is the basic archetype; Latour's studies of the scientific laboratory were primarily about inscriptions, about differences and tensions between texts and inscriptions, or about the 'cult of the inscription' in the laboratory (see H. Schmigden, 'Die Materialität der Dinge? B. Latour und die Wissenschaftsgeschichte' in *Bruno Latours Kollektive: Kontroversen zur Entgrenzung des Sozialien*, eds. G. Kneer, M. Schroer, and E. Shüttpletz (2008) 15–46).

21 Latour, op. cit., n. 15, p. 34.

dominant [in the musical sense], which is why I say that in the Conseil d'Etat the decision between what is true and what is false is made legally, in a way that is obviously not religious, scientific, technological or political.²²

The original sociality of the actor-network is essentially unpatterned; institutions such as law or science exist, but their configuration and extension are qualities that depend on how they are traced out, either by those involved in these institutions or by more panoptic actor-network theorists. Modes of existence emerge from within this marbled sociality as techniques of enunciation that organize the 'rest' of sociality into patterns that are made according to the particular 'truth criteria' or modes of attention that are articulated by each. Institutions run into each other confusedly; modes of enunciation stand out in clear relief. Law as it emerges from the study of the Conseil is just such a 'mode of existence', or 'mode of enunciation' and, like other modes of existence, it comes into being by detaching or differentiating itself from within the 'sociality' of assemblages, hybridizing inflections, delegations, and human/non-human associations.

Law is in every sense the most exemplary 'mode of enunciation'. At least since the advent of legal positivism, law has been cast as an institution, regime, or system that exists only as an effect of self-description; that is, law comes into being paradoxically, as an effect of the identification of certain enunciations or transactions as 'legal' by reference to a criterion that is posited by those enunciations or transactions themselves. And Latour presumes precisely this effect in framing his ethnographic observation of action in the Conseil d'Etat; the identification of certain communicative, gestural, or material transactions as the elements of a 'legal' regime of enunciation depended on ability of the ethnographer to rejoin, and in some sense to reaffirm, the internal point of view of these communications, which all invoked 'Law' as their ultimate addressee.²³ Already, then, law is a communicative or enunciative artefact, and one implication of its constitution through self-description is that it precipitates from the material worlds of actor-network sociality by translating, reconstructing, or re-engineering the sociality of actor-networks into the dynamics of communicative or enunciative action.²⁴ In one sense, this affirms Latour's point that just as the fabrication of science cannot be explained by reference to 'society', nor can the fabrication of law; after all, 'there is more "society" in law than there is in the society that is supposed to explain the making and operation of law'.²⁵

22 *id.*, pp. 34–5.

23 For a different ethnographic construction of an aspect of lawmaking, see A. Riles, *Collateral Knowledge. Legal Reasoning in the Global Financial Markets* (2011).

24 Hence the observation that, rather than resolving disputes, legal procedures actually 'expropriate' the conflict and its parties by parasitizing their 'energy' (see G. Teubner, 'Alienating Justice: On the surplus value of the twelfth camel' in *Law's New Boundaries: The consequences of legal autopoiesis*, eds. J. Pribán and D. Nelken (2001) 21–44).

25 Latour, *op. cit.*, n. 11, p. 278, referring to Yan Thomas's studies of Roman law.

But the analogy between science and law obscures a quite radical change in the theoretical agenda. Law makes the point so compellingly because autonomy is implicitly or explicitly asserted in everything that lawyers themselves say when they perform the work of law. And, by contrast with science, to know what law is, one has to join this ‘internal point of view’ rather than simply observe what lawyers do. The ‘society’ that exists in or for law – that is to say, the semantic or phenomenal content of law’s society – is an effect of processes of materialization, inflection, or detour (to borrow some Latourian terms) that are very different from those of the techno-scientific actor-network. We switch from the space-time of materialities in the sense of actor-network theory into the space-time of speech acts, statements, or *énoncés*, and hence from one kind of medium to another.²⁶ So, if law is taken to be a distinct mode of enunciation, how is enunciation articulated; or, more precisely, what is its materiality?

MATERIAL WORDS

The continuity or connectivity of law as a regime of enunciation presupposes the existence of what Latour calls a code – *une clef de lecture* – which indicates that one is dealing with a legal enunciation:

Here, I claim to have given a possible explanation for the tautology that is common to all definitions of law, a tautology that strikes both specialists and outsiders; the tautology arises because one cannot understand any particular act of the institution of law unless one adds the following code [*clef de lecture*]: ‘what you are about to read or hear is Law rather than fiction, or politics, etc ...’.²⁷

Law is defined not by the propositional content of enunciations but by a marker that qualifies a given enunciation as an element of law and not of some other mode of existence (such as politics, economics, or religion).²⁸ The distinction between law as an institution and law as a mode of enunciation is premised on this distinction between content and code. Codes of enunciation structure the contingency of communicative processes; precisely because it is an operation of transmission, enunciation necessarily creates a split between utterance (the act of enunciation) and information (the content of enunciations). And, if ‘it is in the nature of enunciation to send or transmit, and so to break the connection between speaker and what is said’,²⁹ then the (re)connecting of information to utterance so as to create

26 Presumably, law might also exist as an institution, and hence as an actor-network, but Latour’s representation of law as a mode of enunciation, or as a mode of binding or concatenating statements, makes it difficult to see how one would retrace one’s steps back to this other existence.

27 Latour, *op. cit.*, n. 15, p. 36.

28 For the case of politics, see Latour, *op. cit.*, n. 6, p. 10.

29 Latour, *op. cit.*, n. 15, p. 37.

meaning is necessarily an effect of how that (re)connection is made, and, by implication, meaning is contingent on the observer or addressee who makes the connection. Statements have to be ascribed or imputed to speakers, and ascription is itself a selective or contingent operation. So how is this process of contingent selection – the art of connecting enunciations – figured in Latour’s reconstruction of law? How, precisely, does a *clef de lecture* function to differentiate legal enunciations from political, economic, or religious modes of existence?

Latour mobilizes another materialist metaphor to explain what distinguishes ‘law’ from other regimes of enunciation (in this case, politics):

Imagine a game of LEGO in which the traditional attachment by means of four studs is replaced by attachments of many different kinds. Imagine then that each of these attachments makes further attachments either easier or more difficult. Now assume that in this somewhat peculiar game of LEGO some blocks are connected by means of a LAW connector and others by means of a POL connector. The blocks themselves are of different shapes. Give the game to some kids to play with. They will produce forms – institutions – which will have longer or shorter segments which we can call LAW because they are connected by means of a LAW attachment, even though a given block might also, in another segment, be joined by means of a POL attachment. Of the multicolored assemblage that is produced, one might say, depending on the intensity of the connections, ‘that, more or less, is law’, and ‘that, more or less, is politics’. This will never be entirely true, because the blocks will be of different shapes and colors, but at the same time it will not be entirely wrong, because the ‘dominant’, to adapt a musical term, will indeed be given by a particular kind of attachment, perturbation, or contamination.³⁰

Although the last words of this excerpt – ‘perturbation, or contamination’ – evoke the contingent sociality of actor-network theory, the metaphor materializes the contingencies of enunciation at precisely the point at which one might expect a theoretical account of how that contingent sociality plays out in the medium of communication or enunciation.

The difficulties of this materialist version can be brought out by comparing Latour’s take on enunciation with Niklas Luhmann’s theory of the communicative media and transactions that maintain social systems. Latour’s compositionist politics is constitutionally allergic to Luhmann’s theory of autopoietic systems, perhaps because of the abstract meta-language in which it is presented, and perhaps because materialities, or the actors themselves, are so decisively eclipsed by the existence that they come to have in the schematic horizon of the observer. Although much of what Latour has to say about the existence of law in society is entirely consistent with Luhmann’s theory of law as a social system,³¹ Latour rejects the

30 *id.*, p. 40.

31 See, generally, N. Luhmann, *Law as a Social System* (2007) and G. Teubner, ‘Global Bukowina: Legal pluralism in the world society’ in *Global Law Without a State*, ed. G. Teubner (1997) 3–28.

systems-theoretical perspective on law.³² Confusing Luhmann's social 'systems' with Pierre Bourdieu's 'fields',³³ Latour observes that the notion of differentiated social systems is even less plausible in the case of law than in the case of science because in the case of law one does not have 'the pretext of the clear line of demarcation made by walls of the laboratory and the white coats of laboratory workers'.³⁴ The conclusion is that Luhmann's theory overstates the premise of autonomy: '[L]aw is autonomous in relation to social because it is a means of producing the social, of articulating and contextualizing it, [but] it has no specific domain or territory'.³⁵ But Luhmann's theory of law – and of social systems more generally – says almost exactly that, and, more importantly, it introduces into the explanation of law as a communicative system or 'regime of enunciation' precisely the kind of contingent or emergent action that is found in actor-networks and that is suspended by the materialist metaphor of communication as a construction of LEGO blocks.

For Luhmann, to the extent that law exists, it exists virtually, as 'know-how' that is actualized, or communicated into existence, only when and for so long as it is used as a code or medium of communication. The material and other premises of law – archives, standardized documents, semantic forms – take effect as 'law' through this process of actualization. Contrary to what Latour suggests, law is not construed as a quasi-spatial territory or a bounded domain. Systems theory is not about drawing boundaries around systemic territories; it is about making distinctions, and distinctions are not boundaries but differences made by observers, each of whom schematizes the space and time within which 'boundaries' are drawn. Second, to trace out the functioning of law, one needs to observe the reciprocal modes of coupling and co-production by which the codes, media, and materialities of law are implicated in a broader sociality, and which condition the communication of 'law'.

Luhmann's systems theory resolves the process of communication into three contingent terms or selections: information, utterance, and understanding. The values of each of these terms emerge from their articulation in communication as a mode of double contingency – crudely, the process of 'seeing oneself being seen', to use a formula that is somewhat too Hegelian. From the perspective of the addressee, the 'meaning' of an enunciation in Latour's sense is an effect of how the two selections of utterance and information are spliced together: as speech act theory tells us, the informational content of a statement depends on who utters it, and how. From the

32 For a more sophisticated exploration of possible convergences between actor-network theory and systems theory, see G. Teubner, 'Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law' (2006) 33 *J. of Law and Society* 497–521.

33 Latour, *op. cit.*, n. 11, pp 282–3, fn. 47.

34 *id.*, p. 283.

35 *id.*

perspective of the speaker, the question is how to anticipate how the addressee will splice utterance and information together, and to how to modulate those terms accordingly. Luhmann's formula of double contingency has some resonances with Latour's sketch of the disruptive effects of enunciation, but it is the premise of a very different, and much more complex, account of how contingencies of communication or enunciation are patterned into differentiated regimes such as 'law'. To focus on the central figure in Latour's account of law, the premise of double contingency leads to a very different sense of how communication is 'coded'.

From the perspective of systems theory, Latour's characterization of the *clef de lecture* that marks legal enunciations is too one-dimensional. It misses a crucial point about the practical operation of law. The legal quality of enunciations is not given in advance; it is always an effect of ascription. In law, the juridicality or non-juridicality of any event is always in question, so the first and most basic technique of law is to decide on the difference between legal and non-legal. The basic technique of law is not to connect ready-made blocks of legal enunciation into chains but to produce legal enunciations by qualifying events or enunciations as legal in the first place. Law makes its own 'building blocks' and connections between blocks. Events or enunciations that have not so far been construed as legal might suddenly, depending on how the distinction is drawn, be qualified as legal: one might find that one has made a contract by acts that had not so far been taken to manifest the requisite intention; the 'facts' of a case might be fictionalized so as to ascribe legal effect to a 'non-juridical' act or event.

To account for this basic feature of law, Latour's *clef de lecture* would have to be reconstructed as a binary code rather than univocal marker. The code that identifies legal enunciations is not attached to enunciations in the quasi-material sense suggested by Latour's Lego metaphor; it is only one term of a distinction that produces 'law' by distinguishing it from what is qualified as 'non-law'. Given that distinctions are not inscribed in the world, but are inflicted upon it by observers, law exists only as the competence or know-how that animates its founding distinction. And legal know-how is not an attribute of human actors; it is immanent in a medium which prefigures any of its users, and which has vastly more complexity or potentiality than any participant could possibly grasp.³⁶ So law's *clef de lecture* cannot exist as a quasi-material form, but only as a disembodied, dematerialized, and 'non-human' structure that is sustained by the recursive operations of a system which, in the old adage of systems theorists, 'produces itself from its own operations'.

Presumably, Latour would agree that *clefs de lecture* are not inherent in propositions but have to be ascribed to them. Propositions have to be

36 On the shift from materiality to media, see J. Clam, *Trajectoires de l'immatériel. Contribution à une théorie de la valeur et de sa dématérialisation* (2004).

'coded'. But if codes are binary rather than singular, and if the process of coding presupposes the observer who distinguishes law from non-law and the medial competences mobilized by that observer, then we need to draw on something other than Latour's sense of sociality as inflection to characterize the process of coding. The associative logic of networks has to be transformed into, or complemented by, an account of the communicative logic of enunciation.

All of this will be familiar to theorists of law. The point of the contrast between 'modes of existence' and 'systems' is not to argue for one or other of these reconstructions of law, but to point out that Luhmann's theory of law offers the most astute and consistent answers to the questions that are latent in Latour's sketch of law as a mode of enunciation. Or, to put it the other way around, we can see in Luhmann's systems theory the kind of theoretical moves that actor-network theory would have to make if it were to develop a theory of law as the paradigm of a mode of enunciation. Quite simply, systems theory proposes the most plausible realization of Latour's proposition that 'law juridifies all of society, which it apprehends as a totality in its own particular way'.³⁷ If we are to materialize law as a communicative system or regime of enunciation, then systems theory offers the most plausible account of materiality as momentum; or, more precisely, as an effect of 'time-binding', in which each communication binds time by defining the horizon against which the succeeding communication proceeds.³⁸ But, keeping in mind the theme of 'material worlds', the real question is whether we should mobilize the rich conceptual potential of theoretical reflections on materiality simply to give substance to the assumption that there such a thing as 'law'. Why not instead recruit the potentiality of 'materiality' to imagine material worlds that are not always already configured into law, science, politics, and so on, but which are, in something like the original sense of actor-network theory, as confused as the veining of the marbles of St Mark's Basilica, and which call for more productive and more adequate modes of analysis?

MATERIALIZING LAW

Why is the premise or assumption of 'law' so problematic? For decades, if not longer, the purpose of 'critical legal studies' or 'socio-legal studies' of diverse persuasions has been to tell us something more or different about the

37 Latour, *op. cit.*, n. 11, p. 281.

38 One might ask, from the perspective of Kittler's analysis of media technologies, whether systems theory can really observe 'the communication of communications': see G. Winthrop-Young, 'Silicon sociology, or, two kings on Hegel's throne? Kittler, Luhmann, and the posthuman merger of German media theory' (2000) 13 *Yale J. of Criticism* 391–420.

social phenomenon of ‘law’, and these diverse lines of inquiry all presume one thing – the existence of ‘law’ as an instance or phenomenon whose existence is too evident to require justification. The effect of successive theoretical, sociological, and anthropological investigations and critiques has been to expand law beyond the classic scenes of legislation and adjudication, ‘beyond the state’, and into the texture of a social life that is thereby anatomized (*sub silentio*) in such a way as to make it the medium (or, more accurately, the ‘context’) of this expanding and ever-ramifying instance. Law has been traced into the plane of the unconscious, materialized in architectural forms, cast as the expression of ‘cultures’ of diverse or plural kinds, constituted as the correlate of some negated ‘other’, and generally replicated into the social by means of theoretical devices such as analogy or change of scale, etymology or genealogy, and various modes of differentiation and coupling. This process of abstracting laws into ‘law’, or of absorbing legal forms into their animating contexts, has been taken as the hallmark of progressive or critical thought. These moves have turned ‘law’ into an abstract and generalized social instance, or a question that exists even before theoretical reflection gets under way. Both Latour and Luhmann radicalize the question of law in ways that call into question the old ‘socio-legal’ or ‘law and society’ agenda; for both, there is indeed more society in law than there is in the society that is invoked by studies in ‘law and society’. Ironically, however, the effect is actually a retrenchment of the premise that law exists as a singular social instance that it is the business of the theorist to explain.³⁹

So we have two contrasted strategies for realizing law as a social instance. One is based on Luhmann’s sense of what it is for a theory to be well made; a theory has to be adequate to the complexity of contemporary society, to account for the paradoxical and emergent nature of social beings and social processes, and have an architecture that is thoroughly self-reflexive. The other is informed by Latour’s sense of what it means for the ingredients of sociality to be ‘well composed’, or ‘put together while retaining their heterogeneity’,⁴⁰ which implies a somewhat different sense of reflexivity. Any theory of (say) law or science should be able to engage the attention of the actors themselves, and to do so in such a way as to encourage them to perceive the institution in which they are involved as one of many ‘modes of existence’, and hence to perceive themselves as participants in a world that has to be ‘composed’ in the style of Latour’s ecological politics. These very different takes on materiality converge almost inevitably on the instance of ‘law’. What happens if we reverse the direction of this movement, and instead of presuming ‘law’, and asking how materiality should be configured

39 Latour (op. cit., n. 11, p. 282) observes that Luhmann starts from ‘the most reductive and often the most ethereal definition that the domain of law applies to itself’ but, in a sense, the same is true of his own theory of law as a mode of enunciation.

40 Latour, op. cit., n. 1.

to make good on that presumption, why not begin with the extensive potentialities of ‘materiality’ and ask what becomes of ‘law’ if we try to hold those potentialities open? Why strain so hard to materialize law?

Precisely because it proposes such an astute theory of contemporary law, systems theory also offers the best illustration of the retrenchment of ‘law’ as a conceptual premise. Systems theory has explored modes of ‘law-making’ that are considerably more varied and complex than the mode of enunciation that Latour draws out of the Conseil d’Etat. In particular, it has paid close attention to configurations in which one can see the ‘polycontextual’ logic of law in society. The central example is transnational law, which emerges from the association of thoroughly heterogeneous actors: states, corporations, NGOs, international organizations, indigenous peoples, and so on. These actors are not organized by reference to the warrants of the old juridical schema of sovereignty as hierarchy or center-periphery: territory, constitution, state. Rather, as in an actor-network, the competences and attributes are not ordered by any presiding instance but emerge (paradoxically) from the ways that particular transnational regimes organize themselves. And ‘law-making’ of this kind is necessarily co-produced with other kinds of social transaction: economic, political, scientific, and so on.⁴¹ From this perspective, transnational legal ordering reveals a truth about law that is mystified by the self-representation of institutions such as the Conseil d’Etat. Yet, in dealing with the complexity of this mode of legal ordering, systems theory artfully reconstructs law from the diffracted elements of transnational law; law resurges wherever actors employ the distinction between legal and non-legal (enunciations). However complex any given articulation of law in society might be, the theorist will be able to peel away a diagram tracing out the specifically legal dimension of transactions within this articulation and hold that diagram up to anyone who claims that transnational regimes are just about economic power or ‘social norms’. Ultimately, what is really ‘radical’ about this theory is its capacity to rediscover or reconstruct law in circumstances in which it might seem to have disappeared.

What if one were to reverse the trajectory of the inquiry, and instead of asking how the elements of the conceptual assemblage of ‘materiality’ should be mobilized to realize law as a social instance, ask whether a reflection on materiality might not actually lead to the dissolution of law as a social instance? At the risk of being taken as a reactionary Latourian, this is precisely what I should like to propose. My starting point is the old kinship that Latourian actor-network theory had with Foucault’s conception of the *dispositif*.⁴² The fullest definition of a *dispositif* as an apparatus, assemblage, arrangement, network, or device appears in an interview given by Foucault in 1977, shortly after the publication of the *History of Sexuality*:

41 The classic text is Teubner, ‘Global Bukowina’ (op. cit., n. 31).

42 For a brief overview, see J.-S. Beuscart and A. Peerbaye, ‘Histoires de dispositifs’ in (2006) 2 *Terrains & Travaux* 3–15.

[F]irst, an essentially heterogeneous ensemble, composed of discourses, institutions, architectural formations, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral, and philanthropic arguments; these are the elements of a *dispositif* – in short, what is said as much as what is unsaid [*du dit aussi bien que du non-dit*]. The *dispositif* itself is the network that might be established between these elements. Second, what I want to identify in a *dispositif* is precisely the nature of the linkage that exists between these heterogeneous elements . . . These elements, whether they are discursive or non-discursive, are linked by something like a game, with changes of position or modifications of functions that can themselves be very different. Third, by *dispositif* I mean a kind of formation which has in a particular historical moment been given the important function of addressing some kind of some urgent situation. Therefore, a *dispositif* has a predominantly strategic function, [which involves] a rational and concerted intervention in relations of force, either so as to develop them in a particular direction or so as to block them, stabilize them, or exploit them.⁴³

As in the case of Latour's actor-networks, *dispositifs* are 'assemblages [that] are made up of nothing other than what they assemble';⁴⁴ strategic or tactical modes of actualizing and conjoining the elements of a *dispositif* are emergent articulations that are conditioned by the very elements that they purport to organize.

What becomes of 'law' in the configuration of a *dispositif*-network? First, instead of presuming 'law', one would begin with a set of raw elements: texts, institutions, statements, gestures, architectural and material forms, formalized roles and competences, and self-descriptions (people often characterize themselves as practitioners or participants in 'law'). And, instead of abstracting to a field, medium, code or rationality in which these elements cohere into 'law', one would explore the ways in which elements are assembled into *dispositifs*. Most theories of law focus on documents (or their analogues) and the things that lawyers do with or around documents and texts: drafting, negotiation, research, formalization, interpretation, archiving, citation, argumentation, and so on. Indeed, the question of materiality is interesting to socio-legal scholars precisely because it suggests ways of reconstructing these basic operations. What is questionable is whether we need to continue integrating these operations into law as an instance, institution, or 'mode of existence'. The reference to Foucault's *dispositifs* is apposite because their object was to 'replace what Foucault defined in critical terms as universals'; namely, 'general categories or rational entities such as the state, sovereignty, law, or power'.⁴⁵ If we think of the most celebrated of Foucault's *dispositifs* – discipline, sexuality, governmentality – then each of these incorporated or metabolized law, but they did so precisely by treating texts, practices, visibilities, and self-descriptions as elements that derived their sense and effect from their articulation in each given *dispositif*. The

43 M. Foucault, 'Le jeu de Michel Foucault' in *Dits et Ecrits*, Vol. iii (1994) 299.

44 B. Latour, *We Have Never Been Modern* (1993) 138.

45 G. Agamben, *What is an Apparatus?* (2009) 23.

elements that we conventionally (or radically) materialize as ‘law’ were instead materialized in *dispositifs* that were inventive and yet recognizable.

Systems theorists will point out that *dispositifs* are arbitrary because their makers can give no account of how they come into being or are stabilized, other than by invoking some immanent principle of ‘power’, ‘strategy’, or, perhaps, ‘materiality’. Those who share Latour’s view that theory should instead be reflexive in the mode of ‘diplomacy’ – one has to engage the actors themselves rather losing them in a rarified meta-language – will say that the figure of the *dispositif* is too complex. And, given the somewhat disappointing results of the generalization of the notion of the ‘assemblage’ in the social sciences, one might ask whether the resurrection of Foucault’s *dispositifs* would really be so productive. The answer is that it depends on how these *dispositifs* are made. It is true that the figure is somewhat indeterminate; as Giorgio Agamben remarks, any one *dispositif* can be resolved into many, depending on the order of the analysis or the interests of the observer, and the direction of scaling can be reversed. It is also true that there is no ready-made theoretical formula for a good *dispositif*; Le Corbusier once observed that buildings were not things that one talked about, but things that one walked through (*‘on ne discourte pas sur un bâtiment, on le parcourt’*). One might say something similar of Foucault’s *dispositifs*. They are artefacts whose conceptuality is expressed in the mode and effects of their assembly, and the singular art of Foucault was to invent figures that were both radically new and yet seemingly already ‘there’, potentially, in our cultural-theoretical resources. The challenge for present-day interpreters is to invent *dispositifs* of their own, which would articulate the elements and techniques that are so often abstracted into ‘law’ into assemblages that are as insightful and productive as ‘imprisonment’ or ‘sexuality’. And who is to say that, even if we imagine theory as a kind of diplomatic initiative, lawyers themselves might not be more engaged by these yet-to-be-invented *dispositifs* than by some reconstitution of ‘law’ as rhetorical *techné*?

* * *

Latour might have concluded from his ethnography of law making that the Conseil was the wrong place to begin in developing an actor-network cartography of law; or, alternatively, that there is less to law than social theories of law, or law itself, would suggest. Instead, he takes up the lawyer’s sense of law making as a process of connecting enunciations and turns it into the paradigm of a novel dimension of sociality. So an almost pre-theoretical commitment to law trumps profound differences in theoretical architecture or strategy. In questioning this commitment, my point is not that we should go ‘back to Foucault’ in approaching the question of law, science, and ‘material worlds’. Rather, it is that Foucault develops the only intensive treatment of law that does not presuppose ‘law’ as a basic social category. And, of themselves, in their very making or materiality, Foucault’s

dispositifs expose the contingency of that presupposition. A properly Foucauldian reflection on law and ‘material worlds’ might well unfold by way of a rich genealogy of ‘law’ as a social-scientific category, leading into an exploration of its retrenchment in the materiality of institutional and governmental *dispositifs*. My suggestion in making this more modest contrast between two takes on law and materiality is simply that we should begin with materiality rather than ‘law’; and, in so doing, we should recognize that the vicissitudes of ‘materiality’ dissolve the instances – in this case ‘law’ – that they are supposed to constitute.

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