Sequences on Law and the Body

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Abstract :

Sequences on Law and the Body sketches an account of discursive and material critical legal writings on law and the body. It begins with the discursive and proceeds to the material sequence. This ordering is not meant to designate a hierarchy of accounts in the sense of x sequence being more radical or valuable than the other. Nor does this ordering intend to propose a historical progressive narrative. Such a suggestion would have been preposterous and untrue, as research in both of these sequences is still undergoing. Instead what you witness is an attempt to delineate in a meaningful manner the abundance of work within this field of legal research.

Bio:

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I**ndex:** critical legal studies, discursive, material, Foucault, Butler, Cavarero, Deleuze, Malabou.

I. Introduction

I begin with an apology. Being asked to contribute to the *Routledge Handbook on Law & Theory* is both an honour and a daunting prospect. The contributor has to make decisions on the organisation of the chapter, decisions over which work would be cited and even propose possible future oriented directions on the specific topic asked to contribute. An apology means a statement in defence of something said but also an account of something. So when I say that I begin with an apology, I use apology here in the second sense of the word, in terms of giving an account, and in this instance an account of how the body has been taken up in critical legal discourse.

This chapter sketches an account of discursive and material critical legal writings on law and the body. It begins with the discursive and proceeds to the material

sequence. This ordering is not meant to designate a hierarchy of accounts in the sense of x sequence being more radical or valuable than the other.[1] Nor does this ordering intend to propose a historical progressive narrative. Such a suggestion would have been preposterous and untrue as research in both sequences is still undergoing. Instead what you witness is an attempt to delineate in a meaningful manner the abundance of work within this field of legal research. Andreas Philippopoulos-Mihalopoulos has recently (2016) argued that the discursive and the material bleed into each other. He does so by alerting us to the existence of material metaphors in law. These metaphors 'are more than mere figures of speech' (Philippopoulos–Mihalopoulos, 20016: 46) which if attention is given to the way they occupy and affect our spatial and physical legal worlds could potentially open us to a 'new conceptualisation of justice' (Philippopoulos–Mihalopoulos, 2016: 46). If, as he suggests, these metaphors bridge the gap between the linguistic and the material, then we can argue that they even challenge the very formulation of an account on law and the body that I am offering here. What is the point we may ask of talking about discursive and material sequences, if language and metaphors are material? Whilst Philippopoulos-Mihalopoulos's invitation to see the bleeding of the material into the discursive is an exciting possibility, I find myself nevertheless worrisome of this invitation. I worry that by collapsing the discursive with the material we may end up having a theoretical hierarchy that privileges material accounts of the body over discursive ones (despite this of course not being Philippopoulos-Mihalopoulos's intention). Instead, as I have suggested in earlier writing (Loizidou, 2008), such a danger may be averted if we understand these sequences of law and the body as being complementary to each other. This complementarity may give us a more multifaceted understanding of the limits of legal justice. I invite you to read these two sequences in this way in the hope that they will provoke different sequences in the future.

Just a note on the term *sequences*. Roland Barthes (1977) in his essay 'Rhetoric of the Image', suggests that when an audience or a reader is bombarded with a plethora of textual information then the reader will attempt to put some order onto it, to create an absolute meaning. Sequences facilitate this process of meaning creation. While I use here the word *sequence* in Barthes's sense, I am not by any means suggesting that a totalising meaning of how we understand scholarship on law and the body can be achieved through these sequences. We should see these sequences as facilitating the creation of new or indeed the destruction of existing sequences.

[1]It is true that in the fields of political theory, feminism and philosophy these two sequences have been pitted against each other. A prime example is Nancy Fraser's attack on Judith Butler's work. Judith Butler's discursive accounts of the body were criticized by Fraser for not accounting for material accounts on the body see, Fraser, N. (March-April, 1998) "Heterosexism, Misrecognition and Capitalism: A Response to Judith Butler", *New Left Review,* I:228 pp.140-149; Butler, J. (January-February, 1998), "Merely Cultural", *New Left Review,* I:227 pp. 33-44.

II. Law's body

Critical writings engage with the issue of law and the body from two angles. One angle is critical of positivist accounts of law that depict law as a machine that consistently and fairly applies in order to reach justice. Law, they suggest instead, is like a body (symbolic and physical). The other critical angle focuses on the ways in which law inscribes and affects our bodies. This chapter focuses mainly on the second angle, in which law has been related to the body. Nevertheless I think it is important to understand how these two angles relate to each other.

Law has *no one* physical body.[2] It has instead multiple physical bodies. The physical body of the law comes in the shape of its judges,[3] clerks, lawyers, claimants, complainants, its accused, its jury, its security officers, and police force,[4] and so on. The multiple bodies of the law work continuously to deliver law's primary good, the good of justice. Justice is not of course always delivered, and most of the times remains an imaginary or utopian goal for law. Most of everyday law practices involve making cost-effective decisions (plea bargaining), and trying to avoid its most important practice, that of the trial. So law ultimately is an institution with rituals and practices, and a body of laws. Its body of law or corpus, is made visible in its dusty case law books (Goodrich, 1990) or in their electronic form. Through its multiple bodies, law endeavours to *order* around, command, and regulate our bodies, the bodies of citizens, denizens, animals (see the regulation of pit-bulls in the UK, *Dangerous Dogs Act 1991*)[5] and those who are yet to fall under its jurisdictions (e.g., unborn children). Law commands us to use or enjoy our bodies in particular ways or adjudicates on the way in which we use our and enjoy our bodies. Nevertheless, this ordering or commandment, even the adjudication, has not secured our full agreement. In such cases of disagreement we agonise individually or together to challenge its commands (e.g., women's voting rights). This agonism has produced a series of critical

[2] I am fully aware of the argument that law travels or is transmitted through the body of the sovereign, which as we know from Ernst Kantorowitz (1997) has two bodies, a natural body and body political. The King or by extension the crown symbolises also the law and by extension we may suggest that this dual body is transferred to the institution of law. Goodrich, in *Languages of Law* (1990: 53-110) makes this point. Recently, the philosopher Catherine Malabou pointed out that the image of the split body is also present in philosophy. More precisely she argued that the split between the natural and the political body creates a hierarchy which puts the political body at the top. Her work attempts to bring together or to show that this split can't be sustained given the advances in sciences that demonstrate that even the biological has its own body political or symbolic body. (Malabou, 2015: 35-46). Malabou therefore makes us aware of the multiple bodies that exist in an attempt to break the split between the political and physical body. Following Malabou, I want to suggest that instead of seeing law being divided between two bodies, imagining that there are monolithic legal movements, we can recognise it as having multiple natural and symbolic bodies. I should say that Kantarowitz's political body is a symbolic body.

[3] Some research has been done on the judicial body - see for example, Moran, 2013; Goodrich, 2015.

[4] Some work has been done on police and their gender, racial constitution, see for example, Reiner, (2010).

[5] For an analysis of the regulation of dogs see Dyan, (2015. For more general discussions of law and the animals see Otomo and Mussawir (2013)

scholarship since the late 1980s in the field of law and the body emanating from legal scholars in feminism, gay and lesbian and queer studies, and race theory, medical law and many other areas.[6] They offered a sustained critique to the ways in which the law ordered and regulated our bodies by introducing the body into legal scholarship, elucidating on the ways in which, gendered, racialised, sexual minorities, working class, disabled and aging subjects have been either discriminated or treated as abject by the law. It is important to note what this scholarship is reacting against. It is reacting not only against the restricting ways in which law addresses the body, but also against the theoretical perspectives that posit law as a mechanical operation that uses reason to deliver judgments and justice bereft of any prejudices. It is a critique on the positivist and analytical accounts of law that we are accustomed through the writings of Kelsen, Austin, Hart, Nozick and others.[7] The present chapter tracks this critical scholarship that draws from a variety of disciplines (such as philosophy, sociology, cultural studies, literature, psychoanalysis, race theory, post-colonialism and others) and organises it around two sequences, namely discursive and material, approaches on law and the body. It will be impossible to cite or, engage with all the writings of legal scholars on the body, therefore the work cited here is only indicative of these sequences and non exhaustive.

As I suggested above, law has been presented for years as having *no* body. Nevertheless, there has been a significant number of work that, in its aim to critique positivist accounts of law, ends up giving the law a body. Peter Goodrich has systematically demonstrated in legal theory that law represses and detaches itself from the body. As he suggests in *Languages of Law* (1990), this process of repression and detachment paints the institution of law- common law- as a machine. While the mechanistic and rational image of law is meant to give the impression that it delivers justice to all fairly and equally, Goodrich suggests that the opposite takes place. Law instead imposes itself onto life, our lives, while being equally disinterested in engaging with our experiences, needs and desires. The only interest law has is to superimpose itself upon life '…so as to render it homogeneous, a reproduction, an image in the glass' (Goodrich, 1990: viii).

> In attacking the legitimacy of desire and particularly in circumscribing the domains and occasions of bodily pleasure, the common law embarked upon a rigorous and unrelenting attack upon the history of everyday life. The evident aversion of the lawyer, of the moralist, to the sensuality of material existence, to the history of the body, to philosophical hedonism in all its forms- as semantic play, as the pleasure of the text, as the theatre of lived history-is eventually to be understood, can only be understood, as an escape of memory, a flight from the past as it was spoken and

[6] For example, for criminal law and public law see Lacey,. (1998); Hunter,. and Mack, 1997). In tax law Grbich, J. (1996)

[7] For a sustained critical account of these writers see Douzinas C., Warrington, R. and McVeigh, S. (1991) and Douzinas, C. and Geary, A. (2005).

> lived, and exodus from history if by history we mean "the memory of what has lived, recuperated through material structures, through the body and through discourse. (Goodrich, 1990: 5)

Goodrich sets out to reveal the ways in which the institution of law suppresses desires, memories, imagery and symbols. To some extent we may be able to say that Goodrich's task in *Languages of Law* is twofold: on the one hand, he is telling the story of how law moulds our bodies and life more extensively according to its image; and on the other, he is sketching the body of law which more often is understood as a machine. Recall that most of positivist jurisprudence saw the law and its operations as a mechanical rational operation (Kelsen, 1934), bereft of any morality, passions or, politics, for accordingly this would be the way to arrive to justice.

The focus of the critical legal studies movement in the UK was to challenge such presuppositions, by pointing both to their limits and their distortion of the truth about law (Goodrich, Douzinas, Fitzpatrick, Philippopoulos-Mihalopoulos). It is within this movement that Goodrich proposes to take seriously the body and its distortions that it has undertaken in law. In his later writings, such as *Oedipus Lex: Psychoanalysis, History, Law*, Goodrich puts the legal profession on the couch and reveals to us not only how lawyers have forgotten their bodies ('the law consumed them and left them spent, deprived of civility, humor, and emotion' (Goodrich, 1995:145)) but moreover how it has repressed certain bodies (women, migrants and other aliens) and images. In *Law in the courts of Love* (1996) Goodrich continues persistently to bring back the body to law, by introducing us to a women's court in Paris and their pronouncements on amorous affairs. In his work on emblems, *Legal Emblems and the Art of Law* (2014), Goodrich reveals how emblems, their interpretation and analysis, are essential in our understanding of the constitution of personhood and citizenship (Haldar, 2014:304). Goodrich persists once more in his engagement of the law to a body by taking its visual artefacts seriously and demonstrating convincingly how, as Haldar puts it, 'images govern. Images both transmit law and structure personality, relations, things and actions.' And '[a] failure to account for the 'visibilities' of law condemns law (as a number of emblems studied by Goodrich make clear) to blind administration.' (Haldar, 2014: 308) While the themes and topics in Goodrich's writings may differ from work to work, there is a consistent analysis of how law governs by bringing to the foreground discourses and images that law has repressed from the realm of its study and scholarship.

There are methodological, theoretical, thematic and other differences between the scholarship that engages with the law and the body, and Goodrich's account of how law cuts off the body from its practices and how it ends governing it repressively. Nevertheless, there are also similarities in the fact that like Goodrich's work, they provide us with material and discursive accounts of the body and its relation to the law. It is to these sequences that I turn to now.

There are of course a variety of discursive and materialists accounts of the body. The aim here is not to offer a detailed account of these sequences but rather sketch them in a general way. What you find below is a brief description of the meaning of the concepts discurscive and material and how they way they have been utilised within critical legal scholarship.

First, we need to recall that most legal theory, until the emergence of critical legal scholarship first in the US in the late 1970s[8] and in the UK in the early 1980s, [9] attended to the law as a machine that rationally adjudicated contestations, represented social norms and delivered justice at a distance from morality, politics and other cultural phenomena. It was represented as pure, bereft from external influences. Again, as indicated earlier, the main representatives of this account of law were the positivists and analytical jurisprudes. What the critical studies movement in general achieved was to break up this fantasy about the law and demonstrate the social, political, philosophical and other dimensions of law as well as to demonstrate the variety of ways in which law operates, as well as the various sources (images, symbols) and practices (rhetorics). We have seen some of these presented in the brief reconstruction of Goodrich's work above.

Overall the *oeuvre* of critical legal studies made visible the body that was an *invisible presence* in the pre-critical studies literature. There are two main sequences in the scholarship in law and the body in which the body is made visible: discursive and materialist theories. Discursive writings on law and the body take as a basic presupposition that the legal body is constructed through legal language, legal images, legal symbols and signs, as well as culture more generally. Material writings in turn, focus on the materiality of the body and law's relation to this. What do we mean by the materiality of the body of law? Most critical legal studies work engaged with the material body as fully fleshed, corporeal, affective, different in process, and becoming (for example, the gender is attributed by birth), affective, collective and how it is produced, formed, moved and transformed across different sites and spaces. Both material and discursive accounts on law and the body challenge the way in which the body has been fixed by law and its discourses.[10]

[8] The writings of Duncan Kennedy and Roberto Unger for example have been some of the earlier articulations of this type of scholarship. For an account of this movement see, Kennedy , D, and Klare ,E. K, (1984) and Hunt, A. (1986).

[9] For an account of the British version of critical legal studies see Fitzpatrick, P. and Hunt, A. (1987), Goodrich, P. (1992) ;Murphy, T. (1999).

[10] See Loizidou, E. (2008).

III. The Discursive Sequence in Law and the Body Scholarship

In engaging with the discursive turn in the critical legal scholarship around the law and the body we are engaging in a particular way of representing law's relationship to the body. Moreover we are putting the body at the centre of legal scholarship. In *The Order of Things* (1966, 2002), *Archaeology of Knowledge* (1969, 1989), and 'The Order of Discourse' (1970;1987: 48-78) Foucault engages explicitly with discursive practices.[11] In the aforementioned writings, Foucault tries to understand and account for how certain subjects, such as the insane, are excluded from the production of knowledge and constructed as being unable to talk the truth. In *Madness and Civilization* we see Foucault analysing how reason is privileged in our 'will to knowledge'. By 'making [madness] …an *object* for analysis' (Gordon, 1987: 48), Foucault attempted to erase the distinction between inclusion/exclusion that puts madness outside the realm of knowledge. His drive to give a voice or make visible subjects and objects that have been both made silent and rendered invisible prompted Foucault to turn to 'those rules, systems and procedures which constitute, and are constituted by our "will to knowledge"' (Gordon, 1987:48). In doing so, he identified that discursive practices determine the boundaries, define and fix objects and subjects, as well as produce sets of norms that become the foundation for concepts and knowledge more general (Foucault,1970;1987:199). If either objects or subjects do not fit within given boundaries or norms, they are denigrated to silence, invisibility or simply rendered un-intelligible. Discourse, which travels in the form of linguistic practices, images, signs and symbols, is inextricably linked to power, or put otherwise it exercises power by both constituting and reproducing the system (political and social order) 'through forms of selection, exclusion and domination'. (Gordon, 1989: 48) Discourse reproduces a truth through the above forms. Foucault wanted as he writes in the forward to the English edition of *The Order of Things* to reveal through a discursive analysis the 'unconscious of knowledge' (Foucault, 1966; 2002: xi).

Within the critical legal studies field in the UK one of the first academics to engage with the Foucauldian discursive analysis was Les Moran. Moran's *The Homosexual(ity) of Law* (1996) returns the homosexual body to law. The aim of the book was to investigate the ways in which common law categorises the male homosexual body. Moran sets out to provide a detail account of the language that law uses to describe male homosexuality, and homosexual acts, since the decriminalisation of homosexuality. Law uses a particular lexicon to describe the male homosexual (homosexual instead of gay or queer, popular in everyday life and activism) and male homosexual acts (buggery). In following the lexicon of law, Moran demonstrates how law 'fashions human relations' (Moran, 1996: 9). As he explains, 'the lexicon of law…is…a depository of terms through which

[11] I mention Foucault here because he is philosopher that has influenced extensively the critical legal studies movement. Only recently for example we have seen the publication by Ben Golder (2015) and Peter Fitzpatrick (2009), *Foucault's Law* on the influence of Foucault in critical legal studies.

contemporary human relations are produced, determined and limited…' (Moran, 1996:9) In following a Foucauldian discursive analysis, Moran was able to produce an account of how the homosexual is produced within law, and simultaneously point to the discriminatory aspects of such productions that lead to an unjust criminalisation of homosexual men and their sexual practices in the UK. [12] Sharpe similarly exposes the ways in which the law constructs and produces the transgender body. [13] In *Transgender Jurisprudence: Dysphoric Bodies of Law* (2002) Sharpe focuses on cases where transgender subjects find themselves before the law. Sharpe meticulously shows us the inherent prejudices within law: as litigants in marriage cases we find that law treats transgender subjects with homophobia; as subjects of anti-discrimination law, we find that they are being constructed without consistency on the part of law either through biological determinations (i.e. one is a woman either because anatomy and chromosome designate as such) or, through a psychological determination that seeks harmony between the way one feels and appears in the world. Depending on which of these two determinations the law uses, transgender subjects may be found as being eligible or not to bring an anti-discrimination case to the courts. What Sharpe reveals overall is how phobia and arbitrary tests act against transgender subject and simultaneously disavow the ways in which they identify themselves. Sharpe's analysis of the ways in which transgender bodies are constructed in case law reveals how the so-called 'non-normative' subjects are subjugated by law. Indeed Sharpe's subsequent book, *Foucault's Monster and the Challenge of Law* (2010) takes seriously the figure of the monster or the abnormal. It follows the monster through its Foucauldian genealogy as well as its legal manifestations and its normalisation. The transsexual, conjoined twins and human/animal admixed embryos are the legal figurations of the monstrous that Sharpe takes on. In contrasting the Foucauldian genealogy of the monstrous with that of common law jurisprudence, Sharpe brings to our awareness that law 'orders' the normalisation of monstrous bodies by requiring their physical re-shaping. Recall that Foucault in his *Abnormal* lectures at the Collège de France tracks the genealogy of the category by focusing on three figures: 'the human monster, the 'individual to be corrected and the onanist' (Foucault, 2003; x-vii) and a shift from a regulation of the body to a regulation or correction of the soul.(Foucault, 2003: 263-90). The figure of the human monster, Foucault informs us, was a legal category that designated a breach of the laws of nature. Subsequently this way of thinking has influenced the medical professions and their understanding of the dangerous individual. Sharpe similarly tracks the figure of the transsexual, conjoined twins and inter-species mixings, and reveals common law's inability to deal with subjects that challenge either sex binary (transsexual) or cannot adhere to singular embodiment (con-joined twins) or inter-species mixings (human/animal). Sharpe, perhaps unintentionally, reveals

[12] For more critical legal work on law, body and sexuality, that follows a discursive approach see Gross, A. (2009); Monk, D. (1998) Loizidou, E. (1998); Loizidou, E. (1999) Lamble, S. (2014); Lamble, S. (2009); Sabsay, L (16th May 2016)
[13]See, Sharpe A. (2010); Sharpe A. (2002)..

above all that the law cannot allow anybody to have two or multiple bodies. We can say that law still categorises those that do not follow the order of nature - those who precisely challenge that there is such a natural order of life - as abnormal.

In *Femininity in Dissent* (1990), Alison Young engages in the ways in which the media and law work together to produce the female body. Taking as her example the women's peace camp and demonstrations at Greenham Common,[14] Young offers a discursive reading of the way in which the female body is constructed by the media and the criminal justice system. While not following explicitly a Foucauldian method of analysis, she shows how the media and the criminal justice system constructed the women protesters and campers at Greenham Common peace camp as filthy, dirty and feckless (Young, 1990: 56). Focusing on these media and criminal justice constructions and drawing mainly upon the feminist writings of post-structuralist feminists such a Helene Cixous and Julia Kristeva, Young is able to point to the phallocentric character of these two institutions and the ways in which women's difference is disavowed. In showing this through powerful visual and textual analysis, Young was one of the first critical legal scholars to point out how through images and languages the female body and femininity is constructed but simultaneously works against those constructions.

Following a feminist Foucauldian approach, Julie Wallbank in *Challenging Motherhood(s)* (2001)[15] takes the figure of the lone mother as the focus of her analysis and provides a rich account of their social and legal demonisation. The lone mother, her body and her state of mind, is challenged and treated unjustly by law in various instances, such as paternal contact cases and social support issues. In challenging paternal contact for example, mothers take their cases to courts and present evidence that shows clearly that it would not be in the best interest of the child (because the father may have been violent towards the child or/and them, Wallbank, 2001: 70) to give contact to the fathers. Yet they often find that the courts reject their challenge. Wallbank takes us through a close reading of cases that relate to paternal contact, and reveals that the lone mother is constructed in such instances as 'implacable' and somewhat too emotional[16] to be able to care best for their children. In pointing out these constructions of the

[14] In September 1981 a group of women *Women for Life on Earth* camped outside an RAF military camp in Berkshire to demonstrate against the UK governments to base missile cruises in the camp. The camp was on Greenham Common and it was came to be known as Greenham Common Peace Camp. The camp was dismantled in 2000. At the high levels of activity of the Peace Camp there were regular calls for demonstrations around the RAF military camp. On the 1st of April 1983 demonstration something like 70,000 women protested and hundreds of women where arrested.

[15] For more discursive writings on the construction of the figure of the mother and reproductive rights in critical legal scholarship, see Cain, R. (2009) '; Hanafin, P. (2012) Hanafin, P. (2007).

[16] This is a point that Joanna Conaghan 2000, explores in her excellent survey of feminist theory.

lone mother's body and the so-called legal 'truth', Wallbank alerts us to the legal failures and injustices that haunt these constructions.

The construction of women in legal texts is also the theme that runs through Maria Aristodemou's[17] *Law and Literature: From Her to Eternity* (2000) where she engages in a textual and discursive analysis of literary texts. Literature, like law, Aristodemou argues, is law-making machine. As such it produces or constructs bodies. Like Young and Wallbank, she focuses on the feminine body in multiple literary texts (Camus, Borges, etc.,) to expose how literature *like* law colonises women. Using psychoanalysis and feminist theory, such as the work of Helene Cixous, Aristodemou draws our attention to the myriad of ways in which women's bodies have been colonised by white male law: when women or more precisely women's acts do not fall within the norm are deemed by law (and in this case literature as law) as being irrational and in need to be punished either through exclusion, denigration or murder. Aristodemou's analysis of Aeschylus's *Eumenides* shows astutely how justice is described as establishing 'law and order' (Aristodemou, 2000: 65), and contrasting it to the way Clytemnistra (the adulterous Queen who killed her husband) in *Agamemnon* is treated; she is described as combative and manly (Aristodemou, 2000: 67). Drawing our attention to Clytemnestra's characterisation, Aristodemou shows precisely how certain norms around order are well embedded in western literary understandings of legality but moreover how women that deviate such norms are rendered unintelligible, forceful and in need to be ordered. Literature as a text of law, a text about law and a cultural testament to our understanding of the world, reproduces the same binary hierarchies we witness in legal texts that make any woman not inhabiting these norm, monstrous.

We have seen so far how critical legal scholar engaging with discursive analysis of the body has provided us with some understanding of how the body is constructed in law. What is noticeable, whether it is the homosexual body, the woman demonstrator, or the mother or a literary representation of women, is that these authors show how law manages to pass its constructions of the body as truth. The effect of law's legal construction on the bodies of women and homosexual men is undoubtedly unjust and it has material effects, women/mothers for example as Wallbank shows in *Challenging Motherhood(s)* may find themselves having to communicate over a violent ex-partner of the best care of their children. Such a situation leaves a lot of women exposed to the possibility of further violence from their ex-partners and fathers of their children. Law surrenders lone mothers to the very precarious and dangerous situations and relations that they were trying to avoid, escape and challenge.

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[17] For more theoretical work on the construction of women in law Drakopoulou, M. (2014).; Conaghan, J. (2013),.

In 1992, Patricia Williams published the outstanding *The Alchemy of Rights and Race: A diary of a Law Professor* whereby she brings the biographical to bear witness to law's and legal academy's racist practices and rationalities. While writing within the US critical legal studies movement, she is critical of the ease in which Human Rights are critiqued. Critical legal Scholars have described Human Rights as sheer rhetoric that fails to recognise, represent and protect humanity. Williams instead argues that Human Rights are productive and shows how they give access to the public realm disenfranchised peoples, such as Black Americans. *The Alchemy of Rights and Race* renders visible the multiple ways in which racialised, and particularly black bodies have been excluded and treated prejudicially in law and in every day encounters. Through everyday racisms, Williams exposes the prejudices and injustices of our social norms. In the UK it is not until 2004, when William's namesake, Patricia Tuitt publishes *Race, Law, Resistance*[18] that critical legal studies has its first sustained engagement with racism and the law. In *Race, Law, Resistance* Tuitt offers in six powerful essays an analysis of how law itself, racialises and discriminates against minorities, including black bodies. Her analysis focuses on the ways in which subjects (the slave, the refugee), legal doctrine (doctrine of causation, reasonable man), the concept of sovereignty and that of unsanctioned violence are insufficient in addressing racism (for example the legal doctrines of causation and reasonable man) and moreover law is implicated in continuing discrimination and violence on racialised bodies[19].

Piyel Haldar in *Law, Orientalism and Postcolonialism* (2007)[20] provides us with a powerful critique of colonial law. At the centre of his discursive analysis, drawing on psychoanalysis, critical theory, literature, classical jurisprudence, we find the legal subject, which, Haldar argues, has been colonised through the permission of pleasure. Law used pleasure in British India (Haldar's area study) as a way of subjugating the people of India to a western legality. While pleasure was permitted, any sign of excessive pleasure, such as access to more than one sexual partner in the case of the Sultan, became the site for legal intervention. Haldar takes us through instances where the colonised subjects' pleasures are deemed repugnant, excessive and in breach of modern practices of civility. In his chapter 'The Sultan's enjoyment' (Haldar, 2007: 53-82), Haldar shows how the luxurious attires of Kings, the lavish gardens or the invigorating smells of flowers and spices were viewed by the law as depicting excessive pleasures in need to be regulated and controlled; otherwise such pleasures were thought of being capable of turning colonised subjects into despots. What the various regulations of pleasure and enjoyment in British India show us, Haldar argues, is not that the colonised subject was excessive in indulging an enjoyable life, nor that they were potentially to become despots. This was instead a fantasy concocted and

[18] Of course we have earlier critical writings on law and race in the UK but they mainly take place outside the law. See for example Hall, S., Critcher C., Jefferson, Clarke, J and Roberts, B. (1978).
[19] See also Motha, S. (2010) and Bhandar, B. (2012)
[20] See also Motha, S and Perrin, C. (2002); Bhandar, Brenna (2011); Rush, P. (1990); Hanafin, P. (2001).

projected by the coloniser and the law onto colonised populations because of their fear of becoming despotic subjects and laws. Ironically, as we know, they have succeeded in becoming precisely despotic colonisers and laws.

What we notice so far in the rich literature around law, discourse and the body is a strong desire on behalf of critical legal scholars to articulate the myriad of ways in which law regulates our bodies and consequently organises our lives. The body becomes part of discourse and is the object of analysis. What we do not get at least explicitly[21] from discursive analysis on the body, primarily because all the attention is placed upon how the law constructs the body, is an articulation of what the body wants. We do not get any insights on what these bodies off, women, homosexuals, lesbians, colonised people and people of colour and their intersections[22] need or desire. We do not, to put it metaphorically hear the heart beats and pulsations of these multiple bodes. Theories of materiality, as we shall see, tend to entertain the body, the affective body in particular and reveal both its desires and needs. The difference between these two sequences on the body is that the discursive accounts focus on analysis of how law accounts on the body, or put otherwise on interpretations of the body (discursive), while the material sequence allows the body to speak (materially) for itself. Nevertheless, discursive accounts on the legal body do manage to break away with the more positivistic traditions of legal theory (described earlier in the chapter) and present us with an embodied legal subject.

Before we move on it is important to note that some discursive accounts on law and the body do not always present embodied subjects as purely recipient of power, norms, and laws. Some discursive studies also show how bodies either resist or subvert power, norms and laws.[23] Such work tends to draw on Judith Butler's accounts on gender performativity and the ways in which bodies *subvert* the categorisations that various configurations of power (i.e., law, culture, politics, etc.) try to impose on them. The work of Judith Butler and the ways in which the body operates in law has been the focus of my work. In *Judith Butler: Ethics, Law, Politics* (2007), I show how same sexed bodies exposed to us the 'fantasmatic character of gender formation and identification (Loizidou, 2007: 37).[24] How does this differ from a constructionist account of the body then? While both theoretical perspectives will adhere to the fact that we are formed by

[21] While there is an account in Wallbanks and Young of women's voices, the analysis that ensues in their work focuses mainly on how law subjugates their voices, demands and aspirations. The protagonist of these analysis is law or more precisely an unjust law. Women's subjectivity then ends up being presented through the legal discourse.

[22] Intersectionality is a phrase coined by Krenshaw in 1989 to show that subjects are constituted by a variety of social identities (race, ethnicity, gender, sexuality, etc). In order to understand oppression and its operations we have to study how it operates through and at these intersections See Krenshaw, K. (1989). For recent examples of intersectional research on law and the body see Motha, S. (2007) ; Cooper, D., Grabham, E. and Krishnadas, J. (eds) (2008) .

[23] See also McNeilly, K. (2016)

[24] For a critique of the linguistic materiality divide in relation to writings on law and the body see, Loizidou, E (2008) .

language, power etc., Butler's theory of gender performativity allows us to see that naming, for example somebody as a boy, is nothing but a citational practice that through a constant recitation, make one be identified as a boy. This identity, however, is not necessarily the truth or, put otherwise, it obscures the fact that our genders are not static but always under construction. By pointing to the fantasmatic 'character' of gender and to the fact that gender is always in a process of becoming, we subvert normative notions of the body. We can see that the body does not want to be 'closeted' in a static category, or rather that bodies overflow such categorisations. Bodies thus are able to subvert the categorisations that law or norms attribute to them. For example, women have been attributed with particular normative characteristics, passive, irrational, feminine etc., yet gay, lesbian, trans and queer movements subverted these normative characteristics and demonstrated that to be a woman one does not need to be a feminine woman but could also be a butch lesbian.

The philosopher Adriana Cavarero has been also very important in providing us with an account of the body that is not held hostage to power. In her book *For More Than One Voice: Toward a Philosophy of Vocal Expression*,(2005) Cavarero argues that the voice, the distinct sound that we emit is what makes us unique and simultaneously undoing the very norms that are set to form us as subjects. Cavarero sets out to show how western metaphysics have separated speaker from speech and are invested in the faculty of thinking. In doing so, western philosophy since its inception made speech into something that we study, for example within the discipline of linguistics, and consequentially have separated it from the body. Accounts on speech consequentially become generalised and universal rather than focusing on the singular voice of the speaker and their uniqueness. By invoking the voice, Cavarero aims to return speech back to the speaker and in doing so to show the relationship between speech and voice and remind us of the materiality of speech. Elisabetta Bertolino in her writings on human rights and women's bodies draws explicitly on Cavarero's work to show how the body resists through the voice[25]. This is also the theme of some of Patrick Hanafin's work in his analysis of feminism and embodiment[26]. Cavarero, therefore, is not making discursive accounts of the body redundant, but rather seeks to show through her writings the relationship between the discursive and the material.

Nevertheless, accounts that show how the body subverts power, in law and the body literature remain few and far between. [27] Judith Butler is another philosopher working at the borders of the material and the discursive that enable us to see how the body subverts power. While I have included the uptake of

[25] See, Bertolino, E. (2006) ;Bertolino, E (2008).
[26]See Hanafin, P. (2013); Hannafin, P. (2008),
[27] **See Bhandar, B** (16 May 2016)

Judith Butler's within legal studies within the discursive tradition of law and the body, it is important to note that her work does not necessarily seat comfortably within this tradition. What connects Butler's various writings is a particular concern: how we may create better conditions for life. Such creation for Butler, as I showed elsewhere (Loizidou, 2008: 29-51), entails an agonistic relationship between the various spheres of life, ethical, political, legal. The body is central to her articulation of all these three spheres of life. It is also well known that her understanding of bodies is one that sees them being formed by and through norms (linguistic or otherwise). But, as I explained (Loizidou, 2008: 29-51), her bodies are neither discursive nor material but, rather, both. And as the various spheres of life, if they are to achieve better conditions for life, must retain an agonistic relationship to one another; the same agonistic relationship must be sustained in relation to our knowledge of the body, or between the two competing bodies (discursive and material). This open an antagonistic relationship between the discursive and material bodies best analysed by Butler in her essay 'How can I deny that these hands and this body are mine?' (Butler, 2001: 254-73). In this essay, Butler exposes how in Descartes's *First Meditation* there is a certain refusal of the discursive body to be reduced to the material and the material to the discursive. In the *First Meditation*, Descartes sets out to demonstrate how the senses or the body are not reliable sources of knowledge. Butler reads in Descartes's mistrust of the body a certain tension. On the one hand, he doubts the body and, on the other, '… the very language through which he calls the body into question ends up reasserting the body as a condition of his own writing. Thus, the body that comes into question as an "object" that may be doubted surfaces in the text as a figural precondition of his writing'.(Butler, 2001: 258). This, she argues, destabilises the distinction, between the material and the figural that the *First Meditation* intends to create. It is important therefore to note that, while most of critical legal scholarship may focus on Judith Butler's discursive accounts of gender, her work also draws on both the discursive and the material body.

Scholars working within the material sequence on law and the body as you see in the forthcoming section (unlike Cavarero's and Butler's investment on the *relationship* between the discursive and the material body) articulate the body as purely a material entity and are more interested in the *relationship* of the body to other material entities.

IV. The Materiality Sequence in Scholarship on law and the Body

When we talk of materiality and the body, we refer to those works that understand the body 'being processed and …assembled and made up from the diverse relays, connections and relationships between artefacts, technologies, practices and matter which temporarily form it as a particular kind of object.' (Blackman, 2008: 133). Lisa Blackman, a media and cultural studies scholar, explains how research that takes the materiality of the body as its theoretical

spectrum, enable us to see that the body is constantly being made and re-made, is in process, as well as affecting and being affected by the world. Scholars that focus on the materiality of the body primarily draw on the philosophy of Gilles Deleuze and Felix Guattari. Gilles Deleuze in his 'What can a body do?' (1997: 217-234) writes drawing on Spinoza's *Ethics*, 'What a body can do corresponds to the nature and limits of its capacity to be affected'. (1997: 218), makes us aware of what is internal and external to a body, whether objects or nature can both affect a body at a given moment and a body can affect anything else also. We can see that this type of philosophical encounter with the body that cannot be very easily absorbed by legal philosophical scholarship as it pays all its attention to affect and the body, and less on rules and laws. So when it comes to work within law that engages with affective theory we find very little[28]. The importance of such a theoretical sequence within law and body scholarship enables us to see how law cannot affect our bodies, or put otherwise that bodies can explain affections, and show us the inability of law to affect our bodies.

Critical legal thinkers that have worked with affect theory are very few. We can note the work of Hanafin with the Feminist Deleuzian Philosophers Rosi Braidotti and Claire Colebrook. These three authors have published in 2009 the edited collection *Deleuze and Law: Forensic Futures* that engages with the affective body and law. Hanafin's essay 'Rights of Passage: The Constitutional BioPolitics of Dying' in the aforementioned edited collection is an example of such work. Hanafin draws on the body of the terminally ill patient that wants to die and Deleuze's concept of '*as already gone'* to point that while for some bodies death does not stand as an obstacle or limit to thinking, for law the desire to die is often refused and becomes an opportunity to talk about the right to life. [29] It is not though till Philippopoulos-Mihalopoulos book *Spatial Justice, Body, Lawscape, Atmosphere* (2015) that we gained a sustained presentation of how the body, the body as assemblage and the affective body that we can see how putting the body at the centre of analysis, it can expose to that the question of justice may not be just about the correct application of rules but as Philippopoulos-Mihalopoulos states about space. In *Spatial Justice* we are told that *'spatial justice is the conflict between bodies that are moved by a desire to occupy the same space at the same time.'* (Philippopoulos-Mihalopoulos, 2015: 3). The bodies we are told earlier are not just human bodies but an assemblage of bodies, human, non-human, post-human. *Spatial Justice* therefore by putting these assemblages of bodies at the centre of the question of justice, 'when bodies claim the same space at the same time' (p.3) enables us to see that 'dispute', a conflict of desires may require a different ontological engagement

[28] Critical legal scholarship which engages with emotions, law and the body should not be confused with affect. Deleuze states that for Spinoza emotions or passions are not affections: 'An affection is not a passion, except when it cannot be explained by the nature of the affected body: it then of course involves the body, but is explained by the influence of other bodies. Affections that can be completely explained by the nature of the affected body are active affections, and themselves actions.' (Deleuze, 1997: 219).

than a mere decision over which side is right or wrong. It may require, as the book suggests a withdrawal, so bodies in withdrawal, enable themselves to continue affecting the world.

Within the Materiality Sequence in law and body we also find authors that engage with the philosophical concept of plastic materiality that the philosopher Catherine Malabou brings to the fore. Bhandar and Goldberg-Hiller tells us that 'Malabou's materialism is rooted in an attempt to rethink the relationship between neuroscience and philosophical conceptualization of consciousness and the self' (Bhandar and Goldberg-Hiller, 2015: 8). The term 'plasticity' Malabou has inherited from Hegel. It is a term that designates the ongoing making of the subject, its movement and plastic 'character'. In their wonderful edited collection, *Plastic Materialities: Politics, Legality, and Metamorphosis in the work of Catherine Malabou* (2015) Bhandar and Goldberg-Hiller introduce us not only to Malabou's concept of plastic materiality but also to a number of scholars, some working within the field of critical legal studies, that engage with this concept and its application on the body, biological or otherwise. As Bhandar and Goldberg-Hiller note, Malabou's work and particularly her concept of plasticity provides us with a different understanding of the relationship between thinking and body. While the western philosophical tradition of metaphysics has kept an understanding that separated the process of thinking from the body, and whilst the body was seen as a vessel for sensations and, as noted earlier in relation to Descartes, was described as an unreliable source for the production of knowledge, for Malabou this division becomes obsolete when one follows neuroscientific developments. Thinking is not anymore a process that takes place in the mind but instead 'is built into our bodies'. (Bhandar and Goldberg-Hiller, 2015:1). Bhandar and Goldberg-Hiller propose that this new material understanding of the body can open up new ways of seeing how law operates, but also potentially relieve law from producing injustices. Indeed we can say this is made possible by the simple fact that the body is no longer considered a non-viable source for truth..Allan Pottage's essay 'Autoplasticity' in the same edited collection by Bhandar and Goldberg-Hiller (2015: 73-90) engages with the plasticity of reproductive technologies, DNA and epigenetics to show how Malabou's proposition that the symbolic and the biological (discursive and material in our case here, or mind and body) distinctions still hold in Foucault's is not necessarily valid. This means, he argues, that we do not need to deconstruct further, as Malabou suggests, the concept of sovereignty which is at the core of Foucault's engagement with the symbolic and the biological. In 'Insects, War, Plastic Life' (2015: 169-185) Renisa Mawani shows how the human/non-human, drones and bees, merge into one another, once more reminding us that perhaps categories such as human, monstrous etc., that law tries to hold onto, cannot be sustainable. Critical legal research drawing on Malabou's work as we have seen engages with the multiple ways in which the body, invested in thought now enable us to see the limits of legal discourse. It is

less clear though how this research enables us to see how the law can be challenged. While we may argue that despite the fact that the mind/body distinction may collapse in Malabou's work, and that thought becomes materially embodied, allowing what others called subjugated knowledges to emerge to the surface and provide us with new vantage points to see the world, it nevertheless retains the law, not perhaps as a law with two bodies (a symbolic and a biological one) but rather in the figure of the mythical Lernean Hydra. My point here is that it is not the need to collapse the discursive with the material that will undo the sovereign and ensure justice, equality, but rather our ability to create a different way of relating to the problem of the sovereign. It is not in other words the constitution of the sovereign our problem but our inability to imagine how to create a world without the sovereign.

Research that engages with the material body in law has predominantly as we have seen bracketed out any discussions on the discursive body. This work takes it for granted that the body is a material entity and proceeds to discuss the various ways in which the material body *alerts* us to the inadequacies of an embodied legal discourse to address the political and economic challenges that are before it. If we take for example Philippopoulos-Mihalopoulos's *Spatial Justice*, we may use it to demonstrate that even if rules are applied correctly they will not be a solution to social and economic inequality because of inadequate affordable housing and wealth inequality. Such research we may say challenges the very idea of the sovereignty of law itself. Further work like the one mentioned above which is influenced by Malabou, collapses the discursive and the material body. The significance of this type of work is to open up new ways of relationality and creation, as in Mawani's work that shows relations between the animal and technological that a legal discourse or a discursive analysis on the law on the body would not have otherwise reveal. The material sequence in law and the body enables us to see why we may not need law in forming an understanding of our social and political relations. Whether it does provide us with ways to create a world without law, or whether indeed it proposes that this is possible, is less clear.

V. Conclusion

I would rather avoid offering a conclusion. Readers will be able to conclude for themselves the various sequences in which studies in law and the body exist. I mentioned two, but I am sure within these we can see already very different flights of inquiry. It is important though to note that despite the fact that the second sequence in law and the body does not hold a big number of authors, I think is the most exciting one. It is one that shows very clearly that the body is much more vibrant than the taste of sawdust that law often leaves in one's mouth, as Kafka mentions. It is the one that shows precisely that there is a

multiplicity of bodies (human, animal, technological) that interact and clash with one another. and if we are to take them seriously we will need to invest in understanding how they relate to each other as materialities. As Butler has warned us, it may be important to hold in mind that discursive accounts of the body do not necessarily get subverted or undone by material sequences, nor should we embrace them without thinking to what extent the absorption of the discursive to the material may provide us with a totalising knowledge – a knowledge that will exclude any-body (pan intended) that does not fall within its sphere of vision.

Kafka, in his letter to his father, approximated the study of law with the activity of eating sawdust (Kafka 2015, p.91). Here is what he describes the process of learning the law in his own words:` …for the few months before the exams, and in a way that told severely on my nerves, I was positively living, in an intellectual sense on sawdust, which had moreover, already been chewed for me in thousands of other people's mouths.' (Kafka 2008, p. 91). Indeed we may find ourselves agreeing to this description. The study of law, law itself has this very wooden property. Over the last 20-30 years though, as we have seen, by putting the body at the centre of their analysis critical legal researchers have managed to give some flavour to the otherwise woody law. As research into the material body, its affects and other dimensions is expanding, we may see, although one can never be certain about outcomes, law being slowly phased out from legal theory, while the body, objects and the affect may just become our analytical toys. As this research may expand, we will also see the emergence of new discourses on law and the body. To account for what we sense as new we may need the assistance of language and words.

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