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# As If - Law, History, Ontology

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## I. INTRODUCTION

## II. RIVAL LEGAL HISTORIES – SOVEREIGNTY “AS SUCH” AND “AS IF”

A. *Law’s ground – “Now shown then to have been false”*

B. *Rival historiographies*

C. *Anti-metaphysics: the autonomy of public law and the civil state?*

## III. AN ONTOLOGY OF SOVEREIGNTY

A. *Undoing sovereign autonomy and ipseity*

B. *Jean-Luc Nancy: The impossibility of finite/infinite sovereignty*

## IV. CONCLUSION

## I. INTRODUCTION

In their Afterword to the *UC Irvine Law Review* Symposium Issue, “‘Law As . . .’: Theory and Method in Legal History,” Christopher Tomlins and John Comaroff signal a distinct intellectual moment after the “antimetaphysical revolution.”<sup>1</sup> The antimetaphysical shift in legal studies was reflected in the work of twentieth-century progressive realists (Holmes, Pound, Dewey, and others) who revolted against formalism and promoted the rise and reign of the social sciences in law. The Law and Society movement is the zenith of those developments. It might be summed up, albeit reductively, as the tendency to lodge the problem of law *elsewhere* (“law and . . .”).<sup>2</sup>

“Law As . . .” provokes a line of inquiry that seeks to reinstate the significance of the relationship between metaphysics and history in legal theory. Tomlins and Comaroff (and

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I am grateful to the thorough and generous engagement with a version of this paper by Professor Nehum Chandler when it was presented at the ‘Law As . . . III’ Symposium at the University of California, Irvine School of Law in March, 2014. Any errors are mine.

<sup>1</sup> Christopher Tomlins & John Comaroff, “Law As . . .”: *Theory and Practice in Legal History*, 1 U.C. IRVINE L. REV. 1039, 1040 (2011).

<sup>2</sup> In an *ontic* register—the plain of politics—have little dispute with the large body of important law and society research that has helped to move Anglo-American law beyond legal formalism. The question, however, is with the problem of justice that has been neglected along with the social scientification of law. For a through critique, see MARIANNE CONSTABLE, *JUST SILENCES: LIMITS AND POSSIBILITIES OF MODERN LAW* (2005).

other contributors to the 2011 *UC Irvine Law Review* Symposium Issue) ask what legal theory and practice might gain from “rejoining metaphysics to materiality.”<sup>3</sup> “Law As . . .” seeks to understand the conditions of possibility of the present in order to develop critical knowledge of the here-and-now. After Walter Benjamin, they search for the instances when “the origins of the present ‘jut manifestly and fearsomely into existence,’ spirit into experience, metaphysics into materiality.”<sup>4</sup> Put differently, “Law As . . .” points to the methodological problem of re-uniting historiography with philosophy, or what after Foucault I will call the pursuit of a “historical ontology.”<sup>5</sup>

“Law As . . .” concerns the appearance of statements—specifically juridical statements. These statements are an archive of the emergence of beings, things, power, institutions, offices, and jurisdiction. “Law As . . .” points to how each of these phenomena come into being through metaphor. “Law As . . .” recalls Derrida’s elaboration of the difference between the presence of a phenomenon “as such,” and the trace of its appearance in a performative speech act—acting “as if.”<sup>6</sup>

In this essay I consider the ‘As If’ as it pertains to colonial and postcolonial sovereignty. The archetypical sovereign conceit (fiction) is to assert authority that is only retrospectively inscribed by law. That is, the legal inscription (writing, narrating, accounting) of sovereign acts comes after the event of a sovereign assertion. However, no sovereign assertion has a singular plenitude of its own ‘in the first place’. Bare force or arbitrary violence is hardly the *raison d’être* of sovereign power. I am thus concerned here with the *being-together* of sovereignty and law. Sovereignty is always moving towards or by way of a legal frame. The inscription and re-iteration of sovereign power is one of the primary functions of law. To that extent law is an *archive* of sovereign violence – inscribing and recounting the factual assertions (the constatives) and elaborate fictions (performatives) of

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<sup>3</sup> Tomlins & Comaroff, *supra* note 1, at 1040.

<sup>4</sup> *Id.* at 1044.

<sup>5</sup> See generally Michel Foucault & Paul Rabinow, *What is Enlightenment?*, in THE FOUCAULT READER 32 (Paul Rabinow ed., Catherine Porter trans., Pantheon Books 1984); IAN HACKING, HISTORICAL ONTOLOGY (2002), Chapter 1.

<sup>6</sup> Jacques Derrida, *The University Without Condition*, in WITHOUT ALIBI 202, 209 (Peggy Kamuf ed., trans., Stanford Univ. Press 2002) (2000).

sovereign power. Law inscribes the historical narrative of sovereign violence, and provides the alibi. At the heart of this complex relationship between sovereignty and law is the 'As If'.

The 'As If', or the 'consciously false', has its modern roots in the thought of Immanuel Kant.<sup>7</sup> In the 19<sup>th</sup> Century it was promoted by Hans Vaihinger, and elaborated in the 20<sup>th</sup> Century in the legal philosophy of Hans Kelsen.<sup>8</sup> For the purposes of the discussion here I will draw on Jacques Derrida's elaboration of the 'As If'.<sup>9</sup> The interplay of "Law As . . ." and "law's as if . . ." points to the centrality of narrative, analogy, and fiction for how law goes about accounting for the past. An example from Australia, a society struggling to archive colonial sovereignty and inaugurate a postcolonial legal order, will illustrate how attempts to renew a legal system after histories of colonial violence both preserve and disavow such violence at the same time. Can colonial sovereign violence "as such" be grasped, isolated, and thus be disavowed? Or does colonial sovereignty continue to be reiterated through the conceit of an "as if"?

The ability to distinguish the foundation of a colonial legal system from current law is seen as a central aspect of responding to the injustices of the past. Of course there is never consensus on whether the past can or should be adjusted. Many of the debates about histories of colonial violence concern what knowledge and responsibility present generations can attribute to the past. The "history wars" have been a site of this contestation. Which "truth" of the past should govern the call for recognition and justice in the present? This is a site, I argue, where the tension between the "as such" (a constative) and the "as if" (a performative fiction) presents itself. This tension also marks the sovereign reign of "Law As . . .".<sup>10</sup>

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<sup>7</sup> For a discussion of the genealogy of 'As If', See generally, STEWART MOTHAS, "As If: Constitutional Narratives and Forms of Life in Karin van Marle and Stewart Motha (eds.) GENRES OF CRITIQUE: LAW, AESTHETICS, AND LIMINALITY (Stellenbosch, SUN Press, 2014). 91-108.

<sup>8</sup> See generally, Hans Vaihinger, *The Philosophy of As If: A System of the Theoretical, Practical, and Religious Fictions of Mankind* (Abingdon: Routledge, 1924); and Hans Kelsen, *General Theory of Norms* (Oxford: Clarendon Press, 1991) at 256.

<sup>9</sup> See generally the essays in Jacques Derrida, *WITHOUT ALIBI* (Peggy Kamuf ed., trans., Stanford Univ. Press 2002) (2000).

<sup>10</sup> MICHAEL NAAS, *Analogy and Anagram: Deconstruction as Deconstruction of the As*, in Derrida from Now on 37, 37-38 (John D. Caputo ed., 2008).

I begin the discussion with two seminal cases from the Australian High Court – *Mabo*, and *Wik*. These cases exemplify the law’s complex archival function of at once inscribing, adjusting, and disavowing the violent excesses of colonial sovereignty. These cases illustrate the impossibility of a linear time of law or legal historicity. For instance, does contemporary law declare a fact as it was perceived ‘back then’ or declare what is ‘now’ understood to have been back then? The difference is significant as it goes to the heart of whether the law is merely recording facts (constatives) from the past or bringing them into existence by that very declaration. This temporal problem in law opens to a wider problem of whether legal history should be a redemptive narrative that seeks to address past wrongs, or offer an account of the context of past actions less concerned with remedying injustice. Is the legal historian, judge, or official to identify what was “missed” and put things right now? In the alternative, is history the “uncontrollable consequence” of contingent political struggles in a specific time and place? I consider these rival historiographical methodologies and their implications for how legal theorists account for the relationship between sovereignty and law. The antimetaphysical approach reaches for an account of law and the political as autonomous (here I consider the constitutional theory of Martin Loughlin). I challenge this approach and offer an alternative ontology of the relationship between law and sovereignty.

We live in a time that appears to be obsessed with the ‘return of religion’ to public and political life. The fear is that the European enlightenment’s disenchantment of the world is in retreat. The call to cling to a non-metaphysical rationality is growing. It is in this climate that we should consider what is more widely at stake in the ‘As If’. My argument is that there is no way around the fictive narratives that sustain our social and political life. This will give little comfort to the rationalists or muscular liberals.<sup>11</sup> But nor can we shy away from the call to do justice to the past – a task that will require new imagine constructions. My suggestion, drawing from Jean-Luc Nancy, is that a new ontology of sovereignty that refuses sovereign plenitude is part of what is necessary in the face ‘community’ that seeks to function as ‘law’. ‘Law-as-community’ is partly what is at stake in many sovereign claims. How will ‘law-as-community’ be confronted by a more deconstructive ‘law of community’?

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<sup>11</sup> See generally, STEWART MOTHA, (2009) “Liberal Cults, Suicide Bombers, and other Theological Dilemmas” in *Journal of Law, Culture, and Humanities*, 5 (2) 228-246.

A starting point, I suggest, is to demonstrate that sovereignty or community are far from autonomous, self-sufficient, or self-authorising. The existence of sovereignty and community rely on an exposure across limits – limits that are inscribed and re-inscribed by law.

## II. RIVAL LEGAL HISTORIES – SOVEREIGNTY “AS SUCH” AND “AS IF”

### A. Law’s Ground—“Now shown then to have been false”

In 1992, the High Court of Australia decided *Mabo v Queensland*.<sup>12</sup> For the first time since the imperial occupation and usurpation of Aboriginal lands by the British Crown in 1788, *Mabo* recognised that Aboriginal and Torres Strait Islander peoples’ antecedent property rights, or “native title,” survived the colonial acquisition of sovereignty.<sup>13</sup> This decision gave an account of the basis for the British Crown’s acquisition of sovereignty over Australia, the reception of the common law of England in the territory, and its consequences for the proprietary rights of Australia’s indigenous people.<sup>14</sup> The colonial acquisition of sovereignty was based on the “barbarian theory”—the notion that the Australian territory was acquired by the British Crown, and the common law of England became the “law of the land,” because the natives were “barbarous or unsettled and without a settled law.”<sup>15</sup> The High Court gave a retrospective account of how an *inhabited* territory was nevertheless regarded as “unpeopled,” or *terra nullius*.<sup>16</sup> This is the “as if,” the fictive trace of the inscription of sovereignty, at the heart of Australian law and society. The High Court came to acknowledge that the entire edifice of the Australian legal system was built on the monstrous fiction that the native inhabitants were barbarians without a settled law.

The *Mabo* decision adjusted the common law in 1992 in order to recognise the antecedent property rights of the indigenous people. Two hundred four years after the

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<sup>12</sup> *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 (Austl.).

<sup>13</sup> *Id.* at 62.

<sup>14</sup> *Id.* at 64–70.

<sup>15</sup> *Id.* at 36, 38.

<sup>16</sup> *Id.* at 33.

colonial invasion, the courts came to the conclusion that the natives were not lacking in social organisation and had proprietary rights in land and water from the outset of colonial settlement.<sup>17</sup> These rights and interests, or native title, were retrospectively recognised to be a burden on the “radical title” (sovereignty, or *imperium*) of the Crown.<sup>18</sup> While the Crown’s sovereignty remained putatively unassailable, the common law would now recognise that native title is a species of title that is (and would always have been) a burden on the radical title of the Crown.

This takes us to the heart of the matter of doing justice to the past. Law-making violence and the injustice that accompanies it “jut[s] manifestly and fearsomely,” as Benjamin put it, into the present.<sup>19</sup> In another register, the declaration that indigenous rights in land were always a burden on the radical title of the Crown was the moment of colonial sovereignty being “divided,” or separated, from a colonial past, and oriented towards a future “post-colonial” sovereignty and law. Sovereignty could no longer be regarded as an absolute monistic plenitude (nor could it ever have been).

The demand for justice is partly about addressing a past assertion that does not, and could not, hold true. Sovereignty was always already fragile and divisible. The *Mabo* decision thus becomes an important instance of law *archiving* sovereign violence by way of instituting both a memory of past sovereign force and exercising a creative act of forgetting “now-abhorrent” colonial assumptions and practices. Law is an archive here in the sense of the double logic of violence that Renisa Mawani has attributed to its character as archive—it is grammatological and epistemological, as well as ontological and material.<sup>20</sup>

In *Mabo*, the colonial assumption that sovereignty resulted in the Crown acquiring “absolute title” was distinguished from a “new” conception of sovereignty giving rise to two different forms of title.<sup>21</sup> The divisible trait of sovereignty was found in the distinction

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<sup>17</sup> *Id.* at 62–63.

<sup>18</sup> *Id.* at 45, 54.

<sup>19</sup> WALTER BENJAMIN, *Critique of Violence*, in REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS 277, 286 (Peter Demetz ed., Edmund Jephcott trans., 1986).

<sup>20</sup> Renisa Mawani, *Law’s Archive* 8 ANN. REV. L. & SOC. SCI. 337, 357 (2012).

<sup>21</sup> *Mabo*, 175 CLR at 71.

between radical title (colonial sovereignty) and beneficial title (various interests in land).<sup>22</sup> There was, however, a hierarchy of interests in land to be re-instituted.<sup>23</sup> A variety of Crown grants in land and other actions would effectively extinguish native title.<sup>24</sup> Many indigenous rights would be regarded as washed away by “the tide of history,” as Justice Brennan put it.<sup>25</sup> Moreover, native title would only be recognised if it were found to be consistent with the claimant’s traditional laws and customs.<sup>26</sup> Those laws and customs needed to have continued unbroken from the time of colonial settlement. Given the systematic destruction of Aboriginal society wrought by colonial governmental practices such as the coercive removal of Aboriginal children from their families, Christian missionary activity, and transformations in economic and cultural practices, it was invariably difficult for indigenous communities to establish rights in land that would accord with their erstwhile traditional laws and customs. In recalling Australian law’s origins, the court inflicted new conditions for memory and forgetting on indigenous people.

The fact that the court was able to alter the concomitants of the colonial sovereign assertion points to how colonial law both sustains and disavows its fictions. The “barbarian theory” retained its reach over time—it was the “as such” (the constative assertion) on which the legal system and two centuries of dispossession were built. But the court was also able to render this sovereign assertion more malleable and subject to transformation over time. The “as such” was retained and converted. It was the “as if” character of sovereignty that purported to exist “as such” that enabled this malleability.

Later, in the 1996 decision of the High Court in *Wik Peoples v Queensland*—a case concerning whether native title and rights under pastoral leases could co-exist on the same land—Justice Gummow stated that the gist of *Mabo* “lay in the holding that the long understood refusal in Australia to accommodate within the common law concepts of native title rested upon past assumptions of historical fact, *now shown then to have been false*.”<sup>27</sup> This is a profoundly confessional moment for the Australian legal system. It is the admission

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<sup>22</sup> *Id.* at 51.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 53.

<sup>25</sup> *Id.* at 66.

<sup>26</sup> *Id.* at 65.

<sup>27</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1, 414 (Austl.) (emphasis added).



that the law is built on fictions and falsehoods. It is also a highly unstable speech act, disclosing an uncertainty about whether the error or falsehood is enacted “now” (the iteration of the “barbarian theory” in *Mabo*); whether it is the memory of what has happened “back then” (the account now of past assumptions); or whether it is the recovery of something missed or forgotten (though it is not clear if this is now or in the past). Bemoaning the lack of an “established taxonomy” to regulate “uses of history in the formulation of legal norms,” Justice Gummow wondered whether the gesture to shift the foundation would be regarded as a “rhetorical device devised to render past reality into a form useful to legally principled resolution of present conflicts.”<sup>28</sup> It was all that and more!

Justice Gummow wished for an “established taxonomy” to regulate history.<sup>29</sup> This is the language of the anti-metaphysicians and social scientists that have hitherto been the trusty servants of judges. Judges have come to be accustomed to taxonomies, hierarchies, and irrefutable facts that buttress law as calculation. But no such taxonomy exists. The law confronts its past and becomes, for a moment, lost in time. The court is disorientated by its own past fictions, which it must continue to rely on now and disavow at the same time. The speech act “now shown then to have been false” moves the common law of the 1990s back to its historical antecedents, but only within law’s own rhetorical gestures and textual inscriptions.<sup>30</sup> The judges are the authors of this past and in the process it becomes uncertain whether they are determining “this” past, or whether “the past” (history) is determining what they do now. There are multiple moves here of inscribing, preserving, and disavowing the colonial sovereign foundation. Is the assertion of *terra nullius* as the basis for dispossessing Aboriginal people of sovereignty over their lands a falsehood propounded “back then,” and/or a convenient means of accounting for that dispossession today?

These questions have come to a head in debates concerning rival historiographical methods. Put simply, is the work of the historian a redemptive one—that is, concerned with the construction of narratives that would offer an account of how past misrecognitions can “now” be adjusted (in Justice Gummow’s terms, this would involve “now” recognising that

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<sup>28</sup> *Id.* at 419–21.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 414.

an error or falsehood was performed “back then”)? Or is it rather one of placing past injustices in a social and political context that can be discretely “contained” in a time “now past”? The problem here is the uncertainty of whether law, as an *archive* of the past, and the historiographical rendering of it, is a projection of the present into the past, or a retrospective recognition of what was always there to be discovered. The question I explore in more detail below is whether this is merely a problem of rival historical methods, or a wider metaphysical problem of law’s fictions that needs to be posed differently. In what follows, I examine rival approaches to whether past injustices can be addressed now, and how that can be done. Later, I suggest that the ungraspable character of colonial sovereignty—its apparent malleability—is better addressed as a problem of the ontology of sovereignty. For now, let’s consider debate among the historians.

### B. Rival Historiographies

A telling exemplar of historiographical rivalries about colonial sovereignty is presented in Ian Hunter’s account of the problem of political, rights-oriented and redemptive history.<sup>31</sup> This he associates with the work of the influential Australian historian, Henry Reynolds. Reynolds’s historical work is widely associated with the progressive revisionism of the 1970s and 80s.<sup>32</sup> This latter historiographical method is credited with the Australian High Court’s belated recognition of indigenous land rights in the form of native title in *Mabo*.<sup>33</sup> The fact of this ‘belatedness’, this coming after what should always already have been, is itself at the heart of the historiographical dispute.<sup>34</sup> Reynolds later went onto argue that indigenous Australians should have been regarded as a sovereign nation at the time of the colonial encounter, and that this sovereignty was now capable of recognition.<sup>35</sup> The Australian High Court has steadfastly refused to countenance Aboriginal sovereignty in

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<sup>31</sup> See generally Ian Hunter, *Natural Law, Historiography, and Aboriginal Sovereignty* 11 LEGAL HIST, 137 (2007).

<sup>32</sup> See e.g. HENRY REYNOLDS, *THE LAW OF THE LAND* (Penguin Books 1987).

<sup>33</sup> *Mabo v Queensland (No 2)*, (1992) 175 CLR 1, 57 (1992) (Austl.).

<sup>34</sup> DELETE THIS FOOTNOTE

<sup>35</sup> HENRY REYNOLDS, *ABORIGINAL SOVEREIGNTY: REFLECTIONS ON RACE, STATE AND NATION* (1996). See generally, Chapter 3.

a series of cases.<sup>36</sup> Nonetheless, Reynolds' history, as with other social historians, seeks a perfectibility by way of adjusting past misrecognitions judged now to be capable of being done differently "back then." For instance, Reynolds has argued that, judged by the standards and principles of natural law and the law of nations of the 19<sup>th</sup> century, Aboriginal peoples should have been recognized as sovereign nations.<sup>37</sup> This past non-recognition is redeemable by recognition now.

Hunter's critique of Reynolds is based on a historiographical dispute about the *archive* of natural law and the law of nations in relation to Aboriginal sovereignty.<sup>38</sup> Reynolds' claim for the recognition of Aboriginal sovereignty is not based on a "weak" form of recognition within Australian constitutional law, but on a "strong" claim that it is a time-immemorial right, rooted in the cultural and ethnic identity of the Aboriginal "nation."<sup>39</sup> Aboriginal sovereignty is not dependent on recognition by the Australian state, but is rather capable of recognition as a universal right in natural and international law—the *jus naturae et gentium*.<sup>40</sup> Reynolds locates the failure to recognize Aboriginal sovereignty in the judgment of Justice Burton in *R. v Murrell*.<sup>41</sup> On Hunter's account, Reynolds has posed a moral and metaphysical question—"were the Aboriginal tribes sovereign?"—and determined the answer based on the arguments of eighteenth-century Prussian philosopher Christian Wolff's *Jus Gentium*.<sup>42</sup>

The fact that Wolff's text was not translated into English until the twentieth century is the key problem for Hunter. Reynolds deals with this on the basis that English lawyers of the nineteenth century would have encountered Wolff's work via Vattel.<sup>43</sup> However, Vattel is not helpful, as he distinguished *dominium* from *imperium*.<sup>44</sup> Nomadic ownership was equated with the former, and so sovereignty would not follow from having *dominium* over

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<sup>36</sup> In *Mabo* the court declared the colonial assertion of sovereignty to be non-justiciable in a municipal court. *Mabo* CLR at 31-32; see *Coe v Commonwealth (No. 1)* (1979) 53 ALJR 403, 3 (Austl.); *Coe v Commonwealth (No. 2)* (1993) 68 ALJR 110, 25 (Austl.).

<sup>37</sup> See generally, *Aboriginal Sovereignty*, Chapter 3. ...

<sup>38</sup> Hunter, *supra* note 27, at 137–39.

<sup>39</sup> REYNOLDS, *supra* note 31, at 39-59.

<sup>40</sup> See Hunter, *supra* note 27, at 141.

<sup>41</sup> REYNOLDS, *supra* note 31, at 40 (discussing *R. v Murrell* (1836) 1 Legge 72 (Austl.)).

<sup>42</sup> Hunter, *supra* note 27, at 145–46.

<sup>43</sup> REYNOLDS, *supra* note 31, at 52.

<sup>44</sup> *Id.* at 56.

land.<sup>45</sup> Hunter's critique is that Reynolds has to drop the historical argument for a philosophical (moral and metaphysical) one:

Reynolds appeals to the law of nations in order to establish the normative standpoint, common to us and our colonial forebears, within which Aboriginal sovereignty is rightfully recognisable, and in relation to which its denial (by Burton and the courts) constitutes a manifest injustice. In silently dropping his historical claim that the colonial jurists did indeed share this normative law-of-nations standpoint, however, Reynolds tacitly treats this standpoint as timeless and universal. In fact he treats it as grounded in the time-immemorial 'ancestral rights' of the Aborigines themselves and their recognition by a timelessly rational *jus gentium*. In this regard, he reactivates one of the programmatic imperatives of a particular tradition of the *jus naturae et gentium*: namely, to subordinate the positive law of the state to a higher timeless moral law.<sup>46</sup>

This is a move that Hunter associates with anti-state social history—a move away from the level of law and the state, and towards reliance on a theory of the ideological determinants of society.<sup>47</sup>

For Hunter, the Reynolds-type "redemptive historiography" rests on the idea of a "moral nation" that has fallen from its "high moral destiny."<sup>48</sup> It is a historiography, in Hunter's view, that shares a "presentism" with the common law: "the view that past actors were governed by the same norms and purposes as their present counterparts—which permits the law to function as the trans-historical frame against which the moral history of the nation can be judged."<sup>49</sup> Modern revisionist redemptive historiography is then compared with common law revisionism (and we saw this unfolding in Gummow's judgment in the *Wik* case). Redemptive historiography and the common law both "view the law as historically grounded and yet timelessly present, in the sense that its past defects can

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<sup>45</sup> *Id.* at 49–50.

<sup>46</sup> See Hunter, *supra* note 27, at 143.

<sup>47</sup> *Id.* at 143–44.

<sup>48</sup> See *id.* at 138–39.

<sup>49</sup> *Id.*

be judged and corrected in accordance with present norms that are treated as timelessly available to its original architects.”<sup>50</sup>

Hunter contrasts Reynolds’ social history of the law with the rival Cambridge school of analytical historiography, whose ambit is the “history of historiography” (a school of historiography that Hunter goes on to associate with antimetaphysics).<sup>51</sup> Eschewing the “moral-nationalist historiography,” the analytic historiographers reconstruct the “context-specific ‘languages’ of political thought.”<sup>52</sup> The redemptive history that seeks to resolve historical exclusions is associated with the “revisionist historical sense of the . . . common law.”<sup>53</sup> In contrast to this Whiggish history of immemorial rights “permanently present to reason”, the contextual approach of J.G.A Pocock is relied on<sup>54</sup> It is seen as giving an account of public law arising from the “governmental will of a sovereign or state and is thus anchored to a particular time and place through the contest of political forces.”<sup>55</sup>

This focus on context and contingency is a modernist obsession that Tomlins characterizes as a post-Enlightenment philosophical position:

Historicism’s roots lie in post-Enlightenment, particularly German, scholarly discourse, in the relativist proposition that all social and cultural phenomena, as well as the categories to which they belonged, the truths they were understood to convey, and the values that might be generalized from them, were comprehensible only by an examination of the historical context in which they occurred, an examination rigorously detached from any evaluative criteria belonging to the historian’s present that might distort comprehension.<sup>56</sup>

This brings the antimetaphysical historiographical approach into sharper focus. On Hunter’s account the rights of Aborigines, including their right of sovereignty, was determined in the mid-nineteenth century by a conflict unfolding between frontier settlers, and the Colonial

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<sup>50</sup> *Id.* at 139.

<sup>51</sup> *Id.* at 138–39.

<sup>52</sup> *Id.* at 138.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 139.

<sup>55</sup> *Id.* at 140.

<sup>56</sup> Christopher Tomlins, *After Critical Legal History: Scope, Scale, Structure* 8 ANN. REV. L. & SOC. SCI. 31, 37 (2012).

Office in London.<sup>57</sup> The settlers preferred a plural legality, a localized common law jurisdiction that sometimes opportunistically asserted that indigenous people had not been conquered.<sup>58</sup> The colonial Crown, in contrast, asserted a unified jurisdiction over the territory in order to secure a stable and unified claim to sovereignty over the territory.<sup>59</sup> Both claims were inchoate, and wrought at the expense of indigenous peoples.

For Hunter the variegated story about contested jurisdictions in colonial Australia emerges from a contextualized historiography—one that eschews the metaphysical moral claims about the rights of Aboriginal nations, or indeed the moral perfectibility of a fallen colonial Australian nation.<sup>60</sup> Hunter promotes a rival historiographical approach to public law and constitutionalism which:

[V]iews the state not as an agent responsible to and for the moral history of the nation, but as one whose normatively ungoverned actions—including colonisation—give rise to history as their *uncontrollable consequence*. If this is a historiography from which no moral guilt may be ascribed to today's Australians, then it is equally one from which they may draw no moral comfort.<sup>61</sup>

For Hunter, this is a history without the possibility of guilt or legitimacy. If colonial history is understood to invariably raise the question of the justice of being in place over time, then a contextualized historiography is incapable of providing a normative response. A position apart from the contextual and contingent forces on the ground is rendered unimaginable. Indeed, the place of the imaginary—the significance of narratives, fictions, and images for producing history—is devalued. It is a historiography with no place for justice.

Significantly for my purposes, Hunter's assertion is that history is an "uncontrollable consequence;" and the various colonial impositions are normatively ungoverned, and certainly are not governed by the standards of legitimacy and justice that may now be brought to bear on past events. It is this tension between a historiography of redemption

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<sup>57</sup> Hunter, *supra* note 27, at 160–61.

<sup>58</sup> *Id.* at 160.

<sup>59</sup> *Id.* at 160–61.

<sup>60</sup> *Id.* at 166–67.

<sup>61</sup> *Id.* at 167 (emphasis added).

and a contextual history that I seek to displace with an account of the ontological problem of sovereignty, which places colonial and postcolonial sovereignty inextricably in contact with law and normative frameworks. My point is not to suggest the possibility of a redemptive outcome—on that I am closer to Hunter than I am to Reynolds. It is rather to counter the anti-metaphysical tendency to displace the problem of justice.

My suggestion is that a “Law As . . .” approach offers a way beyond the rival historiographies that we have been considering. Michael Naas puts it well when he argues that Derridian deconstruction, before being a critique of phono-centrism and logo-centrism, and before even being a critique of the “metaphysics of presence,” is a “critique of the *as* that makes all presence possible.”<sup>62</sup> Before being a critique of analogy, sovereignty, or the event, deconstruction is “a critique of the ‘as,’ the ‘as such,’ and the ‘as if’ that make all comparison and analogy possible.”<sup>63</sup> Deconstruction is a critique of the “authoritative or sovereign ‘as.’”<sup>64</sup> What Derridian deconstruction sought to undo was the “sovereign reign of analogy.”<sup>65</sup> We should thus seek the point of contact between philosophical accounts of the coming into existence of phenomena and historiographical problems. In sum, we should explore the relationship between ontology and history.

Derrida takes the problem of the “as if” back to Kant. Derrida asks, “what if the law, without being itself transfixed by literature, shared the conditions of its possibility with the literary object?”<sup>66</sup> He was referring to Kant’s second categorical imperative.<sup>67</sup> In his *Groundwork for the Metaphysics of Morals*, Kant expressed the centrality of the “as if”:

Because the universality of the law in accordance with which effects happen constitutes that which is really called *nature* in the most general sense (in accordance with its form), i.e. the existence of things insofar as it is determined in accordance with universal laws, thus the universal imperative

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<sup>62</sup> NAAS, *supra* note 7, at 37.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 38.

<sup>65</sup> *Id.*

<sup>66</sup> JACQUES DERRIDA, *Before the Law, in ACTS OF LITERATURE*, 181, 191 (Derek Attridge ed., 1992).

<sup>67</sup> *Id.*

of duty can also be stated as follows: *So act as if the maxim of your action were to become through your will a **universal law of nature**.*<sup>68</sup>

The “as if” introduces narrative and fiction to the core of legal thought.<sup>69</sup> There is no history, genesis, or derivation of categorical authority. What is concealed and invisible in law is the “being-law” of law.<sup>70</sup> The narrative or fiction of the law takes the place of an uncertain origin.

The implications of this approach to the *being* of law reach beyond rival histories of natural law in colonial Australia. The antimetaphysical account of the state is also central to debates in contemporary jurisprudence and constitutional theory. The autonomy and reach of the public law of the state is challenged by rival jurisdictions in postcolonial settings. As if sovereignty or law can be autonomous. The status and condition of that “as if” is what is at stake in these discussions: as if Australia was unpeopled and without a settled law; as if the colonial assertion of sovereignty reached a level of plenitude after its original violence. The question that comes after the recognition of “law as . . .” is whether human relations, including relations between rival laws—rival jurisdictions—can be represented as *autonomous*, as constitutionalists and public lawyers are prone to do. It seems as if that is precisely what is at stake in attempts to renounce metaphysics and theology in accounting for the ethics of judges, officials, and their rival jurisdictions.<sup>71</sup> Here, I will focus on the work of the influential constitutional theorist Martin Loughlin, who has attempted a systematic account of the autonomy of public law.<sup>72</sup>

### *C. Anti-metaphysics: the autonomy of public law and the civil state?*

According to Martin Loughlin, “sovereignty expresses three basic features of the modern state: internal coherence, external independence, and supremacy of the law.”<sup>73</sup>

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<sup>68</sup> IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 38 (Allen W. Wood ed., trans., Yale Univ. 2002) (1785) (first emphasis added).

<sup>69</sup> DERRIDA, *supra* note 63, at 190.

<sup>70</sup> *Id.* at 192.

<sup>71</sup> *See generally* SHAUNNAGH DORSETT & SHAUN MCVEIGH, *JURISDICTION* 98–116, 132–43 (2012).

<sup>72</sup> The choice of Loughlin is partly due to the breadth of his account of public law, but more relevant to our discussion, due to his reliance on Ian Hunter at crucial points in his account.

<sup>73</sup> MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* 75 (2003) [hereinafter LOUGHLIN, *THE IDEA*]; *see also* MARTIN LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW* (2010).



Political power, he argues, is independent of material factors—it is generated by the “living together of people.”<sup>74</sup> Drawing on Arendt, Loughlin claims that power becomes authority, a form of government, when it is manifested in an institutional form.<sup>75</sup> Public power is political power harnessed in order to give it institutional form.<sup>76</sup> It is only by way of a relation—society—that public power is sustained.<sup>77</sup> This relation can give rise to a system of rules.<sup>78</sup> The system is only sustainable by the “opinion and belief” that the system reflects the being-together, the being civil, by consent and choice, of equal individuals.<sup>79</sup> This account of public power as the “action” of autonomous beings, the coming-together of equal individuals, is drawn from Aristotle via Hannah Arendt.<sup>80</sup> The political is explained by the fundamental quality of plurality, one that is expressed through action and speech.<sup>81</sup> As we will see later, this version of plurality is not able to sustain the autonomy of the political as I argue that the logic of “each one” is undone in modern democracy (in the “dis-position of beings”).

For Loughlin, sovereignty is a representation, a re-presentation of the relation between individuals.<sup>82</sup> Sovereignty is a function of the being-together of individuals united by common action.<sup>83</sup> Sovereignty is thus vested in the state. But how do we reconcile the relationship between the authority exercised by the office of the sovereign and the liberties of individuals that this office may curtail? In other words, how do we explain the relationship between authority and liberty? Loughlin, drawing again on Arendt’s “What is Authority?”, explains it through the Latin root of authority, *auctoritas*—which is drawn from the verb *augere* (to *augment*).<sup>84</sup> Those in authority must augment the foundation—they must realize that authority is based in the “past,” that is, in “tradition.” Loughlin argues that tradition is a correlate of the *people*.<sup>85</sup> The authority exercised by a sovereign is conditioned

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<sup>74</sup> LOUGHLIN, THE IDEA, *supra* note 70, at 77.

<sup>75</sup> *Id.* at 78.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *See id.*

<sup>80</sup> *Id.*

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<sup>82</sup> *See id.* at 78–79.

<sup>83</sup> *See id.* at 73

<sup>84</sup> *Id.* at 81.

<sup>85</sup> *Id.*

on the autonomy of the rights-bearing autonomous subject.<sup>86</sup> This is another point at which the quintessentially modern character of Loughlin’s account is revealed. The tension between authority and liberty/freedom doesn’t undo the “presence” attributed to the unity or commonality of people, tradition, and so on. The “past,” or tradition, can only be a “placeholder” of what in fact is an “empty place”—the empty place of power identified by Lefort.<sup>87</sup> The sovereignty of the nation-state, as we saw in the discussion of *Mabo* and *Wik* above, is contested, unstable, and subject to revision. The past does present problems of authority and authorization. These can usefully be thought through the root of *auctoritas*. But augmentation is less likely to supply a stable unity than it is to expose the fragility and precariousness of the sovereign claim.

Loughlin does, however, agree that sovereignty, as an expression of a political relationship, is relational. It is impossible, he says, to conceive of sovereignty as an exercise of public power without considering the sovereign as a re-presentation of a political relationship, or as a person, organ, or office authorised to act on behalf of the political community.<sup>88</sup> Sovereignty is the relationship between the “ruler and ruled.”<sup>89</sup> It is an expression of this political relationship and is not a “thing” that belongs to one person or group.<sup>90</sup> For Loughlin, sovereignty is thus both “legal” and “political.” As an expression of public power in its institutional, official form, it is *legal*.<sup>91</sup> As the expression of a political relationship, let’s say between ruler and ruled, it is also *political*.<sup>92</sup> From this is derived the assurance (and the assumption) that “[s]overeignty divided is sovereignty destroyed.”<sup>93</sup> But how, then, is sovereignty both political and legal?<sup>94</sup>

One way to approach this question is to consider whether it would be useful to approach sovereignty, law, and the political as ontological problems (a matter I turn to in

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<sup>86</sup> *See id.* at 82.

<sup>87</sup> CLAUDE LEFORT, *DEMOCRACY AND POLITICAL THEORY* 172 (David Macey trans., Polity Press 1988). (1986)

<sup>88</sup> LOUGHLIN, *THE IDEA*, *supra* note 69, at 82–84.

<sup>89</sup> *Id.* at 83.

<sup>90</sup> *Id.*

<sup>91</sup> *See id.* at 84.

<sup>92</sup> *See id.*

<sup>93</sup> *Id.*

<sup>94</sup> This question can be addressed by the distinction between the “constituent power,” let’s say of the “people” (*potentia*), and the authority/institution in whom that power is vested—the “constituted power” (*potestas*). The power of the “people” is *political*; the institutional or constitutional arrangement of the competencies authorised by such political power is the *legal* manifestation of sovereignty. *See id.* at 79–84.

the next section). Loughlin seems to collapse all three problems into one.<sup>95</sup> In this way, what is asserted to be a relation is returned as a *monism*—the monism of sovereignty as the representation of a relation between ruler and ruled, and indeed as the re-presentation of the *political* and the *legal* as one. Loughlin too readily associates sovereignty with law. He does this by arguing that the general will is given institutional expression through legal arrangements.<sup>96</sup> Hence, the sovereign will is not arbitrary and absolutist, but legal.<sup>97</sup> The sovereign may have the authority to make the law—in positivist terms, law is the command of the sovereign. But, for Loughlin, the “constitution of authority . . . is conditioned by law.”<sup>98</sup> He starts from the position that sovereignty is an expression of the autonomy of the political. This autonomy manifests a political relationship that might be given an institutional/legal inscription in law. As with Ian Hunter, what drives Loughlin’s analysis is a disavowal of any metaphysical grounds of law or sovereignty.

Loughlin’s account of public law is heavily influenced by Hunter’s antimetaphysical move. The key figures in Hunter’s account of a rival enlightenment are Pufendorf and Thomasius.<sup>99</sup> His is an account of the state without recourse to a transcendent theological position, or to the post-Kantian position of a moral, ethical, or normative order independent of the state.<sup>100</sup> Pufendorf is the guiding figure for theorists who promote an antimetaphysical and post-theological sense of public law. For Loughlin, drawing on Hunter’s scholarship, Pufendorf makes the “decisive break by severing natural law from theology and ethics.”<sup>101</sup> This enables “politics” to be identified as an “autonomous realm,” and “natural law to be transmuted into *droit politique*,” or “political right.”<sup>102</sup> Departing from the Hobbesian primacy of positive law as the emanation of the sovereign will, Pufendorf’s natural law and Montesquieu’s fundamental law are seen as conditioning and maintaining an autonomous political realm.<sup>103</sup> In determining the relationship between politics and morality, the autonomy of the political is given primacy: “Moral life cannot exist

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<sup>95</sup> See *id.* at 86–87.

<sup>96</sup> *Id.* at 87.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 88.

<sup>99</sup> IAN HUNTER, RIVAL ENLIGHTENMENTS: CIVIL AND METAPHYSICAL PHILOSOPHY IN EARLY MODERN GERMANY 27–28 (2001).

<sup>100</sup> See *id.* at ix–x.

<sup>101</sup> LOUGHLIN, THE IDEA, *supra* note 70, at 140.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 142

without economic and political life having first been established, and the ethical spirit is a vital aspect of political life.”<sup>104</sup> Rejecting the Kantian categorical imperative as a transcendental law that can guide governmental authority and ensure civil peace, Loughlin sees public law as “an expression of the immanent precepts of an autonomous discourse of politics.”<sup>105</sup>

The lack of an authoritative transcendental morality means that there is no resolution of incommensurability—between peoples, jurisdictions, or ruler and ruled—to be found outside public reason. What then is the source of unification? In the end, and somewhat surprisingly, Loughlin reaches for the imaginary. We will have to proceed “as if” after all! It is “image” and “metaphor”—for instance, the image of Machiavelli as the mapmaker for the prince—that takes the place of metaphysics. Moreover, this is an account of “public reason” as “reason of state.” Much is optimistically expected of *raison d'état*. It must promote the public good, have due regard for morality and justice, and prudentially adhere to law.<sup>106</sup> If politics is guided by neither science nor metaphysics, from where does the “prudential method” derive its content? Politics is a practical activity whose judgments involve “analogical reasoning and is a form of casuistry”:

Although casuistry today has lost much of its respectability in certain circles, it remains an effective method of dealing with practical problems, especially those that involve conflicting obligations. Casuistry operates by applying old illustrations to new problems—a dialectic between paradigm case and novel circumstance—and creates a type of knowledge that is not easily generalizable. In so doing, it replicates politics itself.<sup>107</sup>

Applying “old illusions” to “new problems;” the centrality of image and metaphor—they all point to something other than the material, mundane, and contextual determining the outcomes of legal and political conflicts (recall Hunter’s point about colonial violence above). However, this is difficult to sustain when the overall orientation is away from metaphysical determinations.

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<sup>104</sup> *Id.* at 144–45.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 149.

<sup>107</sup> *Id.* at 152 (citation omitted).

This antimetaphysical approach can be compared to critical legal history (CLH) and critical legal studies (CLS). As Tomlins has put it, they are both forms of: “skeptical antimetaphysical modernism that adapts Weberian wheels to non-Weberian purposes, a disenchanting mode of historical analysis, that ‘strips [law] of its metaphysical dignity, unity, and coherence by exposing law as the outcome of mundane and profane processes and interests.’”<sup>108</sup> So, antimetaphysicians like Hunter and Loughlin face a contradiction. They disavow metaphysics in order to get closer to “reality.” This is done to reveal the true determination of experiences, decisions, and events. But a metaphysical ghost haunts the contextualist. The fictional assertions of the sovereign remain inchoate. The imagery and symbolism of sovereignty assert a unity that is nowhere to be found.

What law sees and does not see, what it recognizes, misrecognizes, or excludes becomes a problem of what *there is* in relation to law. This is an *ontological* question concerning the existence and relation of law and sovereignty. There persists, then, a need to account for the *being* of the sovereign authority that faces the problem of legitimation, and the *being* of the political community without which the singular subject would be a logical contradiction (you cannot “be alone being alone,” as Jean-Luc Nancy has put it).<sup>109</sup>

When Justice Gummow was reaching for a taxonomy to account for the “shift” or transformation of the foundation of Australian law in *Wik v Queensland*, what lay behind his anxious query was the *being* of colonial and postcolonial sovereignty. Was sovereignty capable of being altered, re-positioned, or re-positated? The account of colonial sovereignty before the *Mabo* decision had, it seemed, been altered. How is such an alteration possible when a fulsome foundational sovereignty is supposed to be immovable and indivisible? In what follows, we will examine how the historiographical problem of law and sovereignty gives rise to an ontological question concerning the relation of sovereignty to law.

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<sup>108</sup> Tomlins, *supra* note 53, at 38 (citing Yishai Blank, *The Reenchantment of Law* 96 CORNELL L. REV. 633, 656 n.137 (2011)) (alteration in original). For an alternative deployment of a Weberian typology, see PANU MINKKINEN, *SOVEREIGNTY, KNOWLEDGE, LAW* 59–112 (Routledge, 2009), who elaborates the relation between sovereignty, knowledge, and law in terms of auto-cephalous, hetero-cephalous, and acephalous conceptions of sovereignty.

<sup>109</sup> Jean-Luc Nancy, *The Inoperative Community*, in 76 *THEORY AND HISTORY OF LITERATURE* 4 (Peter Connor ed., trans., Univ. of Minn. Press 1991) (1986). I elaborate this point below.

### III. AN ONTOLOGY OF SOVEREIGNTY

#### A. *Undoing sovereign autonomy and ipseity*

The first task in elaborating the being of sovereignty is to tackle its purported singular presence and plenitude. Sovereignty, as we have observed above, is regularly expressed as wholly autonomous, indivisible, and illimitable. Sovereignty apparently gives itself to itself (*ipseity*). What traces of sovereign appearance and alteration provide insights to the ontological relation of sovereignty and law?

In the opening pages of *Rogues: Two Essays on Reason*, Jacques Derrida refers to “The Wolf and the Lamb,” a poem from La Fontaine.<sup>110</sup> This poem expresses the question, “who has the ability, right, or power to decide on the law,” and with what force. Derrida puts it like this: “But just who has the right to give or to take some right, to give him- or herself some right [*droit*] or the law [*droit*], to attribute or to make the law in a sovereign fashion? Or the right to suspend law in a sovereign way?”<sup>111</sup> Carl Schmitt authored one of the most influential responses to Derrida’s question in the modern tradition. He gave an account of the secularized theology of sovereign power, drawn from the “outermost sphere” of limit-situations, as he called them.<sup>112</sup> For Schmitt, the sovereign exception grounds and conditions a normative order.<sup>113</sup> For Schmitt, sovereignty is a creature of the limit situation.<sup>114</sup> Sovereignty determines limits, but is in movement within and outside of a frame.<sup>115</sup> In constituting a legal order, sovereignty is in movement towards a frame of reference, a normalised political condition.<sup>116</sup> The illimitable sovereign thus moves towards and by way of a limit. It could also be said that the illimitable exists in and through a limit. As Derrida puts it, once the indivisible is divided, and the illimitable is limited, sovereignty, as the

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<sup>110</sup> JACQUES DERRIDA, *ROGUES: TWO ESSAYS ON REASON* x (Pascale-Anne Brault & Michael Naas trans. 2005).

<sup>111</sup> *Id.* at xi (alterations and emphasis in original).

<sup>112</sup> CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., Cambridge: MIT Press 1985) (1922).

<sup>113</sup> *Id.* at 12–14.

<sup>114</sup> *Id.* at 12–13.

<sup>115</sup> *Id.*

<sup>116</sup> *See id.* This can be complicated even further through the distinction between constituting and constituted power drawn from Sieyès and Negri, but I will not take that up here.

“undivided” and “unshared,” becomes an impossible possibility.<sup>117</sup> This is in contrast to the singular plenitude of sovereignty, which is often asserted:

[I]s not the very essence of the principle of sovereignty, everywhere and in every case, precisely its exceptional indivisibility, its illimitation, its integral integrity? Sovereignty is undivided, unshared, or it is not. The division of the indivisible, the sharing of what cannot be shared: that is the possibility of the impossible.<sup>118</sup>

What is crucial here is the insight that whatever divides—and the sovereign limit divides—also “shar[es] itself” in this partition.<sup>119</sup> The singular plenitude of the sovereign decision thus deconstructs itself at the “frontier” of the division it cuts.<sup>120</sup>

For Derrida, sovereignty is at once indivisible and unconditional. As the *indivisible*, it is absolute, complete, a sovereign plenitude.<sup>121</sup> This sovereign plenitude is first figured as the “I” of the “I can”—or ipseity.<sup>122</sup> In a moment, I shall return to the undoing of ipseity, or the autotelic subject at the heart of the *demos* and its representation as sovereignty/democracy. As the unconditional, sovereignty is neither “as such” nor “as if”—neither “constative” nor “performative.”<sup>123</sup> Derrida affirms the unconditional renunciation of sovereignty, but an unconditional renunciation of sovereignty, which needs another sovereignty, perhaps.<sup>124</sup> The unconditional is heterogeneous and rebellious, but irreducible to law, power, or any “economy of redemption.”<sup>125</sup>

Ipeity is akin to *auto* in Greek.<sup>126</sup> It is from *ipse* that one extracts the possibility of giving oneself law, or asserting self-determination. Democracy can only be imagined with the assertion of this ipse/auto—the autonomous, self—as the same subject. Ipeity is also the condition of “being-together,” “living together”—because before the plural will exists, there needs to be the possibility of the singular—the auto or ipse of the self.

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<sup>117</sup> DERRIDA, *supra* note 6, at xx.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> DERRIDA, *supra* note 107, at 11.

<sup>123</sup> *Id.* at xiv.

<sup>124</sup> *See id.*

<sup>125</sup> *Id.* at xv.

<sup>126</sup> *Id.* at 11–12.

This ipseity is at the heart of liberal ontology, and is what Derrida and Jean-Luc Nancy call into question.

The possibility of an “I can” by myself, that is, this ipseity, is named in order to call it into question. This involves calling into question the “assembling” of the “resembling ensemble,” the simulacra of resemblance, the simulation that is the act of making similar.<sup>127</sup> To say “I can” is the key condition of many liberal/modern concepts/practices (and some of these, of course, self-identify as having a classical Greek pedigree): possession, property, power, husband, father, son, proprietor, seignior, sovereign, host, or master. Think, also, of the possessive individual from Hobbes and Locke. There can be no sovereignty, no liberal democracy, or any of those social contract theories, without this notion of ipseity.<sup>128</sup>

In modern accounts of democracy, the individual, autonomous being becomes one with a “people”/nation, authorizes subjection to a sovereign, or holds sovereignty as one-of-the-many. Democracy is a force in the form of a sovereign authority (as reason and decisiveness), and a representation of the power and ipseity of a people. It is in this sense that Derrida’s trope of the “wheel,” at once violence, torture, and repetition, applies to democracy.<sup>129</sup> In democracy, power is not held by any one person, it is held by “everyone and no one.” But this “everyone” cannot be just “anyone.” Recall the calculations, the “who counts?” in all friendship and democracy.<sup>130</sup> This demand for openness to “everyone” will come to undo democracy (as with democracy’s many auto-immunities, which I will not pursue here). The demand of “everyone,” as equal worth and freedom, is always already the undoing of democracy. The authorization of the exercise of power in modern democracy must constantly return to its source, its authorization. While the axiomatic of democracy as circle, sphere, ipseity, autos of autonomy, symmetry, homogeneity, semblance and similarity, and God, which is the analogy in the American Declaration, are all ways of expressing the autonomy of the political, Derrida identifies the double bind within this tradition of democracy. Each of these elements are incompatible and clash with the “truth of the democratic,” namely

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<sup>127</sup> *Id.* at 11.

<sup>128</sup> *Id.* at 11–12.

<sup>129</sup> *See id.* at 13–14.

<sup>130</sup> *See generally*, JACQUES DERRIDA, *THE POLITICS OF FRIENDSHIP* (George Collins trans., Verso 2005) (1994).



the other, heterogeneity, dissymmetry, multiplicity, the anonymous “anyone,” and the “each one.”<sup>131</sup> Sovereignty, as the ipseity at the heart of democracy, represents a stilling of an infinite order of time (even as patricide, regicide).<sup>132</sup> But this ipso-centric order, this autonomy of the political as democracy or other formations of community, undoes itself. The double bind of ipseity, the clash of the “I can” with the autonomy of “everyone”—in other words the problem of “being-singular-plural”—can be taken up as the problem of all finitude through the work of Jean-Luc Nancy.

To recall our discussion above, the autonomy of the political is asserted by theorists like Loughlin as the manifestation of a political/legal relationship. Sovereignty is the re-presentation of this autonomy—one that, in a Schmittian mode, can be conceived as the preoccupation with the political and juridical limit of sovereignty. But sovereignty is neither a bounded unity nor an illimitable institution. I have transposed this question of the sovereign limit and the autonomy of the political into the internal undoing of all autos or ipseity in the democratic demand itself. Ipseity is both the condition and undoing of self-determination. I will elaborate this undoing of autonomy through Jean-Luc Nancy’s thought on the finitude of being.

### *B. Jean-Luc Nancy: The Impossibility of Finite/Infinite Sovereignty*

In “The Inoperative Community,” Nancy calls into question the possibility of an “absolute,” atomistic subject, as individual or state, which exists entirely “for-itself.”<sup>133</sup> According to Nancy, the individual subject, or “total State,” cannot be “perfectly detached, distinct, and closed.”<sup>134</sup> Nancy sets out to establish that every finite, atomistic being, whether that is the individual subject or a State, implies a relation in its separation:

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<sup>131</sup> DERRIDA, *supra* note 106, at 14–15.

<sup>132</sup> *Id.* at 17.

<sup>133</sup> Nancy, *supra* note 106, at 4.

<sup>134</sup> *Id.*

A simple and redoubtable logic will always imply that within its very separation the absolutely separate encloses, if we can say this, more than what is simply separated. Which is to say that the separation itself must be enclosed, that the closure must not only close around a territory (while still remaining exposed, at its outer edge, to another territory, with which it thereby communicates), but also, in order to complete the absoluteness of its separation, around the enclosure itself.<sup>135</sup>

The “limit” that marks the separation of a being (let’s say of an individual or state), in order to be absolutely separate, would have to be so thoroughly and “purely” enclosed that it would not communicate on its outer edge with the subject, territory, or space beside it. Such an absolute separation, Nancy argues, is impossible “to be absolutely alone, it is not enough that I be so; I must also be alone being alone—and this of course is contradictory.”<sup>136</sup> The idea of a finite being violates itself to the extent that this finitude implies a separation that is at once a “communication” “*with . . .*” One cannot say what is “beside” (“*with . . .*”) finitude precisely because of the impossibility of “being alone.” In asserting its separateness, the absolute is undone by the “relation” (communication, community) to which “it” is exposed.<sup>137</sup> The “relation” that this “communication” implies violates the “essence” (as “absolute”) that an “absolute” finite being asserts for itself. Finitude is impossible because being finite implies communication and relation. It is therefore in the “logic of the absolute” that “community comes perforce *to cut into*” the subject/being/state.<sup>138</sup> It is this critique of finitude that I wish to bring to bear on the “ipseity” of sovereignty as a discrete “event” which was discussed above. The critique of finitude elaborates the undoing of democracy, for instance, as the sharing of plural beings—the “everyone” cuts into the autonomy of the political built on the “each one.”

For Nancy, “finitude itself *is nothing*.”<sup>139</sup> It is not a ground, essence or substance.<sup>140</sup> Finitude is always a sharing. Nancy persistently makes the point, in

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<sup>135</sup> *Id.* The finitude of “the Idea, History, the Individual, the State, Science, the Work of Art, and so on” are called into question in Nancy’s critique of the metaphysics of the “absolute.” *Id.* For my purposes, I will confine my discussion to the critique of finitude, and not elaborate the deeper, post-Heideggerian critique of metaphysics that is set out in Nancy’s thought.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 28.

several texts, that “there is no original or origin of identity”<sup>141</sup> which takes form through “exclusion.”<sup>142</sup> Rather than a self-sufficient being, or a being constituted by exclusion, Nancy proposes the original “dis-position” of beings.<sup>143</sup> For Nancy, the “origin” of being is a “dis-position.”<sup>144</sup> There is no purely delimited “outside” that grounds or constitutes being. I will briefly set out what Nancy means by original “dis-position.”

Nancy approaches this question through an account of the origin, which refuses an essential ground of being-in-common through reason or humanity—the appeal to “one-origin.”<sup>145</sup> Instead he proposes an ontology of origin where access to an origin is refused by its concealment in multiplicity.<sup>146</sup> “We” can’t identify ourselves in or as the origin—“we” can only identify *with* it.<sup>147</sup> Nancy refers to this as “originary coexistence.”<sup>148</sup> To hazard putting this simply, I am a *singular* being *among* a multiplicity of other singular beings. I, like every other “I” am originally singular, but it is a singularity that is at once plural: the latin *singuli* means “one by one” (a word that exists only as a plural).<sup>149</sup> The “other” of a singular being-origin is not the “essential stranger who is opposed to what is proper,”<sup>150</sup> as in many constructivist accounts. The other of being-origins is ““one of the two.””<sup>151</sup> “This ‘other’ . . . is ‘one’ among many insofar as they are many; it is *each one*, and it is *each time* one, one *among* them, one among all and one *among* us all.”<sup>152</sup> Each one is the other origin of us all, because we cannot “be alone being alone.” I am, we are, singular plural. In this way, the “being-with” is never secondary to an origin.<sup>153</sup> The origin itself is a coexistence of origins. The “origin” is not to be found “outside” being. This is essentially what is expressed in the

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 33.

<sup>142</sup> JEAN-LUC NANCY, *Of Being Singular Plural*, in BEING SINGULAR PLURAL 1, 24 (Robert D. Richardson & Anne E. O’Byrne trans., Stanford Univ. Press 2000) (1996).

<sup>143</sup> *Id.* 24–25.

<sup>144</sup> *Id.* at 25.

<sup>145</sup> *Id.* at 24. The politico-philosophical traditions that Nancy wishes to displace with his account are the social contract theories of Rousseau and liberal humanism.

<sup>146</sup> *Id.* at 10–11.

<sup>147</sup> *Id.* at 143.

<sup>148</sup> *Id.*

<sup>149</sup> JEAN-LUC NANCY, *Eulogy for the Mêlée*, in BEING SINGULAR PLURAL, *supra* note 139, at 145, 156.

<sup>150</sup> NANCY, *supra* note 139, at 11.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> See Nancy, *supra* note 106, at 14; NANCY, *supra* note 138, at 27, 32.

phrase “being singular plural”: “*The plurality of beings is at the foundation [fondment] of Being.*”<sup>154</sup>

Finitude appears, is exposed, and thus exists as communication.<sup>155</sup> Finitude “co-appears,” “*compears.*”<sup>156</sup> That is, finite being always presents itself together: “[F]or finitude always presents itself in being-in-common and as this being itself, and it always presents itself at a *hearing* and before the judgment of the law of community, or, more originarily, before the judgment of community as law.”<sup>157</sup> A finite, singular being (one that I take to be indicative of a monistic sovereign—that is to say, also indicative of the impossibility of such monism) presents itself, according to Nancy, before the “law of community” and “community as law.”<sup>158</sup> What is this “law of community” before which finitude presents itself? What does it mean to say that finitude is “more originarily” presented before the “judgment” of “community as law”? The “law of community” connotes the ontology of “being-in-common.” Being-in-common is how finitude *always* presents itself. “Community as law” is the presentation, or the originary co-presentation, the co-presence of finitude. There is no one origin. Nancy confirms this in a later reflection on the “The Inoperative Community”, when he claims that:

[T]here has been, already, always already, a ‘work’ of community, an operation of sharing out that will always have gone before any singular or generic existence, a communication and a contagion without which it would be unthinkable to have, in an absolutely general manner, any *presence* or any *world*, since each of these terms brings with it the implication of a co-existence or of a co-belonging.<sup>159</sup>

The origin is *always already* a co-origination. This is the law of community that Nancy refers to in “The Inoperative Community.”<sup>160</sup> The “presence” of a sovereignty is always already a co-appearance.<sup>161</sup>

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<sup>154</sup> NANCY, *supra* note 139, at 12.

<sup>155</sup> Nancy, *supra* note 106, at 28.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Jean-Luc Nancy, *The Confronted Community*, 6 POSTCOLONIAL STUD. 23, 32 (2003).

<sup>160</sup> Nancy, *supra* note 106, at 28.

<sup>161</sup> *Id.*

Sovereignty is a relational concept that involves a “sharing” across limits. This offers one approach through which the “presence” of sovereignty can be called into question. Indeed, the very “place” of sovereignty as unity and essence must be undone. Sovereignty is neither readily limitable nor is it infinite and illimitable. Sovereignty is in constant movement in relation to a frame or limit. That frame or limit is law. In our discussion here, that limit has been marked by the difference between colonial and postcolonial law. Colonial law never achieved the plenitude and presence that had been asserted in its name. Law’s capacity to alter the account of the foundation of Australian law drew attention to the narrative and fiction—the “as if”—that grounds law.

#### IV. CONCLUSION

The formulation “*now shown then to have been false*” manifests the complexity of law’s archival function. Law inscribes its own history by narrating and re-iterating the “as if” that grounds its jurisdiction. In the process, a contested colonial sovereign assertion—an origin of law that never took place as a singular event—is divided and altered. But it is only one account after all—yet another dissimulation of sovereignty that will come again to haunt the law. In that sense, colonial legal history is not amenable to a redemptive account, or to a contextual account untroubled by contemporary ethical and political demands.

The work of assembling the history of colonial violence requires more than a pragmatic assemblage of what can be usefully known or admitted now. The latter continues to form the limits of how courts deal with colonial sovereignty—shielded by the common law’s practice of deciding only what is before the court at a particular moment in time. Such a memorial process will inscribe forgetting along with the act of remembering. This is law’s “act of literature”—its “as if.” Assembling the archive (law’s memorial practices) opens new fissures and gaps that will in turn require a new imaginary edifice, new “as ifs” to be constructed. As soon as law remembers, there will, it seems, be an impetus to forget.