Law and Nature

DAVID DELANEY

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LAW AND NATURE

This interdisciplinary study explores the relationship between conceptions of nature and (largely American) legal thought and practice. It focuses on the politics and pragmatics of nature talk as expressed in both extralegal disputes and their transformation and translation into forms of legal discourse (tort, property, contract, administrative law, criminal law, and constitutional law). Delaney begins by considering the pragmatics of nature in connection with the very idea of law and the practice of American legal theorization. He then traces a set of specific political-legal disputes and arguments. The set consists of a series of contexts and cases organized around a conventional distinction between "external" and "internal" nature: forces of nature, endangered species, animal experiments, bestiality, reproductive technologies, genetic screening, biological defenses in criminal cases, and involuntary medication of inmates. He demonstrates throughout that nearly any construal of "nature" entails an interpretation of what it is to be (distinctively) human.

DAVID DELANEY is Visiting Assistant Professor in the Department of Law, Jurisprudence, and Social Thought at Amherst College. His publications include *Race, Place and the Law* (1998) and *The Legal Geographies Reader* (co-editor, with Nicholas Blomley and Richard Ford, 2001). He has also written many articles exploring the intersection of legal and geographical scholarship.

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For Austin,
friend, scholar, example,
with much appreciation

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PART I

SITUATING NATURE

CHAPTER ONE

INTRODUCTION: THE PRAGMATICS OF NATURE AND THE SITUATION OF LAW

Wilderness, animals, bodies, and brains. Rivers, oceans, endangered species. Pets. Laboratory monkeys, dancing bears, and killer bees. Sperm. Conception, gestation, lactation. Breeding. Giving birth. Genes, chromosomes, and hormones. Lust. Sodium, potassium, electromagnetism, and sexuality. Hurricanes and neurotransmitters. Corn. Iron. Oxygen, nicotine, and blood. Northern white pines, schizophrenia, comets, and death. Black raspberries and instincts. That fish, this urge, these symptoms, those asteroids. Nature.

There is, in the world that humans have created, the concept "nature." There is also in Western culture a range of more specific conceptions of nature – theological, scientific, philosophical, and common. Then there are the things, places, or events *in and of* the world to which the designations "nature" or "natural" are applied or from which they are withheld. One element that appears to hold many of these together has to do with that which they are not. Distinguished from nature in many conceptions are those critical aspects of humanness – consciousness, intentionality, culture, knowledge, and so forth – which, if not regarded as unnatural, are generally considered to be of such a radically different ontological status as to justify a basic distinction in kind between the human and the natural, between humans and other animals or life forms, between bodies and minds, and, more specifically, between brains as matter and mind as, well, something else. Collingwood, in his *The Idea of Nature*, put it like this, "According to Galileo, whose views on this subject were adopted by Descartes and Locke and became what may be called the orthodoxy of the seventeenth century, minds form

a class of beings outside of nature" (1945, 103). More recently Daniel Dennett described Cartesian dualism as "the idea that minds (unlike brains) are composed of stuff that is exempt from the laws of physical nature" (1984, 28).

Humans, though, have trouble with nature – the stuff of the world we call nature *and* the concept itself. A slice of a hill slope slips and buries some houses; a dam is built which threatens a species of fish with extinction; monkeys are liberated from a laboratory; a woman is arrested for committing "the abominable and detestable crime against nature" with a dog; a man is arrested for committing the same crime with a female human being; a woman who had agreed to "carry" a fertilized egg for another woman wants to back out of the deal as the gestation approaches term; a prisoner is injected with a drug that makes him vomit uncontrollably; another prisoner is given, against his will, a drug that will, in the words of Supreme Court Justice Anthony Kennedy, help him to "organize his thought process and regain a rational state of mind" (*Washington* v. *Harper*, 494 US 210, 1990, 214); a hitchhiker charged with murder answers with a defense of "homosexual panic." This defense posits an unconscious and uncontrollable "fight or flight" response in latent homosexuals when confronted with the possibility of self-recognition; a woman charged with murdering her infant answers with a defense of postpartum depression brought on by a hormonal imbalance; another mother requests that life support systems be removed from her comatose daughter so that "nature can be allowed to take its course." Humans have lots of trouble with nature, and lots of trouble with each other over nature, including what counts as "nature" in a given situation.

We argue about nature and, in our culture, we often ask courts to respond to our arguments. We ask law to make the crucial determinations and distinctions. We ask judges to trace the demarcations between "human" and "nature" through totality, animality, and corporeality. We ask them to sever conceptually (or connect) mind and brain, self and body, human beings and animals, and humanity per se and the rest of everything. In a given case a judge may be called upon to authorize one version of nature over others, one conception of the root distinction over others, one vision of what it is to be human (or not) over other plausible visions. Out of disputes such as these there emerges a range of powerful images and representations of what it means to be human in our world. It might be noted that this world – our world – has been

described as both "postnatural" and "posthuman." In any case, it is a world in which the distinction between these two most basic terms of modern thought is itself a topic of often fierce debate. And this causes problems for law. Moreover, these images and representations are not inert. They may play a crucial role in justifications of or challenges to the circulation of physical force or violence in the world.

This work addresses the following lines of inquiry: first, what does law say about nature? This is to ask not simply what law says nature *is* but what the concept "nature" *does* in legal descriptions of events in the world. What does nature signify? Essence? Permanence? Absence? Order? Disorder? How do these themes work to create meaning in arguments and judgments? Second, what does what law says about nature tell us about the legal construction of figurations of the human? What are we that nature is not? What are we that is not "natural"? What does it mean to ask such a question? Part of this line of inquiry involves looking at different kinds of relationships across the ontological gap and examining the role of "limits" in legal stories about humans and nature. As the list of contexts above suggests, the role of nature in limiting ascriptions of "control" or responsibility is of great significance. But this is complicated by the fact that the category "human" can in a given situation be filled by a host of more specific figurations. It can refer to humanity per se – or humankind, "man," civilization, etc., to generic or specific individual human subjects or to the personifications of intermediate or institutional actors such as "science" or "law." We might then ask: what happens when discrepant or competing figures of the human confront each other in law? What happens when, for example, the claims of the human as identified with the free, autonomous individual are countered by the claims of humanity as such? A third line of inquiry looks into what law says about the relationship between nature and humans can tell us about law itself as a humanistic endeavor. Finally, this work asks how answering these questions might illuminate understandings of elements of the material world – landscapes, other species, bodies – that are the *objects* of interpretation.

PICTURING NATURE IN LAW

Consider the following illustration (which, I should say, was chosen not for the purposes of sensationalism but for the way it encapsulates many of the themes of the book). Louis Guglielmi was convicted of violating

a federal statute that prohibits sending obscene materials through the mail. One of the ways in which judges have domesticated the various and famously unwieldy meanings of "obscene" is to hold that obscenity is as follows: "to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interests" (*Roth* v. *US*, 354 US 476, 1957, 489). Among the offensive materials seized by postal inspectors was a film the court identified by name as *Snake Fuckers* (*Guglielmi* v. *US*, 819 F 2d 451). (According to Judge Clement Haynsworth, though, the animal appeared to be an eel.) Guglielmi attempted to have his conviction overturned – and, therefore, his sentence vacated – in part on the basis of the claim advanced by his attorney, Alan Dershowitz, that the materials in question were so vile and depraved that they could not possibly appeal to *anyone's* prurient interests. Though Haynsworth did find the attorney's arguments to be "not without ingenuity" (452), it should occasion little surprise that the judges of the Fourth Circuit Court of Appeals did not find them compelling. We might say, though, that, given the stakes, there was little harm in trying.

So, consider: once, at least, a woman was filmed having sex – whatever that is – with an eel. While sex between humans and nonhuman animals is, it would seem, necessarily sex without reproduction, here people engaged in social practices involving bestiality specifically *for* the purposes of reproduction – at least at the level of representation. These reproduced representations were then put into broader circulation and when those circuits broke down Guglielmi was arrested, tried, convicted, and sentenced. As a result of Dershowitz's failure to reframe these events and practices convincingly, Guglielmi's sentence of twenty-five years in prison was allowed to stand. His body, we might say, was repositioned within a particular circuit of physical force associated with the law.

We might see the depicted events – and the countless other similar events – as being principally *about* hatred of women. Moreover, the practices themselves presuppose a market in which participants exchange money for commodities that give misogyny a particularly vivid and visceral occasion for expression. That the other "participant" – in the sex, not the market transaction – was an animal, and one rather low on the cultural hierarchy of animals, precisely facilitates this semiotics of degradation. But this case, the factual events, and their rendering in law might also be understood as being about the regulation of bodies or about state control over what we can do with our bodies. Most

immediately it might concern what we can do with our eyes, but necessarily what we can and cannot do with our sexual bodies. It can be understood in terms of the regulation of eroticism and sex. Additionally, it can be understood as concerning what we can and cannot do with animals. Judge Haynsworth noted that the scene following the one depicting bestiality showed people engaging in oral sex while, in the background, the eel, now chopped into pieces, sizzled in a frying pan on the stove. If the film had been about "snake eaters" Louis Guglielmi would not be facing a quarter century in prison.

Bodies, sexuality, reproduction, and animals are all made intelligible in our culture by drawing on various aspects of the concept "nature." I will return to this in a moment. First I want to draw attention to another reading of "nature" at work in Dershowitz's attempted reframing. Another part of his argument alluded to "zoophilia" and "zoophiliacs." Zoophilia is a specialized locution for what is more generally referred to as "bestiality" and more colloquially called "buggery." To call it zoophilia is to recast it in the terms provided by the sciences of psychology and psychiatry. It is to medicalize it, to cast it as a psychological condition over which one has little or no control. (I should note, though, that this was not Dershowitz's explicit argument. His argument was that the images could not even have appealed to "the average zoophile" because there is no "average" zoophile. Each is special in his or her own way.)

Not very long ago, only yesterday, actually, the event cinematically reproduced in *Snake Fuckers* would have been an instance of "the abominable and detestable crime against nature," and, if possible, prosecuted as such. Now it is at least *conceivable* to portray it not as sin but as illness, more like diabetes or cystic fibrosis; less like lying or stealing. Not, that is, as a crime *against* nature, but as an expression *of* nature. We might take this fact alone as suggesting either a historical shift in what sorts of things we want to use "nature" for in helping us make sense of the world, or as expressing aspects of ambiguity that are simply built into the concept. Not long ago, I might add, it would have been at least as inconceivable for a judge to refer explicitly to and discuss something like *Snake Fuckers* in the pages of the Federal Reports.

In considering this case we might also consider the webs or layers of representation that are implicit in my telling of the tale. The event itself was captured and reproduced in representational form available for countless repetitions; these representations themselves being represented in a legal brief as so depraved as to be beyond the merely pornographic; that representation, in turn, being represented as a feeble legal

argument in a volume of the Federal Reports; and *that* representation being represented here – in this very sentence – as a sort of skeleton key to understanding significant cultural practices. I want to use it, and other cases at once vastly different but interestingly similar, as windows on how the world of experience is made meaningful by situated actors in difficult situations. I also want to examine how the particular meanings that are made enter into authoritative justifications for channeling the physical force of the organized state through the material world; for example, through or away from human bodies, in the case at hand, Louis Guglielmi's. At the most basic level, that is what this book is about.

Consider this cultural artifact, the document titled *Guglielmi* v. *United States*, with its unique identifying code – 819 F 2d 451. This official text was authored by a state actor for an important public purpose. We might look at it as a cultural artifact the way that the archeologists who unearthed what turned out to be the Code of Hammurabi might have regarded the tablets etched with cuneiform markings. What do we make of it? What might we want to ask of it? Once the code is broken we might see it as an expression of the effort to make sense of the world or, at least, of a moment of worldly reality. We might come to see it as an effort to make a particularly *legal* kind of sense of events; to situate the events within webs of legal meaning and, in the act of so situating them, render them legally meaningful. In our turn, we can try to make sense of these efforts to make sense. We can take the arguments apart in various ways, examine their presuppositions, see how their metaphorical structures work, and explore their use of images or other rhetorical resources. We can recontextualize them this way and that, and put them back together to look at them in new ways. We can see what these sorts of sense-making – and world-making – practices can tell us about the culture for whom these are highly significant and powerful practices. And because the culture in question is not Babylonia but ours – is "us" – then perhaps making sense of how we make sense in these contexts might give us some insight into how, *practically* speaking, we go about making ourselves meaningful. As I will be discussing in some detail, two of the most significant tools we have for doing this are "nature" and "law." Each of these course through the Guglielmi story in a number of ways.

Nature and law are commonly construed as antithetical to each other. In later chapters I shall argue that the relationship is more complex than one of simple opposition. Nevertheless, to the extent that they can be construed as opposing and not simply different it is because each

draws on a similar underlying conceptual structure concerning matter and mind or world and word, but in opposing ways. "Nature" is a collection of categories, concepts, images, and tropes through which physicality is rendered meaningful. But if nature *refers* to physicality, its discursivity and the cultural-cognitive processes of *referring* are commonly elided. In dominant, realist framings nature is not a contingent way of ordering the world, it *is* the world. It is the name for an unmediated reality and the process of naming is itself inert. Nature is natural. With law, on the other hand, we frequently encounter an opposing evasion. Law is commonly associated with meaning, rules, interpretations, categories, lines of reasoning, texts, and words. In discussions of law its physicality – its presence and work in and among the world of things – is usually passed over. Although exploring the discursivity of nature and the physicality of law are preliminary moves, it is not my aim simply to flip the terms of the supposed antithesis. Rather, I want to follow some of the unfoldings that may occur when we dissociate the nature/law antithesis from the matter/mind or world/word dichotomies. In particular, I look at how a range of nature stories work to channel the force of law in the material world; how, through the institutional practices and projects of law, meanings are transformed into vectors of physical force and how these, in turn, effect other material transformations. They may change what the world is like and what it's like to be in the world. "Nature" is a fundamental cultural resource for doing this kind of work, and law is a no less fundamental site of its deployment. One place in the world among many in which this encounter is staged is Guglielmi's body. Another may be your body. Another may be the landscape in which you find yourself.

OTHER NATURE STORIES

Now consider this. Here is a woman undergoing amniocentesis in her obstetrician's office. She is uncomfortable. She is anxious. She has been told that there is a greater than average possibility that the fetus she is carrying may have cystic fibrosis. She tries to focus her attention on the bright colors of a poster showing a cluster of hot-air balloons floating over a desert landscape. And this: here is a trio of old friends on the second morning of a five-day backpacking trip into a wilderness area. They have come upon the base camp of an exploration party working for a natural gas company. They regard the workers as trespassers, as violators. They themselves feel violated. And this: here is an inmate

of a facility for the criminally insane. He struggles as he is physically restrained. An orderly injects him with Prolixin, a psychoactive drug prescribed to treat the symptoms of schizophrenia. He has testified that he would rather die than be subjected to the effects of the drug. And this: here is a Hawaiian palila bird, a small finch found only on the western slopes of Mauna Kea. It lives on the seeds of the mamane tree. But here also is a flock of sheep. They were brought to the slopes to provide Euro-Americans with something to hunt in a land without large mammals. The sheep eat the mamane seedlings which causes a sharp drop in seed production. This radically diminishes the palila's habitat, which sharply reduces the rate of reproduction which, in turn, pushes the species significantly closer to extinction.

As vastly different as these situations are from each other they do share important elements. They are, in a sense, instances of a more general state of affairs. They all concern – *or can easily be construed as concerning* – "nature," the nature/human distinction, and the relationship between what we call nature and the distinctively human. Each situation also potentially calls us to confront the question: what does it mean to be human? Each situation involves as well some sort of "penetration" of the natural by the human. Finally, each of them will become the ground out of which a legal case will emerge.

And here are other situations. A judge is writing a dissenting opinion in the endangered species case. A scholar is writing an essay on the social and ethical consequences of prenatal genetic testing. An activist is updating his website on zoophilia as a form of cruelty to animals. You, the reader, are beginning to read this book. All of these situations presuppose the possibility of meaning. Some of them are related to the first set of situations in that they take them as objects of interpretation, topics to be made meaningful one way or another. All of these are particular instances of what I will rather grandly (or, perhaps, blandly) call "the general situation of being" or human existence at a particular historical moment within a particular cultural configuration called by many "modernity," broadly speaking: here and now. The situation concerns how sense is made.

In the remainder of this chapter I want to do two things. First, I want to sketch out, in general terms, the terrain that this book will cover, the issues raised, the perspective from which they are raised and the importance of raising them. Second, I will provide an outline of how the exploration will proceed, what the various sections and subsections are about, what I want them to do, and where we should end up if you decide

to follow the whole way. I am ultimately (and deeply) concerned with what we might call "concrete particulars" such as the situations alluded to above, and I will return over and over to them as points of reference and as events to be understood in rather practical terms. However, in the following sections I will be beginning the exploration of "Law's Nature" in a deliberately abstract way. One reason for this is that, as I will argue, part of what both "nature" – that is, prevailing conceptions of nature – and law *do*, part of what they accomplish, is the practical rendering of a vast array of situations as being in important ways "the same" precisely through their power to sustain abstractness. If we want to know how "nature" works and how it does what it does in and through legal practice we have to address this power of abstractness. Another reason for beginning in this way is to provide some larger frames of reference for interpreting specific events.

MAKING SENSE OF THINGS

There are countless ways of describing "the general situation." Philosophers, theologians, comedians, and others take this as their primary calling. From what might be called a general phenomenological or existential or pragmatic point of view, the place to begin is with the notion that human existence is primarily experienced; it is primarily *lived* in engagement with the world. As the preceding vignettes suggest, my aim is to say something about this. There are, though, countless plausible ways to grasp reality, to carve it up and put it back together. I want to examine rather closely how – as a *practical* matter – the carving is done and how the pieces are all connected, disconnected, and reconnected as people try to make sense of the world and themselves. For that, ultimately and practically, is what "nature" is all about.

Let us start with us, you and me. We are physical beings who inhabit a material world. We are embodied, sensual, and perceptive. We were born, will die, be ill and in pain, be well and age. This is no news. As we inhabit the world, the extracorporeal world, it inhabits us. We act in and on the physical world. We do things to it and transform what we encounter ceaselessly. In so doing, we transform ourselves. But we are also, we are pleased to believe, more or other than that; more and other than moss, dung beetles, or caribou. We are also cultural beings, conscious beings, signifying beings. We inhabit a universe of meanings. Likewise, a universe of meanings inhabits each of us. It does so through language: semantics, categories, concepts, grammatical forms,

and through the beliefs, ways of being, of doing, of seeing ourselves and the world – and ourselves in the world – that language gives form and content to. Just as we engage in transformative actions with the material world we also engage in mundane and profound ways with the universe of meaning. We cannot not do so. We make sense of ourselves. We are what we mean. These two aspects of our situation, physicality and signification, are not and cannot be separate, but they are not identical.

As we work *on* meaning, we may work it *into* the material world by naming, projecting, or inscribing. As we do, we transform that world, and as we do that, we may transform ourselves and our social situations. Consider, for example, the material and experiential transformations effected by changes in concepts such as "woman" or "race," "property" or "punishment." We *give* meaning to the world of things and events and then we *take* it back to become meaningful to ourselves. These activities of "giving" and "taking" can be profoundly powerful acts, depending on the specifics of the situation. It is perhaps a truism to say that a world devoid of meaning is literally unintelligible. We should remember, though, that it is not just the *idea* of such a world that would be unintelligible, but the world itself. Ground would be indistinguishable from sky, hand from rock.

In the culture under examination – ours – one of the most fundamental devices for conferring meaning onto the material world and ourselves is "organized," so to speak, around a complex cluster of concepts, images, values, and ideologies that is centered on "nature." Speaking most generally, the core feature of prevailing conceptions of "nature" is that it divides the totality into two domains: the domain of nature and the domain of the human. Nature itself most often signifies physicality, while the human is somehow other than or irreducible to the physical. The concept "nature" pries these apart and opens up a space for being distinctively human – or, to shift axes, "nature" provides a background against which "the human" can emerge as a meaningful figure (just as darkness provides the ground against which starlight is discernible). As we will see later, the cultural domain of the legal is one of the more important sites in which this prying apart or figuring is done. If "nature" is used to make aspects of physical reality meaningful in complex but particular ways, it is also, and simultaneously, used to make us meaningful as other than "mere" nature or "brute physicality." The difference that it makes makes us other and more than animals, other and more than simply a collection of bodies. The significance of this cannot be

overestimated. Perhaps we need "nature" and we need to "naturalize" the way a stream "needs" its banks or a figure "needs" a background. We need nature the way that good "needs" evil. It is a simple question of contrastive definition.

Consider the horror that is almost definitionally part of any effort to "dehumanize" a person or group of people. Consider the revulsion we experience when, for example, women, or Blacks, or prisoners or anyone are, as we say, being "treated like animals." One word we have for making sense of such events is to say that the perpetrators are themselves "inhuman." Now consider how most of us probably feel when an animal, say a monkey in a laboratory or a pig in a slaughterhouse or a fox in a hunt, is being "treated like an animal." A word we might use here is "inhumane." But all the difference in the world separates the inhuman from the "merely" inhumane. Nature, and the constitutive opposites of nature, make the sorts of beings we are meaningful to ourselves. They also make particular beings within – and without – the category "human" meaningful. Whatever else "nature" means, and, as we shall see, it is an awful lot, to be human is to be radically distinct from nature. Wouldn't our world be radically different if most of us believed otherwise? Imagine a world very much like our own except that the collection of entities such as earthquakes, forests, bees, magnesium, schizophrenia, and testosterone were not all obviously intelligible with reference to one concept: "nature." Could it even be a world "very much like our own"?

A human infant is born. It is, in obvious ways, a slab of stuff, matter. It is the material product of causal, physical processes. It is, itself, a discrete bundle of processes operating at the atomic, cellular, and metabolic levels. It is also a meaningful entity. It is, for example, a person. It is a "she." Much of the meaning that makes her intelligible as more or other than mere stuff is social not just in origin, but works to position her with respect to the meaningful social-relational webs into which she has emerged. She is a child of parents, she may have been born with a name – Baby Girl Delaney. She is also a citizen, a bearer of rights, an heir. She may be a patient. If she was born in a hospital she has an institutional presence as a medical record number, a file. She may be understood as having been born into a religion. She was born "raced," and the iconography of race is inscribed on the legal documents attesting to her presence among the living. She may be loved. While different aspects of her being can be pragmatically foregrounded, backgrounded, or ignored in analysis, ultimately they cannot be left aside. As with her, so with the world into which she is born.

Now, imagine that that infant was the product – the embodiment of the specific performance of – a surrogacy contract such as was at issue in the famous Baby M case. Imagine, then, that there was a dispute about social relational meaning: whose child is she? what is her name? Imagine that there is trouble. Or imagine that that infant was born with Tay-Sachs disease after genetic screening had indicated – and an obstetrician had given confident assurance – that she would not be. The meaning of the event, the meaning of her being, her life, might well be very different. In this situation materiality (and what we make of it) may be given greater prominence. Or imagine six months earlier. She, or it, was a very different sort of legal entity, a first trimester fetus. Legal personhood had not yet attached to material stuff. By convention, not a she but a conceptus; and, of course, the convention here is very much contested.

The point is simply that we do not encounter "the situation" in general. Nor is "encounter" quite the right notion if that carries the suggestion of coming to it from elsewhere. We are always in "the general situation" but continually encounter it, practically, experientially, and specifically in the flow of time. Most often, for most of us nearly always, whatever situation we find ourselves in unquestionably makes sense. But sometimes, perhaps when there is trouble or perhaps when we encounter radical novelty, "sense" has to be made. And occasionally what we sense is that sense cannot be made, or at least not easily. What to do? One might pray, another might get drunk, one might fly into a rage, another might plunge into despair, one might write, another might call a lawyer.

MAKING SENSE WITH NATURE

As I have been arguing, one of the most basic cultural devices for making the material world meaningful is the complex cluster of notions that is centered on the concept "nature." Or, perhaps it is more accurate to say that it is centered on the edge of "nature," where nature is distinguished, or carved off, from something else such as the human, the social, the mental, the cultural, or the artificial, or the normative, or any of the other things commonly contrasted with "the natural." We use "nature" in countless ways to make sense of the world, to make it and ourselves meaningful in particular ways. We use it to situate ourselves within and in relation to the world. We tell nature stories. We talk about forces of nature or the environment. We talk about animals and how we are like and unlike them. We talk about bodies, health, medicine, death, fate,

and responsibility. We talk about science, sex, genetics, crime, pollution, food, and depression. But "nature" regarded as a cultural, historical artifact is unwieldy. In a sense, it is wild. We use it, that is, to control how these things are understood. We draw lines. But "nature" itself, the very idea, can itself spin out of control. We use it to make some aspect of reality more determinate, but it is itself, in many ways, deeply indeterminate, open or vulnerable to conflicting interpretations. We use it to simplify, but it is too complex. This is a theme I want to explore in greater detail.

Nature is polysemous – it means too many things; it is ambiguous – it is radically context-dependent and contingent on perspective. We use it to refer to galaxies and hummingbirds, to sexuality and family structure, to behaviors and wilderness, to ice cream and morality, to talents and disasters. In some ways it is incoherent. It can be used to signify order and disorder, determinacy and indeterminacy. Beyond that, we can pour into the category a range of vastly competing values or normative commitments. It can name both what we want to overcome or escape and what we need to respect, stay within, or aspire to. If nature is ambiguous, shifting, and unstable – at least when looked at across a range of applications – then so must be the various distinctions that it marks, the meanings that it imparts to the world, and the meanings of those entities with which it is commonly contrasted or opposed. That is, if one of the principal tasks of "nature" is to give meaning to the concepts and categories through which, by way of differentiation, "the human" ("humanity"; "humanness") is understood, then these cannot be less multiple, ambiguous, unstable, and, perhaps, incoherent. This is the worry.

This may also be seen as part of the general situation. Indeed, one of the ways that some philosophers have drawn the line between nature and human – that is, one of the characteristics according to which human distinctiveness is commonly identified – is by saying that what it means to be human is always a problem for us. We are the beings, and, it is asserted, the only beings, who are a problem, a puzzle, to ourselves. One common way of posing the problem is to ask: how *are* we to be distinguished from the rest of totality? Why it *is* a problem is that while we might *imagine* that we are not different after all, it is perhaps hard to *believe* that we are not (not least because in most construals of the difference we are the only beings capable of belief). We find it hard or exceedingly unappealing to believe that we are simply slabs of matter arranged in a particular way.

Now, this might be simply a metaphysical problem of interest only to those with a taste for philosophical or theological speculation. As a practical matter, one might say, such puzzles are inconsequential. We get on with our daily lives and projects. The world simply *does* make sense and, in an everyday sort of way, "nature" is quite serviceable in helping us make sense. Indeed, probably we don't feel as though "we" are *making* sense at all. Reality simply *is* intelligible. I want to suggest, though, that these *are* very practical sorts of issues, and that part of their practicality has to do with law, with the ways in which legal institutions, practices, and forms of consciousness are involved in "connecting" the universe of meanings and the material world.

Consider again some troubling cases. The situation either makes radically different kinds of sense to different people or the situation presents at least the possibility of not making sense at all, of being practically senseless. Consider situations that we will encounter in this book. A child is born with a severe neurologic disease. Is it an act of God, the punishment for sinning? Is it the result of a mistranscription on chromosome number seven? Is it the result of negligent prenatal genetic screening or counseling? Is it the luck of the draw? Is it meaningless? Do we leave it at that? Who decides? An adult child picks up a steak knife at dinner and plunges it into his father's chest. Is he evil? Is the act attributable to a shortage of monoamine oxidase A (MAOA) in his neurocircuitry? Is it the result of insufficient care by his psychiatrist? Is it the luck of the draw? Is it meaningless? Do we leave it at that? Again, who decides? A man sneaks into his neighbor's barn, turns a tub upside down, loosens his pants, and has intercourse with a cow. Is he evil? depraved? Did he commit the abominable and detestable crime against nature or is he suffering from zoophilia? Do we punish him, try to cure him, tolerate him, or regard him with indifference? Was this act meaningful? meaningless? Do we leave it at that? Who decides? Put yourself in the position of deciding, of judging. From this perspective the problems that "nature" may be called upon to resolve – and the problems that *that* solution might give rise to – may be very practical indeed.

The semantic ambiguity of "nature" touches on or gives expression to deep normative ambivalence. As I mentioned, looked at from within the culture as a whole or looked at across various contexts we may both renounce, repudiate, or attempt to obliterate what we call "nature" or we may value, endorse, or seek to protect it. But this broader cultural ambivalence is both unbalanced and unevenly distributed. What we

might call the dominant position is that which seeks to dominate, domesticate, or control nature. This, indeed, is what many take to be a core feature of modernity and of the Enlightenment world view. As such, among its central practical expressions are the organized institutional projects of science, technology, and medicine. Arrayed around this dominant position are various counterpositions which valorize nature or which are founded on a refutation of the nature/human distinction as it has been inherited. I will return to this below. Given the prominence of the science–technology complex to the current social order, an important feature of the *actual* "general situation" is the fact or feeling of continual material and normative revolutions. We exist in a state of continuous radical novelty. In these situations neither "meaning" nor normative significance are as clear as day.

Clearly, "nature" – and the capacity of some humans to intervene in what had been regarded as "natural"– is not what it used to be. Some of the situations that ordinary people find themselves in would have been until very recently unimaginable or fantastic. Yet, they come to life through concepts and frameworks inherited from the past. The amazing thing, I suppose, is that our inherited conceptions of "nature" and "human" work as well as they do. But, at least sometimes, they seem to break down. In situations like those just mentioned, "meaning" and our capacity to *make* meaning seems on the brink of disintegration or collapse. "Nature," the meaning(s) of nature, and its utility in helping us understand the world is more than ever an issue. So, then, is what it means to be human. The sort of radical naturalization allegedly associated with biotechnologies and neuroscience, for example, is cause for deep anxiety for some precisely because the inherited oppositional structure of the categories "nature" and "human" seems to entail that any "naturalization" will be a form of "dehumanization."

On the other hand, in some circles of social thought the present moment is one of radical denaturalizations. "Nature," regarded foremost as a category and the images that give that category content, is increasingly seen as a social, political, and historical artifact. It is something that is made and unmade in practice. Nature is less a pregiven immediacy than a position in a representational system. It does not consist of the preexisting objects and relationships that science discovers and studies from an objective, disengaged position. Rather, "nature," according to these arguments, is an ideologically saturated notion that is inscribed on aspects of reality to render them meaningful in particular, partial, and not disinterested ways. Often, the argument goes, the effect is to

render what is so inscribed suitable for domination. I shall return to these themes in subsequent chapters. We shall see that "the nature question" is *a practical one* that comes up in countless actual situations. In at least some situations the possibility arises that the "nature" that has been bequeathed to us by our past is disintegrating. As flexible or indeterminate as the concept is, it cannot accomplish what we are asking of it as easily as it once could. In particular, a denaturalized "nature" teeters on the brink of meaninglessness.

We are living at a moment when some see both the disappearance or "death" of nature and the disintegration or deconstruction of "nature." We are also, perhaps as a response, living during a time of the most intense *politicization* of nature. We are witnessing and participating in passionate social conflicts along a number of dimensions all of which center on the nature question. Environmentalism and antienvironmentalism, pro- and antianimal liberation movements, and multidimensional body politics concerning sexuality, reproduction, genetics, science, and anti-scientism define the political era. And again, if nature is such a fervent political issue then, by definition, so is humanness.

The politics of nature (that is, normative contests centered on questions of physicality) often takes the form of the politics of "nature" (rhetorical, discursive contests over the sorts of meanings we pour into "nature"). They concern the sorts of conceptual-ideological work we want "nature" to do, the sorts of meanings we want to project onto the world and onto ourselves. In the politics of "nature," whether it takes the form of wilderness preservation, arguments against animal rights, regulation of cloning or any of its many other manifestations, situated social actors work on the meanings of "nature." They exploit elements of polysemy and ambiguity in efforts to make the world meaningful *one way rather than another,* in order to direct concrete transformations in material, social, and experiential reality by their narratives. Again, the nature question touches directly on the most practical of social and political issues.

But if the nature question is not just a metaphysical conundrum, neither is it simply an umbrella for a disparate number of ideological disputes. As my illustrations so far have demonstrated, troubles arise. People get hurt or violated in various and significant ways. When trouble occurs something else has to happen in response. The child of a collapsed surrogacy arrangement has to be raised by someone; the prisoner will be executed or not; the extraordinary medical expenses of a child with Tay-Sachs or cystic fibrosis will have to be borne by

someone; a wilderness area either will or will not be opened up to mineral extraction; a criminal defendant who offers an exculpatory biological defense will either be found blameworthy and worthy of punishment or she will not be. Practically speaking, "nothing" is not an option. This, then, is the practical situation of nature–human entanglements. These are not simply metaphysical puzzles. What *does* happen will, as a practical matter, be a consequence of how these events are made meaningful. And how they are made meaningful – that is, which among a range of competing meanings is deemed the *controlling* meaning – is, in part, a consequence of how these metaphysical-cum-ideological issues are provisionally decided, of what sorts of nature stories are accepted as the right stories.

MAKING SENSE WITH NATURE IN LAW

As I suggested earlier, one common response within the current social order is to translate these nature troubles into legal disputes. Here, in this form of nature politics, actors engage formal state institutions through professional intermediaries. Lawyers, among their other specialized tasks and skills, redescribe events or states of affairs in the operative terms of legal discourse such as rights, obligations, authority, and so on. In this way they engage the normative authority and/or coercive capacity of the law or organized state. This may or may not be a tactical component of a developed political strategy. In many cases, a state actor such as an administrative agency, a local prosecutor, or a prison official may be one of the principal participants.

The shift into the cultural domain of "the law" is significant for a number of reasons. It is significant, of course, for how the events unfold. It is also significant for law itself. As I shall be discussing in more detail below, a turn toward a legal resolution of troubles with nature effects a translation or recasting of what the troubles are fundamentally about. For example, a dispute about endangered species is transformed into one about the relationship between congressional statutes and administrative regulation, or a conflict about excessive beach erosion into one about the conception of property held by the framers. Law is not simply a forum for the resolution of disputes, and legal discourse is not simply one filter among others for making sense of events. Law, as a complex of institutional, state-centered practices, has its own constitutive institutional concerns and commitments that may dramatically affect how the troubles it deals with are treated. Moreover, the very

idea of "modern" law – regarded as a core feature of modernity – is itself constituted vis-à-vis particular understandings of nature, of humanness, and of their relationship. This will be the principal theme of chapters 4 and 5. Of more immediate concern, when troubles with nature are brought to the legal arena, participants are not only involved in "making sense," or in making events meaningful, but in making them *legally* meaningful. This may be done with practice-specific materials and forms such as those provided by doctrines and forms of property, contract, tort, criminal law, or constitutional law. They are at work on conferring specifically legal sorts of meaning onto events and thus into the world. These practices are constrained by how the institutional practices – the tasks, the materials, the styles and structures of authority and so on – themselves are understood.

What we can see when we study the documentary products of these practices (such as briefs and judicial opinions) are the efforts to work on "meanings" of various sorts. In the cases I examine, because the contexts are by definition adversarial and because the underlying troubles are made intelligible by reference to "nature," we shall see disputants telling contending nature stories in order to shape legal meanings, in order to direct legal power. They bring representations of nature to bear on legal form and form to bear on nature.

This, then, is one of the main tasks of this book: to provide some conceptual tools for interpreting the specific events whereby representations of "nature" are infused with state power to effect material and experiential transformations. My aim is to contribute to an understanding of how we make, unmake, and remake our world with "nature" in law. An examination of the politics of "nature" in law reveals that once "nature" is so thoroughly and irrevocably politicized – that is to say, denaturalized – then reliance on inherited depoliticized notions of nature to make sense of the world are bound to fail. One of the fundamental political uses of nature talk is to effect a depoliticization of some state of affairs or practice. Nature talk is frequently used to confer objectivity or neutrality on institutional practices or to locate some aspect of a situation beyond the bounds of change. In many cases, to engage in nature talk is to practice the politics of depoliticization. But if "nature" is seen to be an irreducibly political concept, then the politics of depoliticization in science, in law, and in everyday life will be more difficult to sustain.

The argument goes deeper, though, than a description of the politics of nature as brought *to* law. It begins to converge on questions of

the politics *of* law per se. As I mentioned above, modern law – and now my focus is more specifically on American judicial practices – regarded as a domain of cultural practice, is constituted by its own internal commitments and preoccupations no less than, say, baseball, mortuary science, or jazz. The practical activity of judging is distinguished from other interpretive practices by, among other things, its assumed constitutive tasks. Among these we might include the realization of justice, the maintenance of order or institutional integrity, and commitment to the idea of the Rule of Law. This last concerns the notion that judicial decisions must be made in accordance with norms of neutrality and consistency. Within mainstream legal theory the possibility of the Rule of Law, that is to say, the plausibility that law is something other than simply politics by other means, has been a central preoccupation. This depoliticization of law is a perennial problem within jurisprudence but it is potentially solvable by many different routes. Speaking schematically, the problem is how to insure that the processes and products of judicial practice are sufficiently neutral and objective so as to bear the weight of legitimacy. One aspect of the problem concerns the indeterminacy of legal meaning. If a multitude of plausible answers can be generated in response to a legal question, how are judges to find the determinate answer such that the decision can plausibly be portrayed as being necessitated by "law" rather than as simply the outcome of subjective or ideological choice? That is, how can the outcome and the obligations that flow from it be "legal" and not "political"?

One dimension of the answer concerns what might be called methods of legal reasoning but which I shall call *styles* of judicial reasoning. For heuristic purposes I shall argue that common styles can be arranged along a continuum described by the polar positions of "formalism" and "realism." By formalism I mean, as a first approximation, a style of judicial presentation characterized by the relative preponderance of attention to word meaning, concepts, categories, doctrines, and their interrelationships. By realism I mean a style in which relatively greater attention is given to "facts" or claims about what the world is like and how it "really" works. Pure expressions of either may be hard to find. All legal rulings are "formalistic" almost by definition and "facts" play some significant role in nearly every opinion. Nevertheless, the continuum is wide enough for different texts to be located at different nonadjacent points. Some are highly formalistic and read almost like term papers in analytic philosophy, while others may read like term papers in sociology or even like pieces of journalism.

With respect to the nature problem, more "realistic" opinions might selectively incorporate scientific representations of nature – that is, claims about how the physical world works – in order to achieve the appearance of objectivity. This serves to stabilize legal indeterminacy and thus provide a ground for neutrality and legitimacy. That is, judges might turn toward "nature" in order to solve an "internal" political problem. More "formalist" styles of presentation, to the extent that the argument structure stays close to questions of "meaning" and shies away from claims about what the physical world is like, can be read as performatively repudiating "nature." But this too is a response to the same political predicament. This question of style will be addressed at greater length in subsequent chapters. The immediate point is that within each mode of argumentation – and between them – we can see replicated at the level of rhetorical performance core features of the underlying problem of how best to understand the relationship between "nature" and "human." To put it simply for the present purposes, realism can be seen as a style that appropriates "nature" as a ground of objectivity and constraint *in order to* make determinate articulations of law possible, while formalism can be seen as a style that performatively repudiates "nature" (or authoritative appeals to "nature") *so as to* demonstrate or enact the primacy of meaning over matter, in order to maintain the autonomy, authority, and normativity of law.

In a sense, this question of style is derivative of another very different sort of political problem reflecting the ambivalent relationship between law and science as key cultural domains from within which meaning is mapped to the world. To the extent that the institutional locations of "law" and "science" align with the human–nature poles of the underlying dichotomization, this too can be seen as replicating the underlying problematic at the level of institutional configuration. The point here is that "the nature problem" and "the human problem" are not and cannot be, after all, "external" problems that are brought to law for resolution. Rather, when the sorts of troubles with or about "nature" are repositioned within the legal field of reference they are translated and transformed. However, given the institutional configurations, internal commitments, and stylistic constraints, they retain their basic shape. That is to say, far from being external to law, the underlying problem – the nature problem – may be *constitutive of the very idea of law*, of the historical genealogy of legal practices and of the politics of law vis-à-vis the legitimacy of legal violence. The events we call "cases," then, might be seen as occasions for culturally powerful social actors to render, rehearse,

or revise representations of "nature," of "humanness," and of law itself. They are occasions for self-portraiture rendering law as the very emblem of human distinctiveness and paradigmatic of the primacy of reason or mind over matter, order over disorder, normativity over "brute" facticity. At the level of content, specific stories are told about nature, humans, their differences and relationships. At the level of style or presentation, *how* legal meaning is made may be both a practice-specific manifestation of the underlying problem and a ritualistic or symbolic resolution of that problem. Through the imposition of "form" on what may appear as formlessness, and of meaning on potential meaninglessness, law recreates the conditions of its own possibility. Again, this is not simply talk. Given the location of law at the intersection of representational circuits and circuits of physical force, the texts in question serve as justifications for channeling the circulation of power through the material world, through landscapes, and onto, through, or away from the bodies of animals and humans.

We are now no longer simply talking about the politics of nature but also the politics of law per se and how the former is shaped, conditioned, and perhaps distorted by the internal anxieties of the latter. But then, perhaps it makes sense to see the politics of law as, in some sense or in some situations, an instance of a broader politics of nature. Law, this argument might go, both needs and fears "nature" as it both needs some objective determination of meaning and fears the specter of determinism that would call its own meaning-making and norm-conferring powers into question. Stylistically, it is both attracted to and repelled by naturalism. Institutionally, it is both attracted and repelled by science and its characteristically materialist, determinist renderings of the world. Cases in which nature is an issue simply bring the prongs of this contradiction into sharper focus. Given the broader (but unbalanced) cultural ambivalences about what is called "nature," given the radical ambiguities of the concept, and given the sociological complexities of contemporary American legal institutional practices, it is not surprising that some actors will be more attentive to one side of the contradiction and others to the other.

THE PLAN OF THE BOOK

The remainder of Part I consists of four chapters. The overarching trajectory is from a general discussion of some of the conceptual-rhetorical-political tasks that "nature" is commonly called upon to

accomplish to a more specific discussion of these themes in connection with the practice of judging in American legal contests.

Chapter 2 surveys some of the more prominent and significant things that "nature" does in the modern, Western, or American cultural imagination. These include the projection of negativity and necessity onto what are rendered as objects and the contrastive grounding of "subjects" that nature talk enables. I also briefly look at how relations between "the natural," "the human," and their surrogates are commonly construed in terms of knowledge, control, and limits.

Chapter 3 begins to explore these themes in connection with the cultural domain of science. Science is, among other things, an authoritative source of representations of nature – or natural facts. These representations are put into broader circulation and, more particularly, may be selectively incorporated into legal determinations of reality. The work that they do there in providing objectivity and neutrality to legal utterances is significant. This is not least because they may help to stabilize legal meaning and confer the appearance of objectivity and neutrality on the claims of legal actors. That is, authoritative representations of nature may be useful in projects to depoliticize legal practice.

In chapter 4 I shift the focus more explicitly to the historical relationship between nature talk and the law idea. In many ways the very idea of law, like that of "human," is parasitic on contrastive conceptions of nature. Looked at from a different angle, though, images of law have been important in prominent cultural representations of the distinction between nature and humanity. Law as *nomos*, for example, has historically been contrasted with *physis* or the realm of nature. Legal imagery has played a particularly fecund role in various narratives accounting for the *emergence* of the human *from* the natural. In stories about progress, development, civilization, and socialization, law is frequently cast by social theorists as that which marks the break, and therefore, that which makes humans distinctively *human*. As such, law is commonly figured as antinature, and it is this opposition to nature that makes law *law*. However, notwithstanding this dominant construal of the relationship between the legal and the natural, there have also been prominent readings of law as an *expression* of nature and nature as the aspiration of law. The most prominent example is the natural law tradition. We might say that law is both repelled by and attracted to nature. This abiding, albeit unbalanced, ambivalence, I suggest, is simply a

domain-specific occurrence of a larger cultural ambivalence. It is also a function of the fundamental ambiguity and polysemy that characterizes nature talk more generally and makes it so serviceable for a number of otherwise incompatible uses.

Chapter 5 moves from general considerations of the law idea to the theme of legal practice. I argue that modern, American legal thought is inherently "humanistic" in a number of important senses. As such it cannot be neutral with respect to at least some renderings of "nature" and the nature/human dichotomy. The nature problem, for law, reveals itself on a practical level in consideration of problems of determinist renderings of the legal subject and the indeterminacy of legal meaning. In the interpretation of the situation of legal practice that I offer, the nature problem becomes an internal political problem. The various solutions to the problem that nature causes for legal practice may exhibit the same repulsion–attraction tension that I noted above. Moreover, they may take the form of essentially stylistic or aesthetic approaches to the task of judging as seen through a contrast between more "formalist" and more "realist" modes of adjudication. In the final sections of this chapter I briefly note some of the commonalities and tensions between law and science as authoritative ways of knowing and constructing reality.

Part II consists of a series of nine more specific, topical interpretive essays. Each examines a different context in which troubles with nature arise and are brought to judges for authoritative resolution. Topically, the series is organized along a continuum beginning with what is conventionally regarded as "external" or "exclusive" nature (forces of nature, wilderness), through troubles with animality (wild: endangered species; captive: vivisection; domestic: bestiality), corporeality (reproductive technologies, prenatal genetic screening, biological defenses in criminal law), and, lastly, challenges to the brain/mind version of the nature/human distinction (involuntary administration of psychotropic drugs to inmates).

Each essay includes some contextualizing discussion. This often emphasizes contending political-normative framings of the underlying issue. Each also includes a discussion of the relevant legal forms (property, tort, contract, criminal law, and so on) that are used to make specifically *legal* sense of matters (and minds). But again, this is not a unidirectional relationship. In the structure of judgment we see the staging of an encounter between specific representations and specific

legal forms. Judgments are presented as the assessment of the fit or lack of fit between rival representations and the forms (or counterforms). Determinations are made that the forms can or cannot accommodate the proffered representations, that making them fit will or will not result in legal deformation – that is, the collapse of the conceptual structures that are generative of legal meanings. Each essay also includes interpretive illustrations from cases. These essays are by no means intended to be comprehensive surveys of the issues, much less authoritative statements of "the law" on each point. They are simply illustrative examples of the situation of making sense of nature *in* law and of using "nature" in the process of rendering self-portraits *of* law.

While each essay may fruitfully be read independently of the rest, their fuller significance is made clear through reading the sequence. When moving from one site to the next we pivot, shift perspective, and look at a common topic or theme from a very different angle. Shifting from legal treatments of endangered species to animal experimentation, for example, we look at a very different way of making animals make sense. Shifting from bestiality to reproductive technologies we see the relationship between sex and reproduction in very different lights. Shifting from questions about prenatal genetic screening to genetic defenses in criminal cases we encounter different readings of "the gene." Each essay, then, is set within the whole and derives its interest partly from the play of juxtapositions. As one reads through the sequence one may be struck most by the astonishing utility of nature talk and the amazing agility of legal interpreters – or by the radical incoherence of nature talk and the futility of making it cohere. Both responses, I feel, are warranted.

Two other general trends are worth noting. First, as we move along the continuum, questions of science and technology become more salient. This is to say that questions about knowledge, its production, distribution, and circulation come more to the fore. This, again, raises questions about the relationship between law and science under conditions of radical material transformation. Second, once our continuum has breached "the species barrier" and begins to look at the naturalization and denaturalization of human subjects, practical questions and disputes about how and where to draw the line become sharper. The fundamental distinction becomes increasingly more problematic, perhaps to the point of collapse. I look at how situated actors respond to this by reinscribing the subject with rights – or not.

Part III is a brief concluding essay which returns to some of the themes raised in the present chapter as seen through the intervening chapters. As with Guglielmi's body – and, I might add, the eel's – I situate the situation of law at the intersection of circuits of meaning and circuits of physical force. I end by asking what it might mean to consider the physicality of law.

CHAPTER TWO

THE NATURE OF MODERN POLITICAL DISCOURSE: DOING THINGS WITH NATURE

If "nature" is, among other things, a culturally created device that is used to make sense of entities, events, and states of affairs, what kind of sense does it make? What are some of the meanings that we pour into the category and then project onto reality? The aim of this chapter is simply to survey some of the tasks that "nature" is called upon to accomplish. Among its most basic tasks is to differentiate humanity or humanness from the remainder of totality (or what in other frameworks is called "creation"). Nature is used to provide a contrastive background against which various figures of "the human" are legible. To that end, "nature" is commonly employed to signify negativity as against uniquely human positivities associated with "mind," and to signify a domain of necessity against distinctively human capacities for freedom, choice, or creativity. Using "nature" in these ways often positions it in relation to humanness or humanity and these relationships are commonly conceptualized in terms of control, knowledge, and limits. I shall discuss each of these in turn. In subsequent chapters I shall look more closely at the sort of "humans" that may be fabricated. The chapter is by no means comprehensive. It is admittedly partial and is deliberately suggestive. What I want to do is in a very general way introduce some of the things that "nature talk" can do – or, more accurately, what can be done with it – in the making of sense. In subsequent chapters I shall look at increasingly more specific contexts for these "doings." Throughout this chapter I shall also take note of the range of more particularly political tasks that "nature" can perform.

NATURE MADE

Nature is not what it used to be – if it ever was. In the last generation there has arisen a vast interdisciplinary literature examining what it means to regard nature as itself a social construction, a cultural artifact or invention (Hacking 1999; Castree and Braun 2001). Heterogeneous as this literature is, its primary focus is on the cultural *category* "nature": the ways in which it is shaped and transformed, and the ways in which nature and its multitude of variants and surrogates are practically deployed in efforts to make a particular kind of sense. Typically, a core normative focus of this work is the deleterious consequences of rhetorical figures of nature being used to make sense of the environment, women, people of color, animals, and others categorized as other or less than human (Cronon 1995; Yanagisako and Delaney 1995). Nature is, among other things, a trope, a conceptual figure with reference to which aspects of reality are made intelligible. As a central element in the culture as a whole, nature as trope makes an appearance in various cultural discourses: in literature, religion, philosophy, politics, and popular culture as well as in the everyday discourses of ordinary people. It plays a special role in the domains of culture identified as science and those which aspire to the status of "science" such as psychology and the more positivist inclined of the social disciplines. Scholarship by social constructivists draws our attention to the rhetorical work that nature and its satellite concepts do in the social-discursive practices of explanation, description, evaluation, prediction, critique, and justification. As Castree and Braun write, "[W]hat counts as 'nature,' and our experience of nature (including our bodies) is always historical, related to a configuration of historically specific social and representational practices which form the nuts and bolts of our interactions with, and investments in the world" (2001, 17). Constructionism may also alert us to the political aspects of the social construction of nature by revealing the workings of strategies of naturalization, denaturalization, humanization, and dehumanization. Castree and Braun continue, "[I]t is precisely because we mistake our ordering of appearances for the world itself, unaware of how our knowledges reflect their social context, that power relations become naturalized in our representations of nature. The significance of representational practices therefore lies not only in that they disclose a 'world,' but that representation is a worldly practice" (2001, 19). It is not surprising that such constructionist denaturalizations of "nature" have been denounced and ridiculed by many. Indeed, the patterned assertion,

denial, and domestication of constructivism constitutes one arena of the contemporary politics of nature.

But, of course, "nature" is not simply a category in a universe of other categories. It is a category whose specificity is that through which *physicality* is understood and rendered knowable and, often, controllable. Or, to put it another way, it is a category through which anything may be understood in terms of physicality. It is a category which informs the social and material practices whereby people intervene in physical processes and participate in transformations in the material world, whether that is a landscape, a subatomic particle, a region of the cell, or a trained tiger. That is, while it is important to examine the practices associated with the social construction of "nature," *why* it is important is because of *how* the practical reliance on the category – or on this or that conceptualization – is an ingredient in actual physical transformations. I shall use the word "inscription" to indicate the practical, social process of naming or framing (and the cognitive process of seeing) some entity as an example of nature – or not nature.

The cultural domain of law is, of course, of primary significance in transforming word into deed, concept into action. Law is a principal site of construction and inscription. (An image that one might keep in mind until we explore the role of law more fully in later chapters is that of Supreme Court Justice Oliver Wendell Holmes Jr. authorizing the involuntary sterilization of Carry Bell in the case of *Buck* v. *Bell*, 274 US 200, 1927). It is also the case that the employment of these concepts and categories, in law or elsewhere, is irreducibly related to the general features of the social order that constructs or produces them as artifacts. "Nature," as I've been discussing it, is a fundamental element in a social order that distinguishes itself from other past or possible social orders precisely on the basis of the idea of the distinctiveness, separateness, and primacy of humans as conscious, rational beings vis-à-vis the physical world. As philosopher Kate Soper says, "[A]n opposition . . . between the natural and the human has been axiomatic to Western thought, and remains a presupposition of all its philosophical, scientific, moral and aesthetic discourse, even if the history of these discourses is in large part a history of the differing constructions we are asked to place upon it" (1995, 38).

Many scholars have examined the social construction of nature per se as well as the social construction of more specific figurations. Thus we may find arguments about the social constructedness of wilderness, of animals, of evolution, of human bodies and parts of bodies such as genes,

and of naturalized patterns of human behavior. To the extent that the core meaning of nature *is* in its distinction with the categories of the human or the social, then the processes and practices through which nature is constructed are – almost by definition – complicit in the social construction of humanness, of humanity, and of the individualized subject. It is foundational of the very idea of mind. Of course, unless the processes of construction are themselves naturalized, then it may seem as though constructionists are as reliant on the terms of the basic distinction as are the more commonplace views they seek to displace.

One consequence of the increased currency of constructivist arguments is that it has given rise to new understandings of the politics of nature. The politics of nature concerns conflicts about transformations in the material world. They arise in connection with issues as various as those of concern to environmentalists, animal rights activists, scientists, supporters and opponents of genetic engineering and testing, the politics of health, and countless other contexts. But the politics of nature also, and perhaps with increasing self-consciousness, involves ideological contests over the very meaning of "nature" and "human." That is, one increasingly important component of the politics of nature is the politics of "*nature*."

One form that this sort of politics takes is in academic arguments between what Soper calls "realists" (those who regard nature as discourse-independent) and "culturalists" or constructivists (those who focus attention on the discursivity of "nature"). And these arguments are, perhaps, most vituperatively waged in the context of debates between those involved in the cultural study of science and defenders of some version of scientific realism. As an initial approximation of the field of debate we can say that the former view mainstream science as a highly significant site within which "nature" is produced and from which powerful representations are put into wider circulation. The latter view these constructivist claims as "fashionable nonsense" (Sokal and Bricmont 1998) or "higher superstition" (Gross 1994). Such claims have also been said to constitute a material threat to the very possibility of science and of the form of civilization that science has made possible. I shall return to this theme later in the chapter. For now it is simply worth noting that there seems to be something more significant than definitions at stake here. Another dimension of the politics of "nature" involves what Soper identifies as disputes between those with "Enlightenment" (or "nature-transcending") views of nature and those

with "Romantic" (or "nature-endorsing") views (Soper 1995). We shall encounter variants of this fundamental normative conflict throughout this work. Suffice it to say at this point that "Enlightenment" views remain culturally dominant, while "romantic" is generally a term of abuse that even supporters of "nature" disavow.

If we consider academic arguments as cultural interventions into the production of meaning, then what may also be at stake is what "nature" and "human" will come to mean. This is precisely because of the rhetorical work that "nature" is employed to accomplish – and *how* it does it. It seems to matter, that is, to be of material consequence, whether (or to what degree or in what sort of contexts) "nature" is uncontroversially regarded as itself a taken-for-granted immediacy and a natural category *or* is regarded as an artifact. If we view it as an artifact, then its conditions of production are not only analyzable but open to critique, contestation, and revision in light of normative commitments. In this case it is hard to see how "nature" could continue to do the sorts of conceptual and political tasks it has hitherto been used to accomplish. In a world in which a postnatural "nature" prevails it may be harder to see who we are. On the other hand, accepting responsibility for the power that animates the construction of nature makes possible questions like: What do we want nature to be? What do we want to do with it? These, of course, are social and political questions. I shall be returning to these themes throughout this work. For the moment I shall begin to sketch out a rough guide of some of the effects of the use of the category. In subsequent chapters we shall see how conceptions of nature have historically been used to shape how law is understood. In Part II, we shall see how legal practices are complexly involved in the social-political construction of nature, of humans, and in the transformations of our social-material world.

Before continuing I should like to be clearer about what we might call the central problem of nature. This concerns a third axis of the politics of "nature." As many writers have pointed out, there are two most prominent basic conceptions of nature. Soper identifies these as "dualist" and "monist." "For the dualist," she writes,

> our attributes, realized capacities and potentialities as human beings are so radically different from those possessed by other species that there is no proper analogue between humans and animals. For the monist, by contrast, all the ways in which we differ from other species are matters of degree, which can be all the better illuminated by seeing them as gradations within an essential sameness of being. (1995, 50)

Each conception in combination with other dimensions of the politics of "nature" gives rise to a host of incompatible subpositions. There are, for example, both Enlightenment and Romantic "dualists." And though these two fundamental positions are in some sense competing, dualist conceptions are clearly dominant, not to say hegemonic. But while each position has its attractions, each also has seemingly intractable problems and undesirable social implications. Among the problems of dualism often targeted by constructionists is its tendency to facilitate construing whatever is regarded as "nature" as radically other than – and antagonistic to – the constructing subject. Through "nature" otherness is inscribed onto entities, thereby denying a host of similarities, commonalities, and elements of mutually constitutive relatedness. This otherness of nature, in turn, facilitates estrangement and domination. It is also seen as forming the metaphysical root of the various crises of modernity: ecological, social, and/or spiritual.

But the consequences of monism are, if anything, just as pernicious, particularly when monism takes the form of physical reductionism and the denial of *human* specificity. The antihumanism of such reductions may, for example, make problematic the very intelligibility of justice, of moral responsibility, and, as I shall suggest in chapters 4 and 5, of law as it is commonly understood. The fundamental normative problem with nature is that we might both want and not want dualism. We may subscribe to dualism in some situations while we repudiate it in others. We might both need and revile the distinction and the work that it does. But it is hard to be pragmatic with a concept whose very sense seems to be a denial of pragmatics and the presumption of essence. We seem to run up against a sort of metadualism: nature is either exclusive of the human or inclusive. It is either a pole in a dualistic dichotomy or it isn't. Nature, and the other distinctions that it participates in, is either natural or it is not. Or so it seems. The problem is that various prominent modern discourses may situate "the human" both inside and outside the category. And again, the problem is a practical one insofar as drawing the line is consequential. It is not just a philosophical conundrum. "Human," by implication, is also a problem.

"Nature," then, can be comprehended in a number of incompatible ways. The culture that produced it has actually produced a profusion of "natures" that reflect, refract, distort, and clarify every aspect of itself. Nonetheless, what we might call "standard issue nature" corresponds to the dualist-realist-Enlightenment version. This is the target that those whom Soper would identify as monists (or materialists), culturalists

(or constructivists), and Romantics (in all of its profuse varieties) are aiming at from their different positions.

In the following pages I shall present an outline of some of the principal themes according to which distinctions and relations between the human and the natural are understood in modern thought. The questions are: What does "nature" do? What is it for? If "nature" is used to differentiate, what sort of differences does it make? Clearly such a survey will of necessity be highly selective and cursory. My aim is simply to take a first step behind the basic terms to see how these oppositions work to *produce meaning* in social and, more specifically, legal discourse. The root distinction, for example, is frequently understood in terms of presence and absence, or in terms of necessity and freedom. Relations are often thematized with reference to ideas of control, knowledge, and limits. In addition to these basic themes there is a cluster of supplemental concepts which orbit around them and give *them* meaning. Or, to put it another way, these themes circulate through renderings of human/nature relations as basic units of conceptual value. Many center on the theme of change, hence, its political import. I should like to suggest that, while we use conceptions of control or limits, and so on, in our efforts to understand nature, we *also* use "nature" as a way of thinking about, authorizing, or limiting change more generally. In particular, I want to suggest that nature names a set of ideas and images through which we conceptualize the possibility or desirability of social change. Law names a critical set of social practices within which this conceptualization takes place.

THE NEGATIVE

Negativity is a core aspect of most dualist conceptions of nature. What the nature–human distinction marks and what unifies everything within the domain of nature is the image of absence, deficit, or lack vis-à-vis the distinctively human. This is to say that the nature–human distinction makes sense in a way that a nature–dung beetle, nature–protein, or nature–gamma ray distinction does not make sense. Nature is, as I said, often simply *defined* as the not human or other than the distinctively human. Natural often signifies what is not artificial, or what is characterized by the absence of human intent, supplementation, or intervention. As John Stuart Mill long ago wrote, in a diatribe against Romanticism, "[Nature] means not everything that happens, but only what takes place *without* the agency, or *without* the voluntary and

intentional agency, of man" (Mill 1874/1923: 8, italics added). To take another example, wilderness, as nature's place, is conceptualized as "*un*touched by humans" or, at least, a place where humans are, generally, not in evidence. Earlier conceptions of wilderness rendered it as the realm of the *un*civilized, the *un*safe, the *un*known. More recent romantically inflected views maintain its ontological negativity albeit with a positive evaluation. As expressed in the Wilderness Act of 1964, "Wilderness, in contrast with those areas where man and his works dominate the landscape, is here recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain" (16 USC §§ 1131–1136). William Cronon writes that "for many [contemporary] Americans wilderness stands as the last remaining place where civilization, that all too human disease, has not fully infected the earth" (1995, 69).

Likewise, animals, as significant figures of nature, are often seen in terms of the features of humanness – rationality, soul, consciousness, culture, morality, linguistic abilities – that they lack. In *Regarding Animals*, Arluke and Sanders describe the conventional, anthropocentric view of animals this way:

> [T]he animal can think only in the most rudimentary ways, does not possess a self-concept, has no sense of time or space, cannot plan future actions apart from the boundaries imposed by the immediate situation, cannot differentiate between means and ends, and has no "emotions" in the sense that the animal cannot indicate these feelings to the self or to others. Trapped in the here and now, the nonhuman animal habitually or instinctively responds to stimuli presented in the immediate situation. (1996, 42)

Again, what "the animal" (is it a starfish? a gibbon? a thirteen-striped ground squirrel? a nine-spotted ladybug?) *is* is what it isn't. Philosopher Mary Midgley notes the consequences of what she identifies as the main thrust of Enlightenment thought on the topic: "[I]f animals are irrational and value and dignity depend entirely on reason, animals cannot morally matter" (1984: 11).

Similarly, the human body – the aspect of being that humans share with other animals – is commonly cast as the negative partner of the mind. "The body and its passions," writes medical anthropologist Laurence Kirmayer, "are viewed [in dominant representational theories] as disruptions to the flow of logical thought, as momentary aberrations or troublesome forms of deviance to be rationalized, contained and

controlled" (1992, 325). More explicit is Elizabeth Grosz's argument concerning the effects of the "common view of the human subject as a being made up of two dichotomously opposed characteristics: mind and body, thought and extension, reason and passion, psychology and biology" (1994, 3). Such "dichotomous thinking," she says,

> necessarily hierarchizes and ranks the two polarized terms so that one becomes the privileged term and the other its suppressed, subordinated, negative counterpart. The subordinated term is merely the negation or denial, the absence or privation of the primary term, its fall from grace . . . Body is thus what is not mind . . . it is what the mind must expel in order to retain its "integrity." (3)

As many feminist writers have stressed, women have commonly been associated within patriarchal meaning systems with the body-as-nature. They have been conceived as evidencing a deficit of rationality vis-à-vis men. They have been reduced to those features they are seen as sharing with animals.

The negativity of nature, then, may signify pastness, mindlessness, purity, or any number of other things depending on how the human as positivity is construed. As the examples suggest, this sort of ontological negativity does not always entail evaluative negativity, though in dominant conceptions it usually does. The contemporary romantic reading of wilderness, for example, illustrates that purity, integrity, and absence may be highly valued and what stands for the human relatively denigrated. Though this is by no means the dominant or usual reading, it is not culturally or politically insignificant. What should be emphasized is that nature as a trope of negativity provides a conceptual space or background against which figures of humanness are contrastively drawn and made legible. "What is then at issue in the humanity–nature division is not the positing of the distinction itself," writes Soper (1995, 41), "but the way in which it is to be drawn, and, importantly whether it is conceptualized as one of kind or degree." After the contrast is in place, other values can be projected onto either side of the distinction. As critics of the dominant vision, such as Cronon, Arluke and Sanders, Midgley, Kirmayer, and Grosz, contend, the prevalent mode of dualism tends to externalize and subordinate what is cast in the role of nature to what occupies the position of human. Some environmentalists and animal advocates claim, though, that the specificity and inherent value of the nonhuman world can only be protected from human depredations by maintaining the conceptual gap. Stated in its most general terms,

"[N]ature's independence is its meaning; without it there is nothing but us" (McKibben 1989, 58).

THE NECESSARY

Somewhat more specific than negativity, though flowing from it, is another cluster of nature-meanings that circulate around the notion of necessity. Nature is often used to signify the universal, the permanent, the inexorable, or essential. Alan Lightman, contrasting the workings of nature with the movements of a ballerina, writes that nature possesses "the ultimate in classical technique, unaltered since the universe began" (1996, 5). Necessity here is contrasted with the open-ended features attributable to human forms of being. These features include free will, creativity, culture, choice, intentional change and variation, and the infinite wealth of contingencies that mind brings into the world. Continuing the contrast, Lightman says, "Newton's laws and Coulomb's force, and the charge of electrons must be identical night after night – otherwise, the ballerina will misjudge the resilience of the floor or the needed moment of inertia. Her art is the more beautiful in its uncertainty. Nature's art comes from its certainty" (5). More scientific readings of necessity, then, see it as being rooted in the invariant laws of nature as describable in mathematical terms. Physicist Paul Davies speaks of "the dependability of nature: the fact that the world goes on existing and behaving in much the same way from day to day" (1988, 48). So while the workings of nature evidence manifold changes of state, the laws themselves – the foundations of nature – are inexorable. The processes of transformation such as evolution, cellular differentiation, or climate change, are explicable with reference to these more fundamental continuities. Given the givens, outcomes simply follow.

Necessity may be understood as the ineluctability of physical forces: gravity, landslides, water moving downhill; the nonvolitional nature of chemical attraction or reaction; the irreversible unfolding of biological processes (butterflies cannot turn back into caterpillars, pregnancies cannot be reversed). The primary forces of necessity in animal life and human life are domiciled in our environments and in our embodiment. Creature needs stemming from hunger, thirst, or fatigue; the longer-term processes associated with aging, illness, and death, ensnare us in webs of necessity.

More colloquially, nature may be appealed to in order to indicate the realm of what simply *is* or, perhaps, cannot be helped. One image of

necessity is constraint. From the standpoint of human action nature – external or internal – may constrain our action, limit the realization of our will, and confine the reach of our freedom. Nature – gravity, bodily characteristics, cerebral circuitry – makes us say "I can't." But another image is necessity as compulsion, or "drives." In human terms: "I must." As one legal scholar puts it, "The victim of compulsion does not 'act' at all; rather, she is acted upon by some external force or agency" (Hill 1997, 378).

Sex and reproduction are also seen as imposing strong elements of necessity on all species including *Homo sapiens*, although individuals may or may not feel compelled to participate. It may be argued that the "option" of nonparticipation is both culturally and historically variable. It is also important to note that the recent history of optional nonparticipation is, in part, the result of the confluence of the denaturalization of elements of gender identity and technological change. But this is getting ahead of my story. Individual sexuality and sexual desire are commonly conceptualized in terms of drives, urges, and passions, that is, "needs." Part of how we understand what it means to be civilized – indeed, *human* – is the exercise of self-control over these natural animal-like drives. Likewise, the product of human reproduction, the newborn infant, is seemingly nothing but a bundle of needs. As the saying goes, we are born animals but we become human.

Of particular significance is the relation between nature and causal necessity. Looking back at how something came to be or how some event unfolded, one can invoke "the nature of things" or how some state of affairs was determined in some strong sense by, say, genetic or environmental, or cosmological forces which are immune to change regardless of will. Natural necessity here connotes an etiology beyond the reach of human intervention. But nature may also be the source of necessary conditions for future occurrences. In this sense natural necessity may intersect with historical contingency and human agency. It becomes sensible to see necessity as itself historicized or even domesticated. In these situations, the limitations that natural necessity imposes may be overcome, conquered, or transcended. But in other contexts necessity may simply be accepted or mitigated. I shall return to this theme in the next section. For now it is enough to note that there is a politics of necessity, a range of social or normative positions which strategically assert or deny the workings of naturalized necessity in the sociomaterial world. This is to say that nature is used to conceptualize and argue about change and the relations between the desirable and the possible. Where

a "realist" might assert the constraining influence of what simply *is*, a critic might denounce such assertions as the manufacture of "false necessity." Nature as the necessary may be employed to indicate what can or must not be interfered with or what can and should be overcome. Nature talk, in this regard, is power talk.

RELATING TO NATURE

Control

The question of nature, then, is not simply a question of what *is*, but also, and more practically, a question of what is – and isn't – to be *done*. The terms of negativity and necessity highlight asymmetrical aspects of metaphysical or categorical difference vis-à-vis construals of the human. But nature is also used to conceptualize more dynamic relationships across the dichotomous divide. It is used to provide the ground for arguments about the quality or desirability of these relationships in various contexts. We can imagine, though, that arguments that might make sense in connection with, say, aspects of environmental regulation, may not make the same sort of sense in connection with sexuality or prenatal genetic testing. However, once some element *is* rendered as representing nature vis-à-vis the human, the same general terms of discourse and debate do have a tendency to be put into play. While there are many ways that humans may "relate" to the other-than-human, two are particularly prominent and of great significance to legal encounters with nature: relations of control and epistemic or knowledge relations. In regard to each I shall simply sketch the broad contours of these themes and then raise the issues of the uneven social distribution of the knowledge and control of nature. This will enable us to better frame questions about the politics of nature.

Control is always relational even if the members of the relation seem to be identical, for example, when we speak of self-control. The verb "to control" is transitive. Typically, when speaking of control, we may focus on bilateral relations as in reference to "man's control over the forces of nature" or utterances like, "Medical science has learned how to control diabetes." Fred Dallmayr illustrates this when he says, "The definition of man as a rational agent separate from nature has accompanied man's longstanding quest to control the forces of his environment; aided by the steady advances of science and technology his quest has finally resulted in man's virtually unlimited dominion over nature" (1981, 146). In this passage he critiques some aspects of the prevailing ideology

while reinforcing others. But control is not necessarily – or perhaps even usually – bilateral. Rather, this bilateralism may be, in part, the effect of dualistic framings. Causal chains and chains of social authority through which control flows are composed of many links. Rhetorical figures such as "man" or "medical science" mask both the complexity of these links and the indeterminacy attending even the naming of the links as discrete events. Also, controlling relations between the human and the natural are frequently cast in zero-sum terms such that if "we" don't control "it" (or, often "her") then it, through the imposition of necessity and the limitation on freedom, will control us. This assumption is also far from self-evident. As many commentators have pointed out over the years, there are many instances of some humans dominating others under the banner of controlling some facet of nature, and there are many instances of the consequences of controlling nature exacerbating other social and ecological difficulties. Still, bilateralism and zero-sumism are important elements for making sense of human–nature relationships.

The idea that nature controls often follows from the trope of necessity, where some aspect of humanness or human action is seen as being constrained or compelled by nature and where this sort of necessity is, per se, a bad thing. Seasonality of temperatures or precipitation, environmental capacity, competition with other species, corporeal needs, the specifics of hormonal, genetic, or neurologic determinants are commonly considered to be impositions and constitute barriers to what humans – or some humans – can do. One response to this is simply to acknowledge and accept these limits of physicality – and, of course, we all do this all of the time. Most people, I imagine, do usually limit the range of their desires or projects to the scope of physical possibility. But also common, if in a wider social register, is the notion that nature as the source of necessity can and should be overcome or controlled to the maximum extent possible and that that extent should be continually expanding. Nature should be modified, shaped, harnessed, managed, obliterated, or dominated as the context warrants. Framed in zero-sum terms, it is the river or us, the gypsy moth or us, cancer or us, manic depression or us. (And again, the "us" is undifferentiated.) We rhetorically and materially wage war on wilderness, pests, disease, disorder, and other manifestations of "nature." If nature is the sign and site of negativity, then to assert human control is to attempt to infuse hitherto natural processes with a positivity anchored in human will, rationality, creativity, or intentionality. It is to subordinate them to reason and

to supplement causes with reasons. To the extent that what counts as successful control results in physical transformations, nature is, in a sense, humanized, historicized, and domesticated. Flood control, pest control, animal control, disease control, and most especially, *self*-control are all regarded as signal human achievements. The idea of self-control is of special importance to law and I shall return to it in subsequent chapters. Suffice it to mention here that the idea and practice of self-control often posits "the self" as identical with mind and consciousness in relation to the initially unruly or potentially disorderly body whose corporeal functions and manifest behaviors are the objects of control. Situating this within the broader contours of modernist thinking, Kirmayer writes, "The dominant theories of the social sciences tend to treat the nonrational aspects of existence as defective or in need of rationalization. This emphasis on rationality and control is a central preoccupation of Western culture, and it permeates our models of the acquisition and use of knowledge, no less than our ethical and aesthetic vision" (1997, 330).

Relations of control vis-à-vis nature are commonly conceptualized according to temporal framings and spatial metaphors. We shall encounter these in legal treatments of control. As necessity is located in the processes of causality, so arguments and practices of control are focused on the unfolding of physical processes through time. To control animal reproduction, weather, disease, or human behavior is often to intervene in some causal chain in order to channel the unfolding of events. We breed animals, seed clouds, treat diseases, and modify behavior to achieve desired ends. We overcome some forms of necessity by directing other forms to conform to our wishes. Restating Francis Bacon's understanding of the arts of science, William Leiss writes, "[H]uman art . . . adapts itself to the necessities inherent in things. By following this formula we learn to set traps for nature in the form of experiments, carefully observing her workings and deducing the particular steps involved; then, having discovered the course leading to the end result, we are able to duplicate the process at will" (Leiss 1972, 59). As I will discuss in the following section, controlling nature is often predicated on knowing nature, where "to know" means to have some mindful comprehension of the workings of physical processes. With and through the powers of reasoning, we may look back from the present and infer the causal connections through which the present was brought into being. We may learn to "see" the Big Bang, the Jurassic extinctions, the

pre-Columbian landscapes of North America, the emergence of HIV in the human community, or its arrival in this person's body. We retrodict and reconstruct but, given the asymmetries of time, we cannot intervene. The realm of necessity here seems closed.

But looking forward we can predict. As Donna Haraway notes, "One of the peculiar characteristics of science is thought to be that by knowing past regularities and processes we can predict events and thereby control them" (1991, 22). We can model various unfoldings of events with or without a range of alternative interventions from which we may choose. We can *foresee*. Foreseeability is, of course, fundamental to legal conceptions of responsibility. It is also commonly understood as a uniquely human capacity. Only humans can grasp the future, though some more clearly than others. And in grasping the future with our imaginations and shaping it with our plans we might prefiguratively inhabit it. According to the reach of our physical and technological powers and the strength of our wishes, we may shape desirable futures and avoid undesirable futures, or at least mitigate or prepare for them. The control of nature is often about controlling futures, not allowing them just to happen blindly, but infusing their unfurling with purposeful vision. Controlling the future is about mastering, subordinating, and domesticating fate. We plan for harvests. We stave off disease. We abstain from sex.

But these temporal aspects of control intersect with spatial metaphors in socially significant ways. We speak of engagements with the world such that some processes, causal connections, or facts are understood as being "within" or "beyond" the control of some human subject – or of humanity per se. Looking backward along some causal chain, for example, by way of the practice of forensics, causal and often moral or legal responsibility may be assigned for this or that outcome. But in many cases, whether we are looking forward or backward, the lines may not be so clear. The spatial metaphors of "within" and "beyond" control may be deployed in ways that result in contending maps for shifting burdens of responsibility. Actions, say violent actions, may arguably have been "beyond" the control of an accused on account of metabolic disorder, addiction, or "the heat of passion" (according to which the accused had insufficient time to hear "the voice of humanity"). Or, with respect to the collective subject, "man," a disaster can be construed as "natural" – and therefore beyond control, or as anthropogenic, in which case blame might be assignable (Klinenberg 2002). In either case, *"nature" is used*

to mark the limits of responsibility. Nature as negativity and necessity may be construed to position some event as being beyond human control, to locate it within the realm of the unwilled, the unintended, or the unforeseeable. Or knowledge as positivity may be used to resituate what had been beyond one's control to within it.

But again the historicization of necessity describes the shifting boundaries of this "within" and "beyond" in terms of the expansion of control and thus of intentionality, choice, or freedom vis-à-vis the simply given. The term that names the directionality of this continually shifting boundary – or, as it is often referred to, this frontier – is progress. The still-dominant vision of control relationships is: if it can be done, it should be done; if it should be done, it will be done. Environmental philosopher Murray Bookchin highlights the metaphoricity of nature that undergirds progress talk.

> In our discussion of modern ecological and social crises, we tend to ignore the more underlying mentality of domination of each other and by extension of nature. I refer to an image of the natural world that sees nature as "blind," "mute," "cruel," "competitive," and "stingy," a seemingly demonic "realm of necessity" that opposes "man's" striving for freedom and self-realization . . . this all-encompassing image of an intractable nature that must be tamed by a rational humanity has given us a domineering form of reason, science and technology. (1986, 50)

Progress itself and its motive force of technological determinism may, ironically, take on the coloration of naturalized necessity. Minority views, while numerous, are often dismissed as romantic, Luddite, or irrationalist. The theme of control over nature is itself always and necessarily political, and the rhetoric of this politics is often framed by these spatial metaphors.

At this point it might be helpful to raise a question which is at the heart of debates between constructivists and realists. To what extent or in what situations is it the case that humans confront a preexisting, prediscursive nature – comprehended as negativity and necessity – and seek to control, manage, or protect it, and to what extent or in what situations is it the case that (some) humans seek to work their will on parts of the social-material world, in order to control, manage, or maintain it and *identify* the object of their willing as "nature"? Thus, women, disabled people, people of color, criminals, animals, and ecological systems may first be cast as objects of fear or desire and as such separated

(from the fully human) and rendered suitable for subordination. Naturalization simply prepares the ground for domination. This nominalist argument locates a critical moment of the politics of nature in the process of control over the *meaning* of "nature." This gives rise to anxieties associated with the rhetorical maneuvers of naturalization and denaturalization as preparation for justificatory maneuvers of physical control.

While, as I mentioned, it is quite common to find references to or claims about "man's control or domination of nature," this locution imposes both a bilateral and, often, zero-sum structure onto much more complex patterns and relationships. It imputes a unity to the objects designated as "nature" – a unity based upon what the members of the category lack. It also imputes an undifferentiated transcendental subject – "man" – as the controller. But, of course, some humans exercise much more "control" over much greater amounts of "nature" than do others. These distributions of control are manifested in radically unequal economic control over land, resources, animals, and human bodies. "Man" doesn't control nature so much as differentially empowered social actors do. Much of this control is facilitated, as we shall see, by the legal concepts integral to property law, family law, penal law, and other specifically legal ideas. That is, practically speaking, control is frequently legitimated and reinforced with reference to "rights." Likewise, "man" doesn't control the objects of scientific investigation; particular institutional actors do. The politics of nature in all of its instances – and the form that this takes in law – is fundamentally concerned with these distributional questions.

Control is also relativized and politicized in another important way. The relative control over particular objects or processes may be divided among a number of social actors. Thus, an environmentally sensitive area may be "regulated" by the state yet still be "owned" and, in many ways, controlled by a private entity. Indeed, in a liberal social order nearly all property is the object of some sort of divided control, however uneven the division might be. Similarly, human bodies are the topics of divided control in a number of politically and legally significant ways. The politics of reproduction is the politics of relative and divided control over bodies, as are the various expressions of sexual politics. As the well-known bumper sticker puts it, "Keep Your Laws Off Of My Body." The bodies of inmates and patients are also the sites of legal and material struggles. A prisoner's body is under the control of the state and yet still, at least nominally, protected by a wall of rights, such as the right to bodily integrity.

The point here is that the politics of nature, whether encountered in connection with external, animal, or corporeal nature, is often oriented toward maintaining or revising the social division and distribution of control over segments of the physical world. Underlying object-centered questions of *what* is or should be "within" or "beyond" control are the more overtly political questions of *who* is or ought to be in control of this wetland, these macaques, that fetus, or those inmates. And underlying these sorts of issues is the question of what "control" means or ought to mean. The constructivist argument, especially as it appears with Marxist or feminist inflections, is that idioms of "controlling nature" often mask dimensions of social control. As legal scholars emphasize, the idea of property itself, while understood by the legal laity as focused on the power that a person may legitimately exercise over "things," is often manifested as the power that those who own hold over those who do not own. Those who do not own are, by virtue of corporeal and social necessity, compelled to submit to the will of those who do own and control the necessities of life. As Edwin Baker says, "Property is an aspect of relations between people. It consists of decisionmaking authority. 'Authority' refers to the role of property as a claim that other people ought to accede to the will of the owner" (1986, 742–743). That is, as it is incorporated into property, control over the meaning of "nature" translates into control over the things thus naturalized, which, in turn, translates into control over people.

The theme of control courses through the various precincts of nature talk. In chapters 4 and 5 I shall look more closely at how this plays out in and through legal discourse. For now it is enough to emphasize that "nature" is, among other things, a conceptual device for rhetorically locating things, processes, and events within social constellations of power, both normatively and materially. Construals of control relations are central to the politics of nature. Not incidentally, they are basic to both dominant and insurgent progress stories and to the constitution of the subject as the hero of these stories. Understanding control relations follows from understanding of epistemic relations.

Knowledge

Relations of control are inextricable from relations of knowledge. To speak of knowledge in relational terms may seem odd. We more often think of knowledge in nonrelational terms, as when we say that someone "knows" or "has knowledge." I mean to draw attention to two important relational dimensions of human knowledge vis-à-vis nature.

Fuller discussion of one of these, social relations pertaining to the production, acquisition, and circulation of knowledge claims, will be deferred for a while. Perhaps more fundamental to conventional understandings of knowledge is the posited relationship between the human as *subject* of knowledge and nature as *object* of knowledge. According to Soper, "for nature to be conceived as an Object . . . it must already be opposed to the mental – as that which differs from the Subject in not possessing mind, spirit or soul" (1995, 43). Again, the subject of knowledge may be figured as an individual subject or as a collective or depersonalized subject, such as neurologists, animal trainers, or wilderness guides regarded generally. Or, the subject may simply be "science," as in the phrase "science now knows that . . ." or, more generally still, "humanity." I shall be discussing these collective or "transcendental" subjects at greater length in the next chapter. The point is that the capacity to know is predicated of – and only of – mindful subjects. This is precisely what the root distinction marks. It is the positivity that the negativity of nature points to and makes intelligible. Figures of nature – the totality, environments, animals, and bodies – cannot know, and their inability to know is what makes them "nature." To know nature is to have some *mental* representation of *physical* properties, mechanisms, processes, and relationships. It follows that, although our senses may provide our minds with "input," we cannot "know" with our bodies. Or, perhaps, what our bodies have learned does not count as "knowledge."

There are, of course, hierarchies of knowledge that are commonly marked by their inverse relation to metaphorical "depth," such that having a superficial or working knowledge is less esteemed than having deep (profound and propositional) knowledge. Compare the differing cultural valorization of, say, a chicken breeder with that of a theoretical physicist. Indeed, the modernization and commercialization of chicken breeding as "poultry science" is a reflection of these hierarchies. The knowledge possessed by a poultry scientist may be located a few notches down from that of a physicist in the Great Chain of Knowing, but it is significantly higher than that of an amateur chicken breeder.

As my interest is in the rhetorical work that "nature" does in modern discourse I shall forgo a tour of Western epistemologies and simply sketch some common elements of the metaphysics of nature talk as it pertains to the politics of nature and, more specifically, the legal politics of nature. What is understood as belonging to the realm of nature is not simply rendered an object of knowledge, but an object of a special sort.

The metaphoric constitution of nature provides the conceptual ground for the conditions of knowledge, what counts as knowledge, and what it means to know. As the quotation from Bookchin (1986, 50; see p. 43) suggests, nature as dark, deep, mechanistic, hidden, passive, secret, blind, and closed is mutually constitutive of the construal of knowledge as enlightening, penetrating, analytical, sighted, active, and open. As the mind or the force of rationality penetrates nature more and more deeply, more and more knowledge is exhumed, uncovered, extracted, brought to light, and accumulated. Epistemic relationships between subject and object, like control or transformative relationships, may be dynamic. And, again, this dynamism is understood as directional. It is the driving force of progress, progress vis-à-vis a particular task or solution to a problem as measured in terms of "growth" (consider journal titles such as *Progress in Atomic Medicine*, *Progress in Human Geography*, *Progress in Biochemical Pharmacology*, *Progress in Experimental Personality Research*, or *Progress in Oceanography*). By common extension, this dynamism maps the trajectory of social progress per se. Knowing the workings or unlocking the secrets of nature illuminates both origins and destinations. Joined with the theme of control, prediction translates into a way of grasping the future, of foretelling, foreseeing, and controlling – through physical intervention or, failing that, through enhanced ability to prepare. Knowledge is (potentially) active and transformative. If nature is known in this sense the blind force of necessity may be supplemented or supplanted by foresight, which results in the (at least partial) humanization or domestication of fate. Fundamental to this conception is the assumption that knowledge is an unqualified good, that knowledge's natural contrastive terms are ignorance, blindness, and darkness, and that the augmentation of knowledge and control leads to the expansion of human freedom. How could these assumptions even be questioned?

But, just as "man's domination of nature" masks multiple dimensions of the uneven distribution of power vis-à-vis the material world, so portrayals of knowledge as the unified, coherent possession of a singular subject ("man," "humanity," or "science") mask profoundly uneven social distributions of knowledge. They also disguise the consequential privileging of some forms of knowledge over others. There is, for example, the issue of what sorts of claims and experiences even count as "having knowledge." More rationalist conceptions of knowledge that valorize propositions or representations exclude forms of embodied or intuitive knowledge as meaningless or superstitious. In Part II I shall

have occasion to ask what it would mean for bodies to know, and what animals might know. In the next chapter I shall take a closer look at the production of scientific knowledge as the paradigmatic instance of real, true knowledge. Of importance to my larger project are the qualities that scientific claims are understood as imparting to legal arguments in regard to objectivity, facticity, and neutrality. These qualities follow from the metaphorical structure of nature and knowledge. For now, we might contrast conventional views of the extraction and hierarchical distribution of knowledge as factual, objective nuggets of truth with an alternative view that focuses on the production, commodification, and uneven circulation of contending representations of nature whose quality is inseparable from the metaphors through which the very idea of nature is made intelligible.

Technologizing knowledge

One final point that relates directly to this uneven economy of knowledge-about-nature concerns technology. Material technologies – tools, devices, instruments, compounds, and so on – represent the materialization of social knowledge. Socially produced knowledge of materials and processes, as conditioned by understandings of purposive projects, are physically realized in the form of tools: arrowheads, fiddles, scalpels, napalm, assembly lines, dildos, particle accelerators, Styrofoam, word processors, syringes, psychotropic drugs, Gortex, and any of the millions of devices that are the furniture of our lives, from the simplest to the most complex. The fashioning of an arrowhead or a chain saw each represents in itself, and furthers the intensification of, the transformation of the material world. There is also a subset of technologies whose function is the furtherance of the production of more knowledge. Scientific instruments and other devices supplement the hand, eye, ear, and brain. They alter the powers of observation, manipulation, analysis, and computation and allow for still deeper penetrations into the workings of nature. These tools, in and of themselves, constitute progress.

Another overlapping subset of technologies augments the power to intervene physically in those processes. The bulldozer, the electric fence, the sagittal saw, the serotonin uptake inhibitor, and the birth control pill are some of the countless artifacts through which knowledge of nature is given material form for the purpose of increasing control over nature. In conventional versions of the progress story this is a key

aspect of the virtuous cycle whereby knowledge begets control, which begets knowledge, which begets emancipation from the bounds of necessity. When joined to images of a prospective temporal dimension of control, technologies in general facilitate the domestication of the future. In *Technology, Time and the Conversations of Modernity*, philosopher Lorenzo Simpson argues that "technology, in its attempt to subdue time's characteristic flux, aims to 'domesticate' time by harnessing the future predictably and reliably to the present" (1995, 43). This attempt is not incidental. Rather, he continues, "The goal of technology is the 'domestication' of time, that is, the prediction and control of that which appears in time. Domestication appears as the will to control" (53). But instead of seeing the continuous recession of the limit of necessity, Simpson sees a redistribution of control: "While technology promises a satisfaction which is ideally linked to autonomy, where here I mean freedom from determination by blind natural and social forces, it involves new constraints, in a new set of renunciations" (55).

Modernity – itself a sort of transcendental subject – is founded on a continuous and accelerating revolution vis-à-vis nature, "driven," some say, by the economic and political imperatives of technological change. But this continual revolution manifests itself as continual destabilization of the terms of social-material life and inherited normative world views. These destabilizations give rise to what are experienced as profound social and personal problems. These social problems are, in part, rooted in the radically unequal access to technologies and manifest themselves in social redistributions of authority, autonomy, and wealth, that is to say, redistributions of power. (This provides the context for various facets of the politics of technology.) It also provides the context for social or personal problems for which there is an imagined legal solution. Troubles are made intelligible within a map of power describable in terms of rights, duties, and authority. At the present historical moment the very ideas of nature and knowledge are, as we've seen, being subjected to critical scrutiny. Even within the broad terms of inherited dualist frameworks, the relations of control and knowledge are themes of intense political dispute. One face of the politics of nature concerns precisely these questions: What does it mean to know? Who does, doesn't, should, or shouldn't know what? What is knowledge for? and What sorts of knowledge are worth having? While knowledge about nature is fundamental to the control of nature, these questions ask about the *social* dimensions of the control of knowledge. It must be stressed that asking

such questions is not simply a philosophical exercise. They also inform social-material struggles and frequently emerge as legal troubles. All of this follows from the fundamental conceptualization of nature as negativity and necessity.

AT THE LIMITS OF NATURE

If "standard issue nature" is a tool for assigning negativity and positivity, or necessity and freedom, and for locating things and events within constellations of power and knowledge, it is also a basic tool for conceptualizing and arguing about limits. In various popular and more specialized discourses one of the principal tasks that nature is called upon to perform is the inscription of limits. But limits can mean very different things. Viewed statically, or cartographically, limits mark edges or margins. Viewed more relationally, limits are boundaries or lines of interface. Viewed more dynamically, limits expand or contract and boundaries shift position. When they are joined to conventional journey metaphors, limits may mark the location where something stops and something else begins or where something is itself turned into something else. Aligned vertically, a limit might denote an upper extremity beyond which is excess or a lower level beneath which is deficit. Or, a limit might more specifically be a limitation: that which impedes forward motion along a path. Limit talk is ubiquitous in ordinary language use and, perhaps more so, in political-normative discourse. It is a prominent feature of legal discourse. Here I simply want to note some instances of nature as limit that relate to the themes I have already introduced.

Nature as negativity (as absence and deficit) marks the ontological boundary of humanness. But the location of this categorical boundary has been in flux. Ironically, one reading of the progress story emphasizes the expansion of the category "human" throughout the reign of liberal modernity. Achieving recognition of the full human status of women, people of color, and disabled people – that is, removing the dehumanized from the category nature as negativity – has been a central task of various liberation struggles. Even now, though, there are sharp debates about where to locate animals, fetuses, and "persistently vegetative" patients. With regard to the last two categories, the limits of humanness may be interpreted temporally: When does one become human (at conception, at birth, or at some conventional point in between)? When does one stop being human (with the cessation of

autonomous cardiopulmonary functioning, with brain death, or with some agreed-upon combination)? Alternatively, the line between negativity and positivity, absence and presence, may be located spatially by way of claims about the body or conceptions of the wild. The issue of the line's location hinges on another question: Is the line simply there to be found or do we draw it?

Understood as the limits of necessity, nature marks the limits of will, choice, freedom, progress, and civilization. This, to repeat, implicates questions about the limits of change. Nature often signifies the unchangeable – and as such underwrites ideologies of biological essentialism and determinism. But nature also signifies what *must* be changed – and as such provides the foundation for the conventional ideologies of development, progress, and domination identified by Bookchin. In combination the question becomes: What are the limits within which change is possible, imaginable, or desirable? Or, how far can we go?

Understood as the limits of control, nature describes the reach of human powers to effect physical transformations and/or bodily behaviors. It may be used to mark the limits of causal or moral responsibility – and, therefore, the limits of morality itself. Understood as the limits of knowledge, nature stakes out a geometry of zones. Unknown nature may be the depths of darkness, beyond the light of reason, a darkness that may control and impose necessity precisely in its ungraspability. Nature rendered known yet still beyond the powers of human control is, in a sense, semidomesticated, captive if not tamed – like a zoo animal. It is only waiting for technological control to catch up to what the mind can grasp. Nature known and controlled is nature annexed to the realm of human intentionality. Through all of this there is, again, a distinct politics. As we shall see in connection with events as diverse as animal experiments, reproductive technologies, genetic testing and screening, and psychopharmacology, among the normative questions that are raised are: Is it uncontroversial to believe that knowledge *should* be continually produced? Are there things that *ought* not to be known or even investigated? *Ought* there to be limits to what is rendered known? And how might we know if there are or ought to be limits? Do we intuit them? These are ethical questions. But because of the relationships between knowledge and power they are also political questions. And they are questions whose answers are often cast in legal terms: by what right? with what responsibilities and/or liabilities? on what authority? with what justification?

Facing limits

While the rhetorical work that nature does often implicates some idea of limits, there is, in legal practice, as in the culture more generally, a range of postures or attitudes toward those limits which are revealed in different contexts involving trouble with nature. A limit can be conceived of as either a wall or a threshold, a permanent barrier or a horizon. While conceptions of nature in a particular situation may ground claims about various sorts of limits, these limits may or may not be "naturalized" in the sense of being regarded as essential, universal, or immutable. We often encounter injunctions to stay within the bounds of nature, to acknowledge limits, and to respect nature. An ecology textbook from the 1970s put the matter this way: "If we are going to come to terms with Nature, it will have to be on her terms for the most part. These conditions of nature, the bounds beyond which man cannot step, are the subject of this book" (Ricklefs 1973, 1). Or, in a very different set of contexts, the maintenance of limits may take the form of invocations of the "unnatural." This is common, of course, in the context of sexual practices. In ecological thought this posture may be expressed in terms of the conservation or preservation of nature. In critiques of biotechnology it may be expressed as a condemnation of the conceit of "playing god." Limits, then, in some situations may be regarded as necessary, and transgressions of limits seen as detrimental to both humans and the nature that is being transgressed.

However, we also encounter imperatives to push against the limits which constrain us, to enlarge the scope of our powers, to overcome necessity, and increase our freedom of action in the world. The considered possibility of transcendence is itself one of the fundamental features in which our real distinctiveness from the rest of nature is grounded. Paradoxically, humankind may be regarded as that part of nature (the totality) whose very nature (essence) is not to be eternally constrained by forces of brute nature (necessity). These different understandings of the limits that nature signifies reveal deep ambivalences about "nature," about what we want "nature" to mean, and about what we want to *do* with it. As the sentence before the last, and much of the essay up to now, has demonstrated, recognition of this ambivalence is obscured by the radical polysemy of the concept "nature" – or perhaps, its radical incoherence. More specifically, it is obscured by layers of ambiguity and the shifting frames of reference in which nature talk participates.

Of particular significance, as has been clear in our discussion thus far, there are many ways of conceiving of nature as inclusive or exclusive

of humans. Or, put another way, humans can be *metaphysically* – categorically – understood both as *part of* nature or as other than or *apart from* nature. Similarly, nature can be conceived of as external or internal to humans. That is, nature can be *physically* located as part of us – our bodies, our "species being" – or as the external environment that we are located in. These various framings give rise to ambiguities, and so to deep conflicts not only about "nature," however framed, but also about the various sorts of limits which nature signifies. These conflicts, again, turn on questions of control which, as noted, may themselves turn on questions of knowledge.

CONCLUDING REMARKS

In this chapter I have introduced some of the ways of making sense with – or framing – events, practices, things, and places in terms of "nature," its surrogates and opposites. The range of rhetorical operations is at once conventional – nature simply *is*, "nature" simply *means* nature – and ambiguous, indeterminate, and available for more strategic, specific application. It is useful for making reality meaningful in some ways but, owing to its ambiguities and complexities and to the larger cultural ambivalences, the meanings that it facilitates are themselves complex and unstable. These instabilities are, perhaps, most clearly revealed in contemporary theoretical efforts to denaturalize "nature" and to treat "it" as an artifact or tool.

CHAPTER THREE

THE NATURES OF SCIENTIFIC DISCOURSE

INTRODUCTION

The cluster of concepts centered on "nature," then, is an extremely versatile cultural artifact. Though my main concern is what it may be used to accomplish in political or moral argument, we all use it, or parts of it, in innumerable contexts. There are some cultural domains, however, within which nature talk and understandings of what it means to know and control nature are not merely occasional or tacit but constitutive of the domain and its associated practices. Among these are science and its ancillary domains including technology and medicine. Because of the pervasive cultural authority of these practices and because much of law's dealings with nature are mediated by scientific framings of nature, it is important to look more closely, if still quite schematically, at the practice – and politics – of science.

In this chapter I briefly examine the politics of science as an important component of the contemporary politics of nature. If science is a source of culturally significant representations of nature, a large part of their significance – and their legitimacy and authority – derives from the conditions of their production. To the extent that the practice of natural science is commonly understood as being insulated from political ideology or economic interest, its products, "facts of nature," may be received as objective, value-neutral representations. As such they are extremely valuable resources for making sense of states of affairs. We might say then that one of the most important uses of scientific

facts is the depoliticization of nature. Facticity and evidence narrow the play of values, ideologies, and interests in arguments about the physical world.

After sketching some of the connections between the depoliticization of the practices and their representational products, I shall turn to elements of a contemporary reframing of the practices and products of science which aim to disable this depoliticizing – or legitimating – project, and so, to repoliticize renderings of "nature." To be clear, my objective here is only to describe elements of the politics of science as components of the politics of nature. Even if one is unpersuaded by the critics' claims that science is a political practice, it is undisputable that there exists a robust politics *about* science. In chapter 5, in a discussion of the relationship between science and law, I shall focus on law as a consumer of scientific representations of nature. In Part II some of these questions will be encountered again in more specific contexts such as those involving the designation of endangered species, animal experimentation, sexuality, prenatal genetic screening, and psychopharmacology.

Science, of course, is not concerned only with the production of knowledge and the circulation of representations (i.e. "pure" research). The knowledge that is produced is also used in countless practical ways. Many of these uses are rather directly related to facilitating the control of the objects of knowledge, and control of the objects often entails their physical transformation. Many of the troubles with nature that I shall examine in Part II occur in the changing contexts of knowledge and control and the novel material practices that the augmentation of scientific knowledge facilitates. And indeed, one of the most pressing problems that the law has with nature is how – or even whether – it can or should "keep pace" with science.

THE NATURE OF SCIENTIFIC PRACTICE

Science – natural science, the physical and biological sciences, construed as distinct from the human or social "sciences" – is a source of some of the most significant representations of nature. Every week there are countless thousands of new representations put into circulation. Many of these are intelligible only to specialists. But many are also put into wider circulation. Here is a sample from recent science journals with a more general readership base.

> When a dense cloud of gas and dust condenses to form a star the dust grains closest to the dust forming region evaporate.
>
> (J. Mayo Greenberg, "The Secrets of Stardust," *Scientific American* 283, 6 December 2000, 72)

> Like a lock-picking burglar, HIV slips into cells by tinkering with their outer membrane. Once inside, the virus makes its way to the nucleus, where it commandeers the cell's machinery, and begins churning out copies of itself.
>
> (Marina Chicurel, "Probing HIV's Elusive Activities within the Host Cell," *Science* 290, 8 December 2000, 1876)

> Evolutionary studies have long shown that genetic ties can influence human behavior. For example, scientists have found that parents are more likely to murder step children than biological children.
>
> ("Another Edge for Kinship," *Science* 290, 8 December 2000, 1887)

> After ten years of data gathering and analysis, an international team of scientists reports that specialized vertebrae make the breeding female of a naked mole rat colony longer than her cohorts. This makes the rodent the first undeniably eusocial mammal known, the researchers conclude in the Nov. 21 *Proceedings of the National Academy of Sciences*.
>
> (L. Sivitz, "First Mammal Joins Eusocial Club," *Science News* 158, 2 December 2000, 356)

> Numerous studies have found that aggressive animals, including humans, on average have lower levels of serotonin metabolite – which is thought to reflect lower serotonin levels in the brain – in their cerebrospinal fluid (CSF).
>
> (Martin Enserink, "Searching for the Mark of Cain," *Science* 289, 28 July 2000, 578)

Science tells us much of what we know about nature. The *practices* of science also provide paradigms of the valorized relationship between humanity as a transcendental subject and nature as object of knowledge, prediction, and control. Science – or technoscience – is also the source of the powerful tools with which the material world of external and internal nature is transformed. But, we might ask as a preliminary matter, what is science? It may be significant that the etymology of the word "science" can be traced back to the Latin verb *scire*: to know, from the Indo-European root *skei-* meaning to cut, or split. As science journalist Dennis Flanagan glosses it, "to know is to separate one thing from another" (Flanagan 1988, 13). "The premise," in biologist Katherine

Hayles's words, "is that we know the world *because* we are separate from it" (1996, 223). One contemporary historian of science notes the polysemy of the term.

> One view holds science to be the pattern of behavior by which humans have gained control over their environment. Science is thus associated with craft traditions and technology . . . [But] an alternative opinion distinguishes science and technology . . . It has also become quite popular . . . to define science by the form of its statements – universal law-like statements, preferably expressed in the language of mathematics . . . [S]cience can be defined . . . in terms of its methodology . . . [or] by its epistemological status . . . Thus Bertrand Russell has argued that "it is not what the man of science believes that distinguishes him, but how and why he believes it" . . . science is a privileged way of knowing and of justifying one's knowledge . . . Science is defined by its content. [It is] . . . a particular set of beliefs about nature – more or less the current teachings of physics, chemistry, biology, geology and the like . . . And finally, "science" and "scientific" are often simply employed as general terms of approval – epithets that we attach to whatever we wish to applaud. (Lindberg 1992, 1–2)

Or, as Flanagan more pragmatically, puts it "science is what scientists do" (1988, 8). But what is it that scientists "do"?

Consider Jane Goodall observing chimpanzee family life near the Gombe Stream in Tanzania; Ian Wilmut cloning a sheep in Roslin, Scotland; Michael Faraday discovering electromagnetism in his English laboratory; Edward Teller and Robert Oppenheimer developing the atomic bomb at Los Alamos, New Mexico; Harry Harlow conducting maternal deprivation experiments on monkeys in his primate laboratory in Madison, Wisconsin. These are some of the things that scientists do. Among the scientific activities that will inform the legal events we shall encounter in Part II are: contractors of the US Geological Survey observing slope movements in coastal California; employees of the Fish and Wildlife Service measuring ecological change in northern Minnesota; scientists working for the Sierra Club studying habitat degradation in Hawaii; technicians at the University of Pennsylvania conducting head-injury experiments on unanesthetized baboons; William Masters and Virginia Johnson clinically observing and describing the stages of human female orgasm at Washington University in St. Louis; Robert Edwards and Patrick Steptoe demonstrating the feasibility of in vitro fertilization of human eggs; Katharina Dalton studying the effect of different ratios of estrogen to progesterone to the onset of

premenstrual syndrome; David Wong synthesizing fluoxetine (Prozac) in the Eli Lilly Company laboratories in Indianapolis. These are all subjects engaged in the doing of science. What makes such a disparate collection of practices cohere as instances of the same phenomenon is, of course, "nature." The list is endless because science is "all over." There is famous science and anonymous science; big science and little science; mundane science and history-altering science; corporate science, academic science, and public science. To such a list, though, one might add philosophizing about science, testifying before local zoning commissions about science, evaluating grant applications, popularizing science through journalism or museum exhibits, criticizing science at the annual meeting of the American Anthropological Association; teaching physical geography at a community college, and dissecting a fetal pig in high school. These are all social modalities of doing science where to do science is to engage "nature" in a particular way. As we shall see, contemporary critics of science claim that people who are doing science are also, by definition, participating in the social construction of "nature." To the extent that this claim makes sense it may also be the case that precisely in constructing "nature" as object, they are also constructing "science" as subject. (They may also, of course, be constructing themselves as particular sorts of individual subjects such as "scientist," "science critic," or "expert.")

Science and the depoliticization of nature

The polysemy of the term notwithstanding, the prevailing image of the practice of science does contain a number of core elements. Here I want to stipulate that I am necessarily trading in stereotypes. That, in fact, is part of the point. These may or may not actually inform how the practices are carried out. They are, in any case, in wider circulation and help to underwrite the cultural authority of scientific discourse. Following a brief catalog of these features, I shall present a countercatalog offered by contemporary critics of the ideology of "scientism." My purpose is neither to vilify science as hoax or myth nor to celebrate it or defend it from its slanderers. My aim here is to lay the groundwork both for a discussion of the politics of science as a component of the politics of nature (*and* the politics of the subject) and, later, for a discussion of the relationship between science and legal practice.

Whatever else may be said, science is about engaging both "nature" and the physical world in particular ways. It is about the terms of

humanity's epistemic relation to nature. To quote Flanagan again: "Science is the process of all processes: a perpetual reshaping of what human beings know about the universe and themselves" (1988, 13). The story of the birth of modern, Western science is the story of the repudiation of superstition and of supernatural forms of knowledge. It is also the story of the ascendence and solidification of rationalist forms of knowing; the triumph of mind over matter. It is the story of results. It is, of course, a highly politicized story about the emancipation of reason from the shackles of dogma. It is a story whose heroic figures include Galileo, Bacon, Copernicus, Darwin, Einstein, and Crick. Metaphorically, the story is often told of science engaging nature as an explorer engages new worlds and as an army engages an enemy. Discourse about science is a discourse of frontiers, horizons, breakthroughs, and, especially, discoveries. Cambridge University biologist Michael Berridge describes his experience like this:

> I find science extremely difficult because you're up against nature and I like to think of it very much like a battle. You're like a general marshaling your forces to try to unlock some of the secrets. I see nature as guarding these secrets very carefully, and you have to use all of your skill and wits in trying to get at those secrets. I really enjoy the tremendous intellectual challenge and the occasional exhilaration of uncovering some of nature's secrets. (Quoted in Wolpert and Richard 1997, 146)

Narratively, the story is one of punctuated struggles, victories, and discoveries resulting in an ever-receding horizon of knowledge. There is also a division of scientific labor that corresponds, to a large extent, with a naturalized division of totality: physics, chemistry, biology, earth science, and so on, but science *as a whole* is conventionally conceived as unified because nature itself is rendered as unified and singular.

The immediate objective of scientific practices, whether theoretical, observational, or experimental, is the generation of true propositions about nature. A medium-term objective is the gathering of true propositions into coherent clusters. A longer-term objective is the unification of all the true propositions such that we have as full and accurate a representation of nature as is possible. The limits of possibility at any period are frequently understood as imposed by the limits of technique. As all of these nested objectives unfold through time, their actual achievement constitutes a seemingly uncontroversial image of progress. In *The Roots of Romanticism*, Berlin sets out three fundamental epistemological

commitments of the Enlightenment thought: (i) "all genuine questions can be answered, [and] that if a question can not be answered it is not a question"; (ii) "all these answers are knowable"; and (iii) "all the answers must be compatible with one another, because, if they are not compatible, then chaos will result" (Berlin 1965, 21–22).

The production of knowledge through science is realized through adherence to methodological canons of inquiry. Science critic Stanley Aronowitz writes: "[W]hat all scientists share is a community rooted in method. The primacy of shared methods guarantees the reliability of what counts as science" (1988, 8). In science, as in law, only subjects may know. And in each domain a requirement for producing genuine knowledge is that the individual, idiosyncratic subject must be socialized in such a way as to merge into a collective or transcendental subject (the "community"). Science, in Karl Popper's words, produces "knowledge without a knower." Chief among the shared beliefs is a commitment to objectivism and a fear of subjectivism and relativism. Linguist George Lakoff writes that objectivism "rules out . . . perception which can fool us; the body, which has its frailties; society, which has its pressures and special interests; memories, which can fade; mental images, which can differ from person to person; and imagination . . . which can not fit the objectively given external world" (1987, 168). This means that there is an *a priori* commitment to the view that there exists one true view of the physical universe that corresponds to how the universe really is and that this view is impersonal in the sense of not being contingent on the subjective mental states of the observers. Factual propositions must, in principle, cohere and not be in logical contradiction.

Ideally, facts evince systematicity and are amenable to mathematization, that is, to being capturable by a formalism. "To believe that mathematical laws of some sort underpin the operation of the physical world," says Nobel Laureate Paul Davies, "is now a central tenet of scientific faith. Indeed, it is hard to imagine what we could mean by science if there were no such laws" (1988, 48). He quotes the sixteenth-century physicist Roger Bacon to the effect that "Mathematics is the door and the key to the sciences . . . for the things of this world cannot be made known without a knowledge of mathematics" (Davies 1988, 57). Knowledge production occurs through procedural regularity and repetition and through the interplay of observation, theory construction, and the free circulation of claims within the community of coproducers. Concomitant to this circulation of claims there is an implicit

commitment to a representational view of language which assumes that it is possible, in principle, for a lexical item such as "gene," "proton," "habitat," or "quark" or "act," "vary" or "cause" to correspond in an uncontroversial way to the physical things or events that they refer to. Again propositions (and formulas and equations) are understood to capture reality in a fairly direct way.

As a matter of practice, modern science is also deeply committed to a principle of autonomy vis-à-vis other domains of the social. This is important for understanding the relationship of science to law. In order to insure at least the possibility of objectivity, scientific practice, as far as possible, must be insulated from other extrascientific forces and interests. The practices must especially be cordoned off from politics. Politics can contaminate the practice and its products by introducing elements of subjectivity – and, perhaps, the wrong sort of passion. Politics, here, is understood as signifying "interests" or the clash of disparate wills. Ideology is the enemy of scientific inquiry. The enshrining of this view of objectivism as facilitating the approximation of singular truth claims about nature through the disinterested operation of transparent methods is commonly accompanied or affected by the rhetorical drawing of boundaries which give structural coherence to the very idea of science across its heterogeneous manifestations. Thus, in descriptions of these practices one commonly finds, in addition to the science/society, science/ politics, or knowledge/ideology distinctions, a host of other constitutive distinctions such as fact/value, pure/applied, science/technology, and science/pseudoscience. Hayles argues that, "If we know the world because we are separate from it, it follows that knowledge practices about the world should be insulated from their consequences in the world" (1996, 233). The policing of the boundaries and autonomy of science is of fundamental importance not only for how the practices are carried out but how the products of scientific labor – facts, true propositions, explanations, and descriptions – are portrayed, received, and consumed beyond these borders.

The practice of science in general, and in its many actual expressions, is also understood in relation to temporality in two interrelated ways. The first, as I have already suggested, concerns the location of the practice within – and as an emblem and engine of – larger cultural narratives of progress. Science is, as one prominent twentieth-century participant put it, "an endless frontier" (Zachary 1999). The conventional story of science is one of discoveries and breakthroughs, of the continual

accumulation of facts, of the infilling of the picture of nature. As Joseph Rouse notes, "Philosophers have reconstructed the history of the sciences as a story of the maturation of rational scientific methods and the growth of scientific knowledge. Such progress stories are an integral part of the celebration of modernization as the progressive triumph of human reason over the irrational forces of tradition, reaction, and superstition" (1996, 7). Other parts of the story might discuss blind alleys, mistakes, or even episodes of politicization such as eugenics, Nazi science, and scientific racism. But these may rather easily be overcome, or marginalized or purified away as anomalies. A second temporal aspect concerns the utility of scientific knowledge in the service of prediction and control. Science is commonly understood as the engine of progress. To the extent that futures differ significantly from presents it is largely because the futures imagined by science are realized in the material world. Much of what is better about progressive futures is that through exercising increasing control over nature we lessen its constraining force and expand the realm of human freedom. The futurity of science may be expressed with reference to everything from space travel to genetically engineered crops that will abolish hunger to missile defense systems that will secure a perpetual reign of peace. This theme is very prominent in biomedical discourse as the search for "cures" for everything from baldness to cancer, from Alzheimer's to "social anxiety disorder" (that is, shyness). The very notion of "future" may be problematized, though, when one considers scientific progress against human aging and nature's trump: death. Of course, the futurity of science has historically given rise to a range of dystopic countervisions. We are all familiar with the genre that includes *Frankenstein*, *Brave New World*, and *Blade Runner*. In each case, there is the tightest connection between how science is conventionally understood and how possible or imaginable futures are envisioned. And sometimes the novel material and social practices that science and technology engender outstrip the imagination. Sometimes an unanticipated future seemingly simply arrives – drops out of the sky, even. And sometimes this engenders previously unimaginable troubles.

Of course, any cultural practice that has been in existence and has been changing for hundreds of years and that is engaged in by millions of people cannot accurately be described in a few paragraphs. That is not what I am trying to do. My point is simply to identify some core elements of common descriptions of those practices that are particularly relevant to my larger task of elucidating the relationship between these social practices and others, such as the practice of legal argument and

judgment. Important here is how the various *consumers* of scientific representations and counterrepresentations use them. Dreyfuss and Nelkin claim, for example, that, "[S]ociety accepts [scientific] ideas about nature not only for their explanatory power, but for the legitimacy they provide for the political and social system" (1992, 339). This legitimacy, again, is a function of how the practice is understood as other than – and antithetical to – "the political." What is important for the purposes of my argument is that the social domain of science is a highly significant source of representations of nature, some of which are brought to legal disputes in the form of facts. In Part II we shall see these in contexts as varied as the construal of endangered species and the designation of "critical habitat," the notion of "animal models" in biomedical research, the stigmatization of infertility as a failure of nature, and the promise of psychopharmacology for enhancing the security of prisons. When incorporated into legal arguments these representations are often employed in efforts to stabilize legal meaning, to adjudicate among and grant priority to competing interpretations of the social and competing claims about power. They are part of efforts to assign rights and duties and, ultimately, to justify the use or withholding of violence. The representational products of science are one primary source of objectivity, neutrality, and the appearance of constraint, legitimacy. But, as I shall discuss below, they may also destabilize fundamental legal assumptions. To the extent that scientific representations of nature do cause legal anxieties, some jurists seem willing to repudiate the authority of science to tell us how the world really is.

Science wars

Just as the very idea of "nature" has been the focus of wide-ranging critiques, so has the self-image of science or, as it is called, the ideology of scientism. And these criticisms have been made by many of the same authors, for many of the same reasons by means of many of the same arguments. One prominent critic frames the question this way:

> Is science a distinctively rational form of inquiry, one to which any sensible person owes some deference in attempting to understand and cope with the world? Or is scientific practice a social enterprise conducted according to local norms, involving conflicting interests and interpretations, domination, resistance, negotiation and compromise, which in the end is no more (but also presumably no less) rational or reliable than any other complex social practice? (Rouse 1996, 5)

Here I only want to offer the briefest countercatalog of critical claims, the better to situate the politics of science as a component of the politics of nature and as an ingredient in the ways in which these political contests are played out through the language and institutions of law.

If the institutionalized practices of science are a source of authoritative representations of nature and if many of these are put into wider cultural circulation and, more specifically, are incorporated into and transformed by legal discourse, it is also the case that the quality and status of these representations are grounded by prior representations of these *social* practices themselves. That is, the status of a claim as a *fact* (even if that fact is a statement about probabilities), as an objective and normatively neutral description of physical states, relationships, and processes, follows from the accuracy of the description of the *practices* through which this fact was produced or discovered. In other words, the representation of the practice in general is a basic and necessary feature of the manufacture of facticity itself.

First, though, it should be noted that many aspects of what I have offered as "the dominant image" of science have for some time been criticized from within the boundaries of science itself both by practicing scientists and, more forcefully, by mainstream philosophers of science. Thus, while popular conceptions of the social practice of science – crafted, in part, via popularizing accounts by scientists and science journalists – may resemble simplified versions of naive empiricism, these views have long been discredited within the domain of the philosophy of science (if not within the more routine precincts of "normal" science). In any case, the emergence of more critical views associated, for example, with strands of neo-Marxism, feminism, radical environmentalism, and culturalist academic positions are radically different from these more internal criticisms.

These external critiques are themselves, though, highly heterogeneous and not necessarily mutually coherent. Biologist and critic Dorothy Nelkin describes the organization of the field of science criticism in this way:

> Contemporary studies of science extend beyond examination of its social impact to include the development of research priorities and the methods and organization of research. Anthropologists look at the relationship among scientists in their laboratories. Cultural analysts explore scientific modes of discourse. And philosophers and sociologists

> question the nature of objectivity, the construction of facts and the biases and values that shape scientific interpretations of nature. Such investigations treat science as a profoundly human endeavor, a product not of disembodied minds but of actual people in social interaction. To some scientists this social constructivist approach appears to be a hostile attack on science and they are responding aggressively. Indeed, the counterattack is remarkable for its emotionalism, hostility, moral outrage, and polemical tone. (1996, 114)

It is important to say that these critics are by no means necessarily "antiscience" per se, so much as anti-actually-existing scientific practice. In fact, Steve Fuller argues that the field of "[s]cience studies typically portrays itself not as anti-science, but, in certain important respects, as more scientific than science itself" (1996, 45). One feature, though, that the various lines that science studies share is the effort to *politicize* science, that is, to reveal elements of scientific self-portraiture as constituting a form of the politics of depoliticization. Science, in this view, is always already "political" in some nontrivial sense. This might reasonably be construed as "antiscience" to the extent that it makes congratulatory self-portrayals of the practice harder to accept. Beyond that, these critiques share a commitment to refashioning the prevailing representations of nature and of humanness even if these various strands of argument advance divergent alternative construals.

One strand of critique, that can be viewed as an internal critique, is associated with sociological studies of science and the sociology of knowledge. The various arguments that constitute the strand stress and elucidate what has simply been asserted here, that science is a *social* practice that takes place within social and historically changing institutional structures. As a social practice – a practice the participation in which implicates a complex constellation of social relations – science is as amenable to sociological analysis as any other. As a social practice it is also irreducibly interpretive and hermeneutic. Perhaps the best known of these studies is Thomas Kuhn's *The Structure of Scientific Revolutions* (1962). This was an analysis of theoretical paradigm shifts and revolutions as transformations in the interpretive frameworks by means of which "nature" is comprehended, reduced to facts, and communicated. As domesticated by mainstream science talk this claim is, at minimum, a recognition that nature is not a pure, unmediated immediacy that is simply described. Rather, the descriptions and explanations that are produced are necessarily mediated by conventional, contingent, that is, socially produced, frames of reference. An elucidation of the philosophical

problem of objectivity, though, is not the same as a political critique of objectivism. So the program of a sociology of science does not by any means presuppose the falsity of the claims or the relativism of scientific perspectives on reality so much as it requires an adjustment in what we take "true" and "false" to mean.

A second strand of critique that pushes the hermeneutic nature of scientific inquiry further along these lines examines more closely the discursivity of science. As Keller says, "Scientists usually assume that only their data and theories matter for scientific progress, that how they talk about these theories and data does not matter" (1995, 10). Some critiques of actually-existing science emphasize the ways in which the discursive construction of objects and subjects through science talk is reliant on ideologically informed metaphysical assumptions. These assumptions, the argument goes, are infrequently acknowledged and, in any case, impossible to justify except in their own terms or as conventional cultural artifacts in their own right. Because the world of physical reality (call it nature) is necessarily mediated by language (for instance, by conceptions of "nature," or "wilderness," or "environment," or "the gene") and because meaning is itself polysemous, unstable, and ideologically charged in various ways, then the representations of nature that are made out of these meanings cannot be less so. Scientific propositions therefore may be contingent and indeterminate. And though some propositions are more plausible than others and some are more difficult to refute than others, insofar as their predictive ability is continually verified, none are simply "facts" in the sense that objectivism wants them to be. All require contextualization to be intelligible and there exists an open-ended set of serviceable contexts. As one critic puts it, "science is a discourse that narrates the world in a special way" (Aronowitz 1988, 34). Other scholars such as Evelyn Fox Keller and Emily Martin stress the irreducible metaphoricity of science discourse (Keller 1995; Martin 1987). Unless metaphors are themselves naturalized, then this suggests another source of indeterminacy, plasticity, and instability. Moreover, if the metaphors can be shown to reflect other contextual values or ideological suppositions, this further suggests that "politics" resides at the very heart of the production of facticity. The statement by Michael Berridge about battling nature may exemplify this.

Another common criticism of science as a way of comprehending the world is that it is reductionist in a number of senses. From within the precincts of science reductionism is an ontological claim. But it has

epistemological and sociological consequences. As John Barrow describes it:

> The outright reductionist sees science as a straightforward hierarchy. Starting with zoology, we take the attitude that we "understand" it when it has been reduced to something more basic. In this case that something is biology. Biology likewise is founded entirely on chemistry; chemistry can be shown to be founded on physics; and physics leads us back to the most elementary particles of matter. When we find them – whether they turn out to be point particles or strings – we have completed the linear chain. Thus, at each stage, the ardent reductionist claims that there is a "why" question that always points in the same direction: inwards toward the smaller scale. The workings of the magic box are always to be found on the inside. (1991, 139)

Reductionism is essentially a claim about the unity of nature and the unidirectionality of causation from which may be derived claims about the unity of science. It is also understood as a claim about the primacy of physics vis-à-vis the other sciences. As such it raises boundary issues about which physicists and others such as biologists and psychologists might be expected to disagree. It is important to note, though, that not all physicists are reductionists and not all antireductionists are anti-naturalists. Radical biologist Richard Lewontin describes the issues in this way:

> When scientists break up the world into bits and pieces, they think they're breaking things up into some natural entities, but they're not. They're breaking them up into bits and pieces that they see in the world by their own training, by their own ideology; by the whole way in which they've been taught to see the world. But that doesn't mean those bits and pieces are the real bits and pieces. So, an antireductionist is someone who believes that in order to understand processes of nature, you must not import into them some artificial notion of "real" bits and pieces. (In Wolpert and Richard 1997, 103)

Beyond a concern about the methodological or ontological contexts of science per se critics emphasize other pernicious social effects of reductionism. These criticisms are especially sharp with respect to physicalist reductions of "life" generally and of human forms of being more particularly. Reductionism here is read as a radical form of monism (in Soper's sense of the term), materialism, or naturalism. As such it is understood as antihumanist if not necessarily antihuman. Two varieties

of reductionism whose traces we shall encounter in Part II are genetic reductionism and neurological reductionism. The first suggests that explanations about life forms and processes, including human beings and behavior, are to be found primarily in understandings of the workings of DNA. The second suggests that the characteristics conventionally associated with mind, including thoughts, beliefs, and decisions, are more or less directly reducible to the workings of neurochemistry. There are obvious moral and practical problems with strong forms of reductionism, or, rather, with the acceptance and validation of reductionist frameworks. These are problems relating to understanding the individual subject. I shall return to some of these later in this chapter. For present purposes what is important for critics is how the reductionist view of nature grounds a politically significant vision of science. Reductionism makes it easier to frame anything identified as "a problem" as, more specifically and essentially, a *physical* problem. Physical problems are, at least in principle, amenable to technological solutions which are precisely the sort of solutions that science is in the business of providing. Reductionism, then, tends to position science (or, more accurately, actually existing scientists and their institutions and investors) as the social actors most competent to identify problems and offer solutions. It may facilitate the denial or minimization of social aspects of whatever has been identified as a problem, for example, crime, depression, infertility, or pollution. It may even eliminate from the list of "problems" those states of affairs that are not as easily reduced to the domain of the physical. Reductionism, seen as a rhetorical strategy, is understood as an extreme form of naturalism that promotes the accrual of social power to social actors who are able to position themselves as speaking in the name of "science."

Arguments about discursivity are not confined to analysis of the factual products of science but extend to the claims about the practice itself, not the least of which concern the discursive construction of scientific autonomy. Autonomy from social, political, and economic forces is seen as more rhetorical than real and the image of autonomy, so crucial to the ideology of objectivism, is itself understood as the effect of an obsessive concern with the boundaries of science. This is also a central concern for the domain of law. Put in more general terms, "The construction of autonomous domains of knowledge and practice which can be rationally administered in accordance with internal goals and standards is a fundamental part of familiar stories of 'modernity' " (Rouse 1996, 61). This follows from the ways in which epistemic relations

are understood. Science is predicated on the separation of the knower both from the world that is known and from other social actors. Hayles argues that "objectivism drives a wedge between science and society, leading to the peculiar belief that funding priorities responsible for setting research agendas can somehow be separate from the knowledge produced by those agendas" (1996, 233). The inscription and defense of the boundaries of science (which themselves are ultimately reliant on claims about the distinctiveness of the practices vis-à-vis other modes of inquiry, and which, in turn, are grounded on claims about the nature of nature) are constitutive elements of the politics of depoliticization. This is an important feature that scientific discourse shares with legal discourse. In fact, as I shall discuss more fully in chapter 5, among the devices that legal discourse employs to reinforce its image of legitimacy and autonomy vis-à-vis politics are the objective, normatively neutral facts that it imports from science. Again, I want to stress that all of this is vigorously refuted by practicing scientists and mainstream philosophers and historians of science.

Another prominent strand of the critique of scientism highlights the ways in which science is complicit in patterns and structures of domination. The dissolution of claims of autonomy reveals material connections between ideologies of scientism, material practices, and the circulation of power in the social world as a whole. Science is not simply social in the sense described by mainstream sociologists of knowledge, but is deeply implicated in – as a fundamental component of – more extensive power orders such as capitalism (in the realm of production) or patriarchy (in the realm of reproduction). Sandra Harding writes:

> The conventional conceptual frameworks of the natural and social sciences have been designed for quite different projects – in short, for producing the kind of information useful to administrators and managers of nation states, multinational corporations, and militaries . . . If you want to do modern agribusiness, modern technoscience can help. If you want to maintain a fragile environment and biodiversity, those sciences, so far, have been of little assistance. (1996, 17)

On this view, far from having even the possibility of neutrality, actually-existing science and its relation to technologies are predicated on domination. One take on this argument is that what science is *about* is the domination of nature and, by extension, the domination of those segments of humanity that, according to hegemonic ideologies, are more

easily rendered as nature. Donna Haraway, stating that "The degree to which the principle of domination is deeply embedded in our natural sciences . . . must not be underestimated" (1991, 8), goes on to argue for "the rejection of all forms of the ideological claims for a pure objectivity rooted in the subject–object split that has legitimated our logics of domination of nature and ourselves" (19). Among the links in this chain are the connections between science and capital either directly as manifested in the Research and Development departments of major corporations such as Monsanto, Archer Midlands Daniels, Upjohn, Dow Chemical, General Electric, or Raytheon where much of what we call science actually happens, or indirectly through the funding mechanisms of the capitalist-patriarchal state in public institutions and universities. Another set of links involves the connections between what technoscience produces and what the repressive state or multinational capital consumes. For critics, it is thus a misnomer to speak of "science." More accurate designations would be capitalist science, patriarchal science, or modernist science.

From these various perspectives, mainstream philosophy of science is regarded as being engaged in a legitimation project. Through a process of transitivity, the legitimation of the practices (protected, as they are, by rights) underwrites the legitimation of its representational products and, thus, the legitimation of domination which these representations facilitate. I shall simply note here that these are precisely the same claims that leftist legal scholars level against law and the politics of liberal jurisprudence.

Wherever one might locate one's self with respect to these issues, the point I want to bring out is that there *is* a multidimensional politics of science, and that, for a number of reasons, this form of politics has never been sharper or more contentious. At the level of discourse, and particularly academic discourse, we are in the midst of what has been called "the science wars." Recent books by scientists such as Sokal and Bricmont (*Higher Superstition* 1998) and Gross (*Fashionable Nonsense* 1994), and by nonscientists such as Aronowitz (*Science as Power* 1988), Latour and Woolgar (*Laboratory Life* 1986), and Ross (*Science Wars* 1996) are volleys in the struggle to control how the practice of science is represented in academe. Other books such as *The Gene Wars* (Cook-Deegan 1994), *The Monkey Wars* (Blum 1994), *Nature Wars* (Winston 1997), and *Eco-Wars* (Libby 1998) explore more localized skirmishes. These wars of representation are by no means wholly removed from more substantive sociopolitical conflicts such as those concerning the

environment, animal rights, gay liberation, women's liberation, civil liberties, and the politics of medicine and health.

The sharpness of the disputes notwithstanding, in most of these contexts, for many participants, it is fair to say, the status of "science" is deeply ambivalent or even contradictory. There are divergences, for example, between different segments of the environmentalist community and between environmentalists and animal rights activists. There are also sharp divisions among feminists about, for example, whether the changing role of reproductive technologies – and the visions of nature and science that inform them – are best seen as part of the solution to oppression or as simply the most recent form of oppression. There are also significant divisions within the scientific community itself about many of these substantive issues. Moreover, there are very few people who identify with a position espousing antiscience per se. Rather, arguments of critics that are against actually-existing science are being made to enable the creation of better – that is, more genuinely progressive, more honest, less patriarchal, less tied to the logic of capital accumulation, less environmentally destructive – science. From within the dominant view, however, such moves *necessarily* entail the politicization of science and compromise science's asserted neutrality and objectivity as well as the integrity of the representations that it produces. From this perspective one might reasonably ask: can science accept such a radically revised conception of nature and still *be* science? The science wars, after all, are part of the politics of nature and of larger efforts to maintain and reinvent what we want nature to mean and what we want these meanings to do. The critiques of science are interventions in the knowledge–control nexus and, like most forms of politics, this is very much a politics of – or for – the future. While the politics of nature embraces a wide range of overlapping issues these political contests are manifest in particular events. This is seen most clearly, perhaps, when troubles occur. It is in evidence when logging happens in this forest, when these animals are liberated from a laboratory, when that fetus undergoes prenatal testing, and when those prisoners are subjected to involuntary medication.

Naturalizing the subject

One last point: a particularly acute anxiety about science concerns the trouble that some representations raise for the intelligibility of the individual subject. This returns us to the issue of reductionism. As chapter 2 suggested, one of the most significant cultural tasks that nature is called upon to perform is to provide the contrastive background against which

"the subject" becomes legible. Or, to switch the axis, the idea of nature provides the foundation upon which subjectivism as a philosophical anthropology is built. According to Laurence Cahoone, "Subjectivism is the conviction that the *distinction between subjectivity and nonsubjectivity is the most fundamental distinction in an inquiry*" (1988, 19, emphasis in original). Restating the basic terms of the human–nature distinction in terms of the doctrine of subjectivism, he writes:

> When subjectivism is in force as a *metaphysical* doctrine it is generally characterized by two claims. First, subjectivist metaphysics identifies mind with individual consciousness. Mental events or qualities are events or qualities belonging to subjectivity. Second, nature or world or objectivity, insofar as they are not considered to belong to subjectivity, are defined as material and metaphysically antithetical to mind.
>
> (1998, 22)

Briefly stated, to be a subject is to be an entity whose being exceeds and is not reducible to physicality. In John Hill's terms, this is the conviction "that persons are possessed of a self that is free, rational, and unique to itself, an entity causally and morally set off from the nomic web that ensnares the rest of material reality" (1997, 291). In Western theological traditions the requisite immateriality is situated in a soul, a divinely granted aspect of being whose core features include immortality in contrast to the worldliness and finitude of the flesh. The life of the soul, and the self, are not limited by the temporalities of the body. While the soul still lives on within modernity, its place as locus of immateriality and grounding of subjectivity has been more or less supplanted by the figure of "mind." Against the negativity and necessity of the physical, and more specifically the corporeal, the mind (the consciousness) of the individual subject, as Cahoone emphasized, is the primary locus of positivity and freedom. The mind is the *mind* – and not simply the brain – precisely in its nonreducibility to physical functions and processes; and the subject is the subject precisely in the attribution of mind. Without some sharp ontological distinction between the subject, so construed, and nature as the realm of objects, the notion of subjectivity as a distinctive mode of being unique to humans – and all that depends on it – is harder to maintain.

When the sciences, particularly the biological sciences and biopsychology, regard humans as the naturalized objects of knowledge and, through the vast array of technologies, as objects of control, the subject seems in danger of disappearing, or of appearing as the faintest vestigial

or rhetorical trace, or of fragmenting and dispersing. As the distinctions between mind and body or human and animal upon which the subject has been built are swept away, the subject may be objectified, reduced, dehumanized or naturalized in a host of different ways. Where once it might have been plausible to believe that the subject was a natural ontological category, being human is increasingly seen as partaking of a set of physical processes. But, as Lelling says, "Revealing the self as a facade for jostling teams of neurons makes assignments of moral responsibility problematic" (1993, 1551). Another legal scholar, John Lawrence Hill, argues that

> The implications of these modern modes of materialist reductionism would appear to have devastating consequences for the traditional view of the self; in the most significant sense, on the level of ontology, the reductionist rejects the notion of the self, along with those of ideas, thoughts, desires and the entire panoply of mental entities, as remnants of folk psychology. (1997, 342)

And following the implications further, he writes:

> Determinism does not pose a challenge to the core self simply because determinism may negate the case for free will, where free will is itself a basic element of the core self. The determinist world view constitutes a much more basic assault on the notion of the self insofar as determinism plays havoc with any principled distinction which might be drawn between the internal and external worlds. Determinism provides not only that everything we do is a function of antecedent causes, but that everything we are is a function of these causes, and is thus a product of the external world. If determinism is true, then there may be no principled way of including some aspects of our nature as part of who we are in some essential way, while excluding others . . . Determinism trumps the claims of the core self precisely by undermining the distinction on which it depends between the internal and the external. (1997, 332)

A core feature of the politics of nature thus consists of various efforts to assert or deny – explicitly or tacitly – the existence or characteristics of a particular sort of subject – the person, the self. One obvious example of this is the attempts to construe fetuses as, on the one hand, babies, and therefore abortion as murder, and, on the other hand, as conceptuses, and therefore of abortion as a routine extractive medical procedure more analogous to an appendectomy. As the cases in Part II will examine in detail, the imbrication of the politics of nature, science, and the subject is also seen in conflicts about wilderness, endangered species,

animal experiments, sexuality, maternal surrogacy, genetic testing, criminal prosecution, and punishment. When the politics of nature takes the form of the politics of the subject, partisans often bring these disputes to judges in an effort to revive (or resist the resuscitation of) the subject as a bearer of rights. In resuscitating the subject, social actors seek to demarcate the limits of nature – or, at least, of representational naturalizations. Resistance to reductionisms, whether the resistance takes the form of opposition to sociobiology, behaviorism, eugenics, eliminative materialism, genetic essentialism, or any other manifestation of the naturalizing impulse, might, though, seem to entail a defense of dualism in one form or another. This, as we saw in the previous chapter, may not be without problems.

Science constructs itself against the ground of nature through claims about what nature "really" is, in contrast to, say, what you say you are. It suggests a view of nature that gives science sole possession over what counts as knowledge. Against this, other pretenders to the status of "knowledge" are relegated to the category that contains folklore and superstition. Some refer to the disenchantment of the world as the real gift of science – or, again, modern, reductionist science. In the process of scientizing the universe, normativity – including the normative pretensions of law – goes the way of the virgin birth, the wrath of Shiva, the flat earth, and creation myths. As David Griffin writes:

> The world as a whole was disenchanted [by the acceptance of scientific reductionism]. This disenchanted view means that experience plays no real role not only in "the natural world" but in the world as a whole. Hence, no role exists in the universe for purposes, values, ideals, possibilities and qualities, and there is no freedom, creativity, temporality or divinity. There are no norms, not even truth, and everything is ultimately meaningless. (1988, 3)

Along with these falls "the legal subject," with all of its intentions and choices, its rights and responsibilities. At the end of the day – should there be an end of the day – Science is the only subject left standing. Or, it might be that as Science swallows the individual subject it also swallows itself. Science as "knowledge without a knower" may itself be naturalized. Griffin continues: "[T]he final disenchantment of modern science is its conclusion that its own discoveries prove the meaninglessness of the whole universe, which must include the scientists and their science" (5). There is the more common perception that the gift

of science is the gift of salvation from teleology, from final causes. But from this other perspective what science with its reductionist, materialist view of nature offers us is deliverance into meaninglessness. And again: "Besides . . . seemingly to leave no alternative beyond anti-humanitarianism or a humanitarianism based on an arbitrary choice [that is, an intellectually untenable dualism], modern science also seems to alienate us from our bodies and from nature in general. Because it has disenchanted the world many people have become disenchanted with science" (Griffin 1998, 7–8).

CONCLUDING REMARKS

If nature is a social construction, the domain of natural science is a primary site of construction. In comparison with the natures that are produced by other discourses, say, theological, romantic, literary, or "folk" understandings, the nature of science is a nature of a particular sort. Science offers the official word on nature. Science's nature is the nature of the objective facticity of physical properties, forces, relationships, and processes. It is measurable and formalizable. It is singular but decomposable and hierarchical. It is mechanical. And the nature that is constructed is, of course, constitutive of science itself. The nature that science constructs is, above all, realist nature. This is a vision of nature whose core feature is precisely the denial of its constructedness. The view of science that this entails is one that refutes the claim that it *is* a site of construction, that "social construction" accurately characterizes what it is that scientists do. From this perspective, while necessarily "social" in a banal sense, science is not social (and, *a fortiori*, political or ideological) in the ways that its critics claim. And it is not social in these senses precisely *because nature is natural*. Science's nature is Enlightenment nature. This vision of nature sustains the view of science – and rationality more generally – as the source and bringer of light, the dispeller of darkness, the revealer of secrets. Bringing the previously dark and mute facts of nature to light, capturing them in propositional form, provides the paradigm for the discovery of truth. Science's engagement with – and triumph over – nature is the model for what it means to know. Critics such as Bookchin, in the passage cited in the previous chapter, suggest that the specific dominant (and dominating) metaphorical framings through which nature and science are made intelligible lead to distorted and truncated understandings of what it means to know (and

therefore, what it means to be human vis-à-vis nature). As we shall see in the following chapters, these anxieties, although in a much attenuated form, are not unknown to legal thought. As powerful as scientific representations of nature might be, and as valuable as they are for the project of depoliticization, their incorporation into legal discourse does not come without significant potential costs.

CHAPTER FOUR

THE NATURES OF LEGAL DISCOURSE

INTRODUCTION: SITUATING LAW

A central notion in this work so far is that "nature" is, among other things, a conceptual tool that is used for making sense, for making things meaningful. I am deliberately employing terms like "task," "tool," "used," and "making" to emphasize the practical character of its deployment. People *do* things with "nature." Things, places, events are *made* meaningful. Often "nature," its surrogates and oppositions, are used strategically, pragmatically, and instrumentally. This needs to be emphasized right off because often in discussions of concepts or ideas the practical character of making sense can too easily be forgotten and the discussion can appear to be *about* concepts or ideas as such, untethered to social life and experience. For example, when in this chapter I discuss cultural artifacts such as "the state of nature idea," or "the idea of natural law," or even "the law idea," I wish to be understood as focusing on how these malleable artifacts are *used by* particular and situated social actors *for* particular – often political – purposes. Like other tools they are both made and employed for making.

Like science, law is, among other things, a significant site of cultural production. It is one of the primary cultural sites in which the categories, images, and narratives of "nature," "humanness," their differences and relations are constructed and from which they are put into broader cultural circulation, projected, or inscribed onto segments of the material world. Here, as elsewhere, "nature" is both constructed as an artifact and used as a tool in the construction of other things. Part II will examine

how this is done with respect to forces of nature, wilderness, animals, human bodies, and biological processes. All of these are given specifically legal constructions that, because of the power of law – the physical force exercised in the name of law – have profound effects on how the material world is transformed. Consider, for example, the significance of which among various contending images of the nature–human relationship are built into basic property doctrines and how these, when backed up by the threat of legitimate violence, affect landscapes, animals, and bodies. Law *matters*. If law is a key domain for the construction of "nature," it is even more clearly a key domain for the construction of "humanness." And it goes without saying that the legal arena is the primary site for the construction of the law idea itself. "Nature," in all of its ambiguity and in various ways, has been a fundamental ingredient in the autoconstitution of law. If law matters to "nature," it is no less true that "nature" matters to law. This is the principal theme of this chapter.

This chapter and the next are, among other things, more specific applications of the survey of nature talk to the cultural domain of law. Law, of course, is preoccupied with many of the same themes that I have been discussing (necessity, knowledge, control, limits) even when the topic of legal discourse is not focally about the physical. Indeed, these themes are probably no more prominent than when law is talking about itself. In the first half of this chapter I trace some of the work that the law idea does in underwriting and maintaining the terms of the basic distinction. In the second half I turn toward an examination of some of the ways in which the distinction grounds the idea of law itself. To the extent that conceptions of law align it with humanness and the positivities of reason, language, or morality as against the negativities signified by "nature," then the presence of law, its arrival in the world, is taken to signal the presence of the distinctively human. I begin with a brief discussion of Donald Kelley's genealogy of the *physis–nomos* distinction in Western social thought as a variant of the nature–human distinction in which law ideas play a prominent part. I then discuss, again in a very cursory way, some culturally prominent deployments of law figures to describe and explain the emergence of that distinction, or the emergence of a distinctively human sort of (social, political, legal, moral, institutional) being *from* nature. These emergence stories, narratives of progress and development, include those concerning the state of nature in classical liberal thought, the notions of socialization and the internalization of rules in developmental psychology and accounts of the civilizing process offered by Freud and Elias.

Fragments of the law idea are used to draw the line, to mark the distinction, and to measure the increasing distance between an historically dynamic human domain and the domain of nature as essential, static, or as representing pastness and, therefore, regression. But, in an important sense, law is not only used to draw the line, it *is* the line. It is, therefore, as much *of* the order of nature as *against* it. The relationship between law and nature, in many renderings, exhibits features of liminality, marking not just a cleavage but a conjunction. Or, to put it another way, we can look at law as not only marking a boundary between nature and the distinctively human, but also as constituting a border zone partaking of each. Seen this way, the discursive relationship between nature talk and the law idea is much more fluid and ambiguous. This ambiguity reflects the underlying cultural ambivalence. Again, we may both fear and desire what we render as nature. As a cultural domain, law is not immune to the push and pull of the natural.

After discussing some of the complexities of these emergence stories I turn toward "other natures," attempts to align the legal more firmly with the natural. My illustrations are the ideas of natural law, legal evolution, and law as an object of scientific analysis. In these illustrations I look at law less as a tool used for marking the distinction and more as a focal topic. The overarching objective is to support the suggestion that the law idea and nature talk have had a close, complex, and enduring relationship. The question is how, practically speaking, one has in various ways been used to give meaning to the other.

"THE HUMAN MEASURE"

Nature talk has been an important constitutive element of the law idea for a very long time. In a sense the very ideas of "nature" and "law" were born together. But the historical relation of nature talk and the law idea is best characterized in terms of an unbalanced ambivalence. The major prong of this ambivalence has been law as antinature where nature, as negativity and necessity, is opposed to law as a supreme emblem of the human realm of positivity and freedom. The minor prong of this unbalanced ambivalence has cast law as an expression or a surrogate of nature. This ambivalent constitutivity is traceable through prominent cultural renderings of humanness and legality and is discernible in contemporary legal theory and current judicial practice. It is discernible in the oscillations between the legal repudiation and embrace of nature and of scientific representations of nature. In the following pages I

shall simply catalog some culturally significant tellings of the law–nature relation the better to understand the practice of judging nature.

Donald Kelley has undertaken a genealogy of the role that the nature/human distinction has played in the main currents of Western jurisprudence from pre-Socratic times to the present (1990). Perhaps, though, it is better understood as an archeology of moments of the construction of the distinction. The specific terms of the distinction that he examines in *The Human Measure: Social Thought in the Western Legal Tradition* are *physis* and *nomos*. Kelley demonstrates the endurance of the distinction, its fluidity, and its central position in efforts to ground the very idea of law. He also makes strong claims about the cultural significance of the distinction as a talisman for broader intellectual or political disputes. "Nature and Law, *physis* and *nomos*" are, he writes, "twin concepts, sibling rivals for the legacy of human wisdom" (1). They represent "the great dialectic of Western consciousness" and the "central topos and antithesis of Western thought" (24). Understandings of nature not only provide the conceptual foundations for law as antinature, but also law as the foundation for humanness, or at least for the more specific geographical-historical identity of "Western."

Beginning with ancient Greek thought, according to Kelley, *physis* has been employed to represent "the physical environment" (16), "nature" (25), "the cosmos" (24), or "physical reality, including animal instincts and material processes" (26). In contrast, *nomos* represents "the world of man's making," including convention and custom. It is perhaps most firmly associated with language and the word. The distinction being drawn is that between negativity and necessity on the one hand, and positivity and freedom on the other. But the distinction between *physis* and *nomos* also points to contrasting ways of knowing reality and the forms that knowledge takes. "If the book of nature is 'written in the language of mathematics' . . . the book of human nature and its social forms has been written, in the most practical contexts, in the language of the law" (12). Indeed, Kelley states that "the primary vehicle of *nomos* is the grand tradition of Western jurisprudence" (2). That is, the distinction between *physis* and *nomos* provides the foundation *for* and is expressed *in* the contrast *between* science and law. But, as Kelley recognizes, the distinction itself is social not only in its origins but also to the extent that each pole names a position within often antagonistic world views or ideologies. *Physis* and *nomos* are not themselves simply sibling rivals, they are the banners under which contending social-political forces collide.

But, as Kelley's telling of the unfolding of this relationship makes clear, there is the familiar and abiding ambivalence in social and legal thought about nature. In our survey of Law's Natures we shall encounter, in various ways, both a repudiation or distantiation – to the point of antagonism – and a sort of selective incorporation of some of the valued or serviceable connotations of nature talk. These include the images of permanence, universality or immutability, coherence, and, crucially, the sort of knowledge claims associated with the scientific study of *physis*: objectivity. Kelley's scholarship demonstrates for us some of the ways in which the construction of the very idea of law might be grounded in construals of the idea of – and in opposition to – nature or physicality and some of the ways in which law so construed provides a foundation for the very idea of humanness.

EMERGENCE STORIES

While Kelley has persuasively shown both that conceptions of nature have been used to ground the idea of law and that *how* this has been done reveals deep ambivalences, there are other conventional understandings that turn not just on the distinctiveness of law vis-à-vis physicality but on the processes by which humans have come to distinguish ourselves *from* nature *with* or *into* law. These understandings of the temporal processes of separating the human from the natural are, in part, used to explain history itself. For history, understood as what follows the prehistoric, is nothing other than the trajectory of this emergence of humans from the rest of reality. In the following illustrations I trace instances of how notions of law have been employed to account for the distinctiveness of humans. I discuss two sorts of emergence stories corresponding to the two different kinds of subjects. The first set concerns how the transcendental subject of humanity per se – or leading segments of it – came to separate itself from nature both *through* and *into* law. These are variations on the story of "progress." The second set of emergence stories deals with how individual subjects enter into humanness through the internalization of rules to achieve autonomy. These are stories of "development." As incorporated into narratives of civilization, they are aspects of the same story.

The birth of law

One way of grasping the significance of law in the demarcations I have been discussing is to look at conventional, canonical accounts of how

humans came to be distinguished from the rest of totality. These sorts of conventionalized imaginings of emergence can be encountered in various sorts of arguments including those in anthropology and developmental psychology. They are particularly well developed in descriptions of "the state of nature" in classical political theory. Though undoubtedly of diminished practical value now, these stories still provide the ground metaphor from which much of modern legal theory is derived. Different political philosophers associated with the foundation of Liberalism constructed different pictures of the state of nature in their efforts to advance political projects. This range of visions in itself shows the malleability of nature and the variability of the work it is called upon to do. However else the specific content of nature might vary, its predominant function of providing a contrast or *opposition* to law and legality, and of providing a point of temporal-historical disjuncture, is a constant across otherwise discrepant renderings. Another common feature which we shall encounter is the deep ambivalence of classical political renderings and the ambiguity of the "nature" that is portrayed.

Thomas Hobbes, for example, famously described "the state of nature" as a prepolitical war against all. While living in such a condition, existence – the life of a "man" – was "solitary, poor, nasty, brutish and short" (1651/1994, 76). It was a time characterized by violence and disorder, by the absence of institutions of government, authority, and civil law. According to Sheldon Wolin, Hobbes drew a sharp distinction "between the state of nature and the political order, between unrestrained naturalism and the artificial restraints imposed by political authority in support of civilization" (1960, 305). More pertinently,

> The state of nature symbolized [for Hobbes] not only an extreme disorder in human relations, causing men to consent to the creation of an irresistible power; it was also a condition distraught by an anarchy of meaning. In nature each man could freely use his reason to seek his own ends: each was the final judge of what constituted rationality . . . The state of nature formed the classical case of subjectivism. (257)

David Johnston describes Hobbes's state of nature in similar terms in his *The Rhetoric of Leviathan* (1986).

> For Hobbes the state of nature represents much more than a breakdown of political authority. Rather, it describes a moment of almost primordial chaos, of absolute disorder, or even annihilation, comparable in some ways to the condition of the universe immediately before its creation. In

> short, the state of nature for Hobbes was synonymous with the destruction of the capacity for meaningful social intercourse itself. Interpreted in this way as a condition of absolute privation, Hobbes's state of nature set the stage upon which the radical reconstructive pretensions of his political philosophy could appear as a plausible act of creation. (189)

This picture of the state or condition of nature was itself founded on a deeper understanding of *human* nature. Human nature, in Hobbes's vision, dictates that actions are driven by passions and desires which, in the state of nature, are destructive. While the passions themselves have a corporeal basis in the search for pleasure and the avoidance of pain, the bodily basis of this prepolitical, presocial realm also gives rise to a sort of natural right. This is expressed in his well-known claim that in the state of nature, "every man has a right to everything; even to another's body" (1651/1994, 80). In *Leviathan* (1651), *The Elements of Law, Natural and Politic* (1650), and other works Hobbes constructed a state of nature which reasonable men were compelled to leave. They "left" it not physically, though, but through convention. They left it by entering into a social contract whereby certain rights were relinquished in exchange for peace, security, and all of the goods that come with them. The social contract represented a meeting of the minds. As Johnston writes:

> His key judicial idea is that the absolute right to all things possessed by all human beings in the state of nature is converted by means of a covenant into the absolute right of a sovereign to adjudicate disputes, declare war, make laws, and do all other things he deems essential for the protection and contentment of his subjects. (1986, 45)

But Hobbes was not unambiguously antinature. While human nature is passionate and in a sense wild, it is also essentially rational. And the function of reason is to discern the "Laws of Nature" which include, for Hobbes, the laws of universal morality. Here then is a paradox. Dissatisfaction with nature compels man to leave it. Leaving is accomplished by creating multilateral contractual relationships which institute the commonwealth and establish a sovereign. Political life, therefore, is not natural in itself. It is artificial and conventional. By the terms of the social contract man renounces aspects of his natural liberty. But, in a reverse move to *re*-naturalize convention, this renunciation is seen as having been obligated by natural law itself. So political life and civil law, while not natural in themselves, are seen by Hobbes as necessary conditions

for the realization of natural law and the realization of universal morality. In Lessnoff's ironic phrasing, for Hobbes, "most laws of nature are inoperable in a state of nature" (1986, 53). Hobbes, like others, reads nature two ways. First, he reads it as a sign of violence, disorder, and passion; of corporeality and pastness, a regime of negativity and necessity, which was transcended by law. This entering into law thereby initiated a regime of peace, order, reason, and social history, in a phrase, the initiation of progress. But nature is also a sign of universality and harmony. Law, then, to use Soper's terms, is constructed both as antinature or nature transcending and as nature endorsing (1995, 4). Working with culturally available rhetorical materials for a particular political purpose – that of justifying a fairly absolute form of monarchical sovereignty – Hobbes interpreted nature both as that which man, through law, has escaped but could potentially, perilously fall back into *and* that to which law itself aspires.

John Locke, working later with the same materials, but for a different political purpose, interpreted nature somewhat differently. Locke's state of nature was not, at least initially, a state of war. Where Hobbes had depicted nature as a figure of violence and disorder, Locke read it as a condition – a time – of relative peace and good will. Likewise, Locke is clearer on the point that the state of nature did have a sort of "law": the law of nature. Under Locke's law of nature, though, there were duties as well as rights. The problem was that men might disagree about the distribution of rights and duties in a given situation so that rights would not always be respected. In Wolin's interpretation Locke actually constructed two temporal phases of the state of nature. The first he calls "ideal," the second, "fallen" (1960, 306). The transition from one to the other was caused by, in Locke's phrase, the "corruption and the viciousness of degenerate men" (1690/1980, 67). The fallen state is "full of fears and continual dangers." "The greater part" of its inhabitants, far from being rational interpreters of the law of nature, are described as "no strict observers of equity and justice" (66). The remedies of the "deficiencies" of the state of nature include: "a common law, a method for impartial judgment, and enforcing power" (Wolin 1960, 307). Some people might have had insufficient knowledge of natural law or might have been biased in interpreting it. The crucial point for Locke was that there was insufficient power to punish transgressors. The problem with nature for Locke, as for Hobbes, was too much of the wrong sort of equality. As Charvet has framed the issues:

> The problem of sovereignty for Hobbes . . . is . . . to substitute a unified public reason for the multiplicity of private reasons that exist in the state of nature. The problem does not arise, even for Hobbes, from a lack of common and knowable rules for preserving men in multitudes. Such rules exist; they are the laws of nature . . . The difficulty is that while everyone has good reason to follow natural laws . . . in fact each also has good reason to distrust the other's willingness to adhere, in a state of nature, and under such conditions the laws of nature permit, or indeed command, a person to give priority to his self preservation over that of others. (1999, 208)

Nature signified absence and deficit. What was specifically lacking in nature, from Locke's perspective, was "a common judge with authority" to settle disputes and to punish breaches (1690/1980, 15). "Nature," it seems, was the name for an interpretive problem. It was the problem of unbridled subjectivity, the problem of indeterminacy. The unresolvability of disputes was "one great reason of men's putting themselves into society and quitting the state of nature" (16). The social contract which established civil society required individuals to give up "the executive power of the law of nature," that is, self-help or self-adjudication, in exchange for peace and justice (12). But in Locke's vision of the state of nature law had different characteristics from those in Hobbes's vision. Not only was greater weight given to natural rights but they were given different content as well. Locke read the contract – and the contrast it marked – such that natural rights could still be used in the postnature social order as a *limit* to political authority.

Among classical liberal political theorists Jean Jacques Rousseau crafted a radically different picture of nature to ground his normative vision of political life. As a social contract theorist he described a move from nature to an institutionally governed sociality. But this is less an unequivocal emergence into light than a descent into corruption. Government and civil law are, at best, consolation prizes. In Rousseau's image nature signified a condition of equality, peace, and relative harmony. To quote Wolin again:

> In the natural condition, authority and power resided solely in impersonal nature. The physical forces of the environment were felt by all, but in a manner that was equal and indiscriminate. The sun shone on the good and bad alike. The natural condition was one where the individual was subject to the general laws of nature, but independent of his fellows. (1960, 374)

While humans were described as more "animal like" in that they were lawless, amoral, and asocial, they were not the roving predators which inhabited Hobbes's state of nature. Rather, they were possessed of self-love and a measure of fellow-regarding compassion. The emergence of History is the story of the fall away from nature, step by step, into corruption, inequality, and violence. Hobbes's state of nature, for Rousseau, is not "nature" at all but a postnatural, prepolitical barbarism. The mechanism that brought about these transformations directly implicated the themes of knowledge and control. As Rousseau wrote in his *Discourse on the Origin of Inequality* (1755/1983): "[F]rom the moment one man began to stand in need of the help of another . . . equality disappeared, property was introduced, work became indispensable, and vast forests became smiling fields, which man had to water with the sweat of his brow, and where slavery and misery were soon to germinate and grow up with the crops" (151–152). Crucial steps away from nature were the emergence of forms of social organization and technologies sufficient to sustain settled agriculture. The key theme was control. With control over aspects of what we might call both "internal nature" (reproduction) and "external nature" (production) there arose divisions of labor, inequality, hierarchy, corruption, and, finally, war. The social contract-founding government was entered into by those who were long removed from "nature" and nature itself was unrecoverable.

Like Hobbes and Locke, Rousseau deployed the trope of nature as a contrast to state-centered civil law. Nature is an antecedent state that is transcended or supplemented by artificial convention. In Rousseau we see a key anticipation of what would become the Romantic strain of Counter-Enlightenment social thought: "Take away our fatal progress, take away our faults and vices, take away man's handiwork, and all is well" (1762/1963, 49). To the extent that nature is the name of what was lost through a commitment to progress, Rousseau's thought can be viewed as a form of proto-antihumanism. Nature is the ground of critique. Not, as for Locke, only a natural rights critique of tyranny, but a broader critique of History.

Less important than claims about what nature *is* are claims about what "nature" *does* (and continues to do) in such narratives of the origins of centralized, sovereign authority, that is, positive law. For Hobbes and Locke nature grounds the legitimacy of government by providing an emblem of anarchy read as lawlessness. It is also used to derive the legitimacy of state violence from the posited consent of the subjects of law. Nature, notwithstanding its abiding ambiguities, is predominantly

figured as a pole in a widening gap. The increasing distance between nature and modernity is now understood in terms of progress. Nature itself, however else theorists may differ in their readings of it, is the name of priorness, pastness, and stasis.

The emergence of the social subject

Similar stories are told about individual humans. Here, the larger civilization process is replicated in the process of *socialization* which, in Margaret Mead's words, is "the process by which human children born potentially human become human" (1983, v). Without socialization children are wild. Where the first set of stories can be read as variations on the larger cultural theme of progress, the stories about individuals draw on the related theme of development: of personality, autonomy, moral consciousness, and so on. Development as a *process* is commonly described via metaphors of *movement from* a sort of bodily based, instinctual, animal nature *to* a sociality founded on rules. Nature signifies a sort of disorder – in fact, a kind of indeterminacy while culture, signified by the presence of rules, may signify a sort of artificial order. This move from nature as indeterminacy to a law-like social order is captured by psychologist Elliot Turiel, who writes in *The Development of Social Knowledge*: "within social systems the promulgation of rules and prohibitions, as well as their enforcement with sanctions serves as primary means for the exertion of control on the behavior of individuals. Rule conformity is fundamental for the individual in that it provides order by constraining the wide variety of behaviors that are part of one's potential repertoire" (1983, 75). Again, the center of interpretive gravity here is on the theme of control. Crucially, where nature may be located in bodies (and sanctions visited on bodies), *rules* are located in properly socialized minds. Central to the idea of socialization, then, is the process of "*internalization*" (of rules, or norms, or of "culture" reduced to rules) where "inside" is understood as the mind, psyche, or self of individuals, and "outside" as society.

One of the resultant products of successful internalization and socialization is a self of a certain sort, one possessed of self-control or, as it is sometimes called, self-government or *autonomy*. According to the philosopher Alfred Mele, this is etymologically derived "from *autos* (self) and *nomos* (rule or law)" (1995, vii). Mele says that "efforts to understand autonomous agency are efforts to understand the agency distinctive of self-ruled or self-governed individuals" (vii). Similarly, Joel Feinberg describes autonomy as "the sovereign authority to govern one's

self" (as quoted in Mele 1995, 3). As Dennett describes the conventional view of the person, "a self is, above all, a locus of self control" (1984, 181). The objects of control are the impulses and desires that are rooted in corporeality and can be manifested in bodily behavior. These are all renderings of the emergence from the state of nature writ small. What emerges from nature, by degrees, is a human, by definition a being to whom is attributed rule-boundedness where rules control certain aspects of corporeality.

The larger point is that, on the one hand, the ambiguous distinction between the natural and the human is drawn through the concept *law*; the physical world is describable in terms of physical laws or observable regularities, the human world is governed by self-made laws as manifest in rules, norms, and institutions. (This is Kelley's *physis* and *nomos* as applied to the constitution of the individual subject.) Agnes Heller, bringing out the contrast between humans and animals, puts it somewhat differently. "Human life on Earth," she writes, "is the result of self-domestication. Crossing the threshold dividing the 'human' from the 'animal' has . . . taken several million years. 'Several million years' is not human time . . . Human time is historical time. During the period of self-domestication, social regulation was substituted for instinctual regulation. After this substitution ended, the 'human condition' began" (1988, 18). What she calls self-domestication, which seems to blend the breeder and the bred into a single organism, commonly goes by another name: civilization. I shall return to other understandings of the legal subject in chapter 5. For now it is best to look at the relationship between these subjects with respect to the idea of civilization.

On civilization

Other prominent portrayals connect the two emergence stories together through the idea of the civilization process. These stories may also be more explicit about some of the terms of the initial bargain than were Hobbes and Locke. Freud's classic statement, *Civilization and its Discontents* (1930/1962), for example, can be said to have the specific terms – the fine print, so to speak – of the social contract as its principal theme. Again, the mechanism of emergence is a historical shift in the balance of control. In an apparent initial collapse of the external/internal framing of the nature/human distinction, he described "our own physical constitution" as "a piece of unconquerable nature" (33). As long as civilization endures, he wrote, "we shall never completely master nature; and our bodily organism, itself a part of that nature, will always remain

a transient structure with a limited capacity for adaptation and achievement" (33). But even here the figure of "the human" as the "we" who might aspire to conquering and mastering is split off from the bodies that resist and ultimately limit civilization as a process. The transcendental subject operates on the bodies of individuals, transforming them into subjects. From this implicit split, his argument, or rather, the "man" that his argument describes, works both outward and inward toward ever greater, if never finalized, control.

In the first place, Freud wrote that "the first acts of civilization were the use of tools, the gaining control of fire" (37). By the mid-twentieth century, when he was writing, he found that "countries have attained a high level of civilization if we find that in them everything which can assist in the exploitation of the earth by man in his protection against forces of nature . . . is attended to and efficiently carried out . . . wild and dangerous animals have been exterminated and the breeding of domestic animals flourishes" (39). Mastery of external nature is achieved through economic activities of transformation (and, of course, by the legal forms appropriate to the task such as property and the means of enforcing property rights). Civilization itself is measured in degrees as these are indicated by the scope of its domination of external nature.

In the second place, he also said that the signal moment in the process was the institutionalization of social regulation or, we might say, the emergence of law. "The element of civilization enters the scene with the first attempt to regulate social relationships. If the attempt were not made the relationships would be subject to the arbitrary will of the individual: that is to say, the physically stronger man would decide them in the sense of his own interests and instinctual impulses" (42). The emergence of civilization is a function of the initiation of a rule-based sociality that supplants the dynamic of the will of the physically strongest male. This describes a move from animality, corporeality, physicality, and arbitrariness toward a supraindividual regularity founded on rules, that is, on words.

This part of the picture casts law as identified with the renunciation of physicality: law as antinature. (But also in its implicit universality it is a sort of second nature.) Freud is quite explicit about this. "The power of the community is set up as 'right' in opposition to the power of the individual which is condemned as 'brute force' . . . The first requisite of civilization, therefore, is that of justice – that is, the assurance that a law once made will not be broken in favor of an individual" (42). Relating this more specifically to the terms of exchange, he says, "the final

outcome should be a rule of law to which all have contributed by a sacrifice of their instincts and leaves no one at the mercy of brute force" (42). The two emergence stories, then, are merely reciprocal aspects of the same story. In fact, comparing the civilization process with individual development, Freud identifies them as "the very same process applied to different kinds of object[s]" (86–87). The mechanics of the reciprocal relationship are described in terms of "sublimation . . . forced on instincts by civilization" and "civilization [as] built upon the renunciation of instincts" (44). "[Man] . . . first appeared as a feeble animal organism . . . each individual of his species must once more make his entry ('oh inch of nature') as a helpless suckling" (38). Refocusing on a different aspect of law and a more specific character of corporeality, he asserts that "a cultural community is perfectly justified, psychologically speaking, by proscribing manifestations of sexual life of children, for there would be no prospect of curbing the sexual lusts of adults if the ground had not been prepared for it in childhood." In fact, he states that the taboo-observances were "the first 'right' or 'law' " and that "the sense of guilt is the most important problem in the development of civilization" (81). The locus of nature for him is less in the instinctually driven violence of the physically strongest male than in the sexuality of children. What Freud is describing is the initiation of legal consciousness in the form of self-reproach under the pressure of necessary "proscriptions."

Norbert Elias produced a similar portrait of the relationship between renunciation and control of nature and the development of individual autonomy as linked by *The Civilizing Process* (1939/1982). In a revealing passage he remarks on

> how constraints through others from a variety of angles are converted into self-constraints, how the more animalic human activities are progressively thrust behind the scenes of man's communal social life and invested with feelings of shame, how regulation of the whole instinctual and affective life by steady self-control becomes more and more stable, more even and more embracing. (230)

For Elias, as for Freud, these processes are also linked to a reading of law, but here it is not simply the law as generalized regulation or rules or prohibitions. Rather, described as a historical fact in the specific context of the emergence of modern Europe, it is linked to the founding of the centralized state. He describes the historical process this way:

> It has been shown how . . . the mechanisms of feudalization are slowly neutralized and how, step by step, a more stable central organization, a firmer monopolization of physical force, are established. The peculiar stability of the apparatus of mental self-restraint which emerges as a decisive trait built into the habits of every "civilized" human being stands in the closest relationship to the monopolization of physical force and the growing stability of the central organs of society. (235)

Also like Freud, Elias emphasizes that the initial bargain is not without costs and is never completed.

> Although the self-steering of a person, malleable during early childhood, solidifies and hardens as he grows up, it never ceases entirely to be affected by his changing relationship with others throughout his life. The learning of self controls, call them "reason" or "conscience", "ego" or "super-ego", and the consequent curbing of more animalic impulses and affects, in short, the civilizing process, is never a process entirely without pain; it always leaves its scars. (244)

In an interesting – and emblematically humanist – twist Elias affects a reversal of the key terms and suggests a deeper naturalization of the civilizing process itself centered on the relation of knowledge and control. "It may be that, through clearer understanding, we shall one day succeed in making accessible to more conscious control those [civilizing] processes which today take place in and around us not very differently from natural events, and which confront us as medieval man confronted the forces of nature" (xvii). This passage illustrates the mobius character of "nature" – and therefore, of whatever is paired with it as its inverse. In one sense this is perhaps a more Romantic or Rousseauian reading of civilization as blind, dominating, and out of control. But, in another sense, the dream of controlling such a naturalized civilization (through social engineering? with the instrumentalities of law?) hints at the limitlessness of the Enlightenment imagination that would leave nothing, not even civilization, not even itself "free" of "conscious control." We might contrast these visions with Agnes Heller's view of the emergence of the individual subject from nature: "The newborn infant is not a 'piece of nature'. The general genetic endowment of the infant is a product of self-domestication: we are born human infants because social regulation has already been substituted for instinct regulation" (1988, 19). Here, the civilization process is read backwards beyond the

fusion of egg and sperm, before the initiation of history. It is radically naturalized in the service of denaturalization.

As with previous portrayals, we can see in these fragments by Freud and Elias a reiteration of the root distinction and of the processes of distantiation and emergence as renunciation and control of physicality. The human is identified with history as history is identified as the progressive separation of humans from the state of nature. The unstated leverage point of this process is the unique human capacity to enter into the initial exchanges and transferences. The center around which the expanding circle spins is the control of fire and external nature and the invention of guilt and shame – our most important artifacts.

As a genre of renderings of the human, those that center on the notion of civilization emphasize the moves from mere distinctiveness to opposition, to an endless antagonistic struggle to control. Every new birth presents a new occasion for reenacting the foundational exchange, each episode of child-rearing a new opportunity to succeed or fail. Though nature is most often contained, containment is contingent on vigilant control. In these renderings of nature we again encounter the split referent. Foregrounded is nature as violence, brute force, disorder, animality, unpredictability, pastness, and, crucially, the asociality of the (male) individual. But of course, both the process itself and the specific mechanisms are easily naturalized. And, in an important sense, this was Freud's more specific project. To the extent that the distinction may collapse, this may simply be indicative of the larger cultural ambivalences concerning nature, or the reiteration of Freud's claim about the unconquerability of nature in a different register. Likewise, his more specific project of objectifying mind, medicalizing knowledge of mind, and developing techniques for undoing or mitigating some of the costs or consequences of the civilizing process, may be seen as a prefiguration and institutionalization of Elias's dream of controlling the now naturalized process of civilization itself. As we shall see in Part II, the dream may be realized, after all, through the development of genetic engineering, psychopharmacology, and other techniques for controlling nature.

THE LIMINALITY OF LAW

But beyond reiterating the themes of difference, opposition, and movement, and in addition to what these renderings of separation and emergence tell us about the work that "law" does in crafting the

nature/human distinction, they also tell us something about *the work that "nature" does in constructions of the very idea of law*. Most obviously, law is one of the principal tools with which the line is drawn. But, in an important sense, it is also the case that law *is* the line. To indulge the portrait analogy, if the human is the figure that emerges *from* and is made legible *against* the background of nature, notions of law are tools that trace the outline which, in turn, defines the contrast, marking off the inside from the outside. It constitutes the space of order and coherence as separated from but bounded by the space of chaos. But law is also a basic element of the texture and color of the figure itself. Law is precisely that which provides order and directionality. The portraits, rendered in the form of unfolding arguments, purport to describe what is essentially a *temporal* process. The figure of the human emerges simultaneously as the line that represents law emerges (as on a canvas being painted). And as the figure of the human emerges more clearly, law – in more elaborate and explicit forms – is carried forward. The elaboration from taboo, through subsequent forms of regulation to the arrival of centralized states and the Rule of Law, provides a measure of the increased distance from the background of "nature." It is measured in the units of progress and civilization itself.

Just as nature remains both threat and foundation, so the essentially liminal quality of law is perpetuated. Nature and law *always* limit each other: law limits – confines, constrains, controls – nature, but never completely. There is always a residue and so always the real possibility of regression, of falling back, of losing control. Nature marks the limits of the power and reach of law (even if the location of the boundary changes, its function *as* boundary remains). No matter how strongly law is identified with the human side of the line, with *nomos* as against *physis*, nature and law are always in contact as it were. Nature never goes away and is never far from the center of concern.

Consider the moment preceding emergence, when all on the canvas is nature. Already law is immanent in the naturalized capacity of the precivilized protohuman to enter into the contract or to participate in the exchange. It is immanent in the very possibility of picking up the brush, in envisioning in the mind's eye the portrait that is to emerge. This, perhaps, is Heller's point. What makes humans human is that we, unlike all other life forms, have the potential for "self-domestication," even before it is realized in the flesh. The focus for Freud, as later for Lévi-Strauss, is on the peculiar temporal and metaphysical status of the incest taboo as both the first sign of culture, rule,

law, and the distinctiveness of humans as other than nature *and* as the seemingly pan-cultural, universal, species-specific characteristic rooted in anxieties pertaining to sexuality and reproduction. The paradox of these renderings of law is seen in the status of taboo as the natural convention, the universal artifact. According to Lévi-Strauss, this "constitutes a rule, but a rule which, alone among all social rules, possesses at the same time a universal quality" (1985, 54).

More importantly, the separation of humans from nature and their emergence into law (or into "society" by means of law) is not accomplished by simply stepping over a threshold. There is in all of these renderings an exchange, a transaction. Just as it is not irrelevant that the prelegal is rendered as "nature," it is not irrelevant that "contract" is the prevailing legal metaphor for the boundary-making event. Nature in most of the stories – but not in Rousseau's – is the domain of violence. What changes as separation occurs is the character of violence. Violence is by no means eliminated by the terms of the social contract, socialization, or the civilization process. Rather, it is domesticated, concentrated, rationalized, and deposited in law for safekeeping. This is what law is for. There it is tethered to (or guarded by) the word, to (by) reason. But as natural, purely physical violence becomes constrained by the word, so the word is invested with the latent violence of nature that it now commands. The emergence stories all implicate a revolution in the social economy of violence. Under the order of nature, violence was exercised and experienced arbitrarily. This was precisely what was so horrible. We might, then, imagine how violence is distributed under the order of law. After the break, law apportions violence in various ways. A portion of it is distributed directly to all members of society to be directed inward by way of the dynamics of "internalization," renunciation, and self-control as subjects become "law-abiding." A portion is kept as formal, legal violence. This is used comparatively sparingly, according to rules. It may be used in various ways, most obviously by the organs of policing and punishment. It is presumptively legitimate. It may be directed against those who break the contract by the illegitimate usurpation of violence, against those who break the rules, against those who break promises, or against those who do not regard law's violence with sufficient seriousness. Access to legal violence may also be granted to authorized "private" actors by way of, for example, property law or family law. Historically it has been used against other subjects such as the propertyless, employees, and tenants. It may also be used against beings who, at any historical period, have not been admitted

to the realm of rights such as children, wives, slaves, and animals. Crucially, it may be directed back at "nature" itself. The point is that while law may be the supreme emblem of antinature in some respects, its liminal character suggests that it is also a sort of "second nature." But this sense of "second nature" is not the usual sense that connotes custom or habit. Rather it is in the sense of the successor to nature as the origin of violence. It is in this sense of "second nature" that we may glimpse the physicality of law.

The differences between natural violence and legal violence, though, are extreme. Crucially, legal violence, on most accounts, is limited by reason. In what are often called "mature legal systems," legal violence itself is bound by rules, by procedure, by form, by words. And these are always paramount. When, therefore, law seems to lose contact with word, procedure, form, and reason, when law appears to go wild (we can all pick our most horrible example), it ceases to be legitimate, it reverts to brutality, it descends into meaninglessness and marks a traumatic regression. In such cases, though, its physical effectiveness may be augmented by the awesome technologies of repression and terror that have been among the most striking gifts from science to law.

Law does not only appropriate nature's violence. It also appropriates nature's necessity. Natural necessity is subsumed under the order of legal necessity. Like legal violence, legal necessity takes many forms and, as under the (dis)order of nature, violence and necessity are closely related. Legal necessity resides primarily in rules, that is, in words of a particular form. Rule words are crafted to constrain and channel (limit) and control actions. Their connection to violence is made legible through their conditional form. "If," says the rule, "then," says the violence that is discharged when the rule is broken. The connection is formally a necessary one. But legal necessity inhering in words presupposes a more fundamental necessary connection between words and meaning. It presupposes that words have sufficiently clear, stable meanings, necessary implications, unproblematic applications. And this, as many philosophers, linguists, and legal scholars have shown, may be too much to ask of words or of the wielders of words. Words – for example, "nature" or "right" – may be polysemous, ambiguous, context-dependent, shifting, and vulnerable to conflicting interpretation. The relationships among words or between words and world may be too multifarious, too rich to be capturable in a single grasping. Meanings may not rest easily in the words we build for them. They may resist any single framing. Meanings may, in a sense, have a tendency to go wild themselves. And again, it

is the meanings that reside in rule words that are to confine, constrain, and control actions and the distribution of legal violence. When legal meaning seems to have broken down, legal violence may escape. And legal violence, unconstrained by the word, loses its legal character.

In the next chapter we shall encounter other dimensions of the liminality of law vis-à-vis the nature/human distinction in the ambivalences and ambiguities of the work that "nature" does in jurisprudential self-portraits of law and in actual legal performances. It will be seen most clearly in the predicament of legal thought as caught between the forces of determinism, materialism, and naturalism on the one hand, and those of indeterminacy, subjectivism, and humanism on the other. But if this liminality is a response to contradiction, it is not so much to logical contradiction as such but to the incompatible ideological demands placed on law within the various cultural projects it participates in. As in the conventional renderings, nature as a sign of disorder, violence, or blindness requires constant effort to suppress, distance, and control. The stabilization of the liminality of law – as both emblematically and uniquely human and as at least in contact with nature, if not a second nature – requires constant cultural work to avoid collapse. This is because within the terms of the larger cultural project if collapse occurs – that is, if law is rendered as too natural or, on the other hand, if law loses contact with nature – all else that depends on that stability, such as civilization or the very idea of human uniqueness, progress or the primacy of reason, the possibilities of justice and truth, may be in danger of collapsing as well. While these cultural tasks may be difficult enough in a social order predicated on stasis, it is all the more urgent given the practical material transformations associated with capitalism, "development," and the dynamic disruptive practices associated with science and technology.

OTHER NATURES

For our purposes it is significant not only that law is, in Kelley's view, the primary social expression of *nomos* – that is, as having been founded on its fundamental contrast with physicality – but also that the historical unfolding of their rhetorical relationship in conventional legal thought reveals an ambiguity – or essential incoherence – nearly as enduring as the distinction itself. For while the terms *physis* and *nomos* mark an utter distinction, there have been, throughout the history of the distinction, recurrent attempts to assimilate *nomos* and law to the status of "second nature." Across the same span of time from the age of the classical

Greeks to the twentieth century, Kelley notes that "custom, the most rudimentary but also the most fundamental form of law, came to be regarded as 'second nature'" (1990, 1). He cites Pascal as having posed the issue this way: "[I]s custom not natural? I am very much afraid that nature itself is only a first custom as custom is a second nature" (ix). This naturalizing move with regard to the law idea is found in writers as diverse as Aristotle, Cicero, Augustine, Blackstone, and Hegel. A fifteenth-century treatise writer stated that English law was natural, "like the nerves of the body physical" (Kelley 1990, 169), and Blackstone held that the common law was "a sort of secondary law of nature" (Kelley 1990, 171). For Hegel, "the system of right is the realm of freedom made actual, the world of the mind brought forth out of itself like a second nature" (Kelley 1990, 256). Because of the abiding ambiguities of "nature," the work that it is called upon to accomplish in these various positions may not be the same. For English writers, naturalizing the common law and custom suggested a sort of perfection or order in law that was rooted in the essence of a people, while for Augustine custom may have connoted, in Kelley's phrase, "corruption both of human nature and of human law" (74). For some, second *nature* might be used to signify constraint and necessity or that which limits the will, while for others *second* nature may have been identified with will and artifice itself. Then there are different readings of "second." For natural law thinkers, second may have meant secondary. If natural law is universal, customary law as second nature may signify a sort of constructed nature that has some of the features of nature such as constraint and relative endurance but lacks the universality and immutability of natural law. Or, second nature may indicate that which comes after and supplants first nature.

Then there are images of law that do not portray it either as antinature or as a "second" nature, but as, in some ways, an expression of nature itself. The most obvious example is the natural law idea. According to Lloyd Weinreb, a necessary feature of classical natural law theories was "the idea of a unitary normative natural order immanent in the cosmos" (1987, 1). Weinreb opens his influential work *Natural Law and Justice* with the conventional paradox that "Human beings are apart from nature and part of it. As *human* beings we are uniquely capable of reflecting on our experience and formulating our own governance . . . As human *beings* we are subject to nature's laws . . . In its origins and principal developments, the philosophy of natural law was an effort to merge these two aspects of human existence" (1). Classical treatments such as those

of Cicero and Augustine are, he says, ontological in that they are rooted in the belief in the existence of a normative natural order. More recent versions which dispense with this he calls deontological insofar as they are not grounded in a belief about what *is* but proceed from arguments about what *should be*. Because of this uncoupling of theory from ontology he refers to most contemporary nontheological views as "natural law without nature." In either case, the natural law idea seems to imagine a nature without matter. In response to Weinreb, other commentators assert that the "nature" of natural law refers to conceptions of "human nature and the place of man in nature" (George 1992, 32). This seems to read nature less as a cosmological or teleological entity and more as a vague sort of essence. And this essence, as usual, points to our distinctive capacity to reason.

Whatever "nature" is taken to be – and this is a point of dispute within various theories of natural law – it is clearer what nature is understood to be *doing*. As applied to aspects of social ordering nature locates actions or behaviors (rights and duties) within the domain of the immutable. As Cicero put it, "True law is right reason in agreement with nature . . . it is a sin to alter this law, nor is it allowable to attempt to repeal any part of it" (quoted in Weinreb 1987, 40). These prohibitions are themselves, presumably, part of nature. Natural law is not the same as physical law but its adherents use nature talk in order to treat some aspects of social life as if they were as determinate and immutable as gravity or inertia. While this seems to underwrite conservative political agendas through its implicit casting of change as unnatural, natural law ideas have also provided philosophical grounds for civil disobedience through their contrast with positive law. In Weinreb's view, natural-law talk in the twentieth century has become little more than "a mark of genealogy or a rhetorical trope used to invigorate and accredit intellectual or political assertions advanced on other grounds" (1987, 2). That is, "nature," here as elsewhere, is a political concept, one of whose uses is depoliticization. Nature as origin of law per se is used as a device to limit specific substantive laws or legal obligations.

Law can be naturalized in other ways as well. From time to time in the course of modern legal thought there have been attempts to render law as an object of scientific study. The dream of a legal science provided the foundation for university-level legal education. As Christopher Langdell, the innovative dean of Harvard's new law school, wrote in 1871, "Law, considered as a science, consists of certain principles and doctrines . . . If these doctrines could be so classified and

arranged that each should be found in its proper place they would cease to be formidable from their number," and would be rather easily mastered (1879, viii–ix). An influential twentieth-century exponent of legal science was Hans Kelsen, whose magnum opus was titled *A Pure Theory of Law*. Kelsen wrote, "It is precisely by its antiideological character that the pure theory of law proves itself as a true science of law. Science as cognition has always the immanent tendency to unveil its object" (1945, xvii). Legal science, then, allows law to purify itself. Perhaps the extreme of naturalizing law was achieved by John Henry Wigmore with his "The Terminology of Legal Science" (1914) in which he proposed a reconstruction of legal theory as "nomology." He distributed the labor of nomology among the branches of nomoscopy, nomo-sophy, nomo-didactics, and nomo-practics. Nomo-scopy itself was broken into nomo-statics, nomo-genetics, and nomo-physics. Legal science is still around in various forms such as law and economics, and jurimetrics.

Yet another attempt to imbue the legal with the desirable features of the natural can be seen in the project of legal evolution. This was a prominent vein of American legal thought in the late nineteenth and early to mid-twentieth centuries. It took sustenance from and was a local jurisprudential expression of the prominent social evolutionary ideology of the time more generally. Even though it had, by the latter half of the last century, lost much of its attraction, the metaphor of evolution as a way of accounting for legal change has continued to be useful and viable. A key text in the evolutionary model was Oliver Wendell Holmes's *The Common Law* (1881). Here Holmes deploys organic metaphors of growth and development to account for the emergence and transformation of legal forms such as the law of contract. The more specific objects of evolution are judge-made rules which are analogized to species or to the traits of species that are seen to be engaged in a struggle for survival. As in evolutionary imagery elsewhere, the fittest survive. The extralegal social world is assigned the role of environment. The value of an evolutionary framework was that it made possible the positing of the laws of law, or the underlying, unifying transformative principles of continuity that account for legal change. As legal historian James Hegert says, "[I]n theory the science of legal evolution [could] determine the course of the law by finding the laws of change and applying them to the known development of legal history" (1990, 138). This idea is not so far removed from Elias's dream of controlling the unfoldings of the civilization process. Wigmore, who was also a legal evolutionist, analogized

the work of the legal analyst to that of a paleontologist at work on the reconstruction of dinosaurs (1917). But retrodiction and reconstruction were not the only fruits of evolutionary thinking. As with other sciences, there was also the promise of prediction and forecast. Indeed, other evolutionists saw merit in comparing the work of judges to that of cattle breeders who can take the product of natural evolution and, cognizant of the underlying processes, shape it to desired ends. But of course, here they depart from the natural.

Naturalizing law through these sorts of maneuvers is, in a sense, an unsurprising aspect of the general project of jurisprudence insofar as one of its foundational tasks is to render law as an *object* so as to constitute itself as a science – as a particular sort of subject. The naturalization of law and its construal as a closed, coherent, functionally ordered system – like the cosmos, the genealogy of pea plants, or the body of a squid, but consisting of systematically interrelated "principles," doctrines, and rules – seems a necessary condition for the scientization of legal study and thereby the depoliticization of legal theory and practice. The scientizing of law occurred most self-consciously in the domain of legal education. Here, the immersion in the methods of discovery and the production of scientific truths were, in theory, to inform the practices of lawyers and judges. The work that nature does in all of these cases is to put "the object," whether law per se, an underlying principle, or a specific rule, "outside" of the analyst or practitioner. "Nature" does what it always does: it externalizes by inscribing a line between a subject constituted as inside and an object. These are simply some historically significant renderings of the law that have been attracted to "nature" or have found nature talk serviceable. It is important to note, though, that, while the general political work that nature talk accomplishes is to objectify and externalize – *so as to depoliticize* – the actions of those who work on legal meaning, the *specific* political work that it does is much more variable. As I noted, natural law ideas can be used both to block change and to authorize change. Likewise, while the conservative thrust of legal science and evolution may be obvious, the same notions can be used to account for and support change in "progressive" directions. This is illustrated by Martin Luther King's "Letter from the Birmingham Jail" (1963). Perhaps a more important point, though, is that if within the larger cultural order law is identified with the human as opposed to the natural – and if law is, moreover, an artificial device for subduing, supplanting, overcoming, or transcending the domain of necessity – then

efforts to naturalize key aspects of the legal may raise concerns about the blurring of the basic distinction and the distinctiveness of humans. And indeed, the projects of natural law, legal science, and legal evolution have all been criticized and, in the critiques, law resituated firmly within the domain of the human.

One final point: Though I have been concerned here with efforts to constitute the idea of law with respect to nature talk, it is equally true that all of these efforts are also instances of the constitution and reproduction of "nature." They all reiterate the basic notion that "nature" signifies that which is unified, systematic, orderly, determinate, and constraining.

CONCLUDING REMARKS

The initial focus of this chapter was on the use of images of law in renderings of the nature/human distinction. But just as a painting of anything may also tell an art historian a lot about paint and the representational alchemy of the practice of painting, so these renderings may tell us something about law – the very idea of law and what can be done with it. (The painting analogy breaks down because of the closeness of the relationship between the medium – law talk – and what is specifically being portrayed here – the distinctiveness of humans vis-à-vis nature inhering in the initiation of law itself.) Chapter 3 described the cultural work that "nature" does in providing the foundation for the constitution of science as a transcendental subject of a particular kind. In this chapter I surveyed the use of images of nature in culturally prominent renderings of the law. In many ways, the work that it does here is the same. Nature as negativity and necessity, nature as that which must be controlled lest it control us – or worse, lest in overpowering us it erases the distinction – underwrites both science and law. That it can do the same work highlights the similarities between the cultural projects of law and science. But, in many ways "nature" performs a different set of functions in stabilizing the law idea than it does in providing the foundation of science. While the position of science vis-à-vis nature is, broadly speaking, unequivocal, the position of law is much more ambiguous. Law may be read predominantly as a sign of antinature, but also as an expression of nature, as a quasi-natural "object" in its own right, and, in different ways, as second nature. These various readings of the law's nature reflect the broader cultural ambivalence

about nature – and suggest a measure of ambivalence about law. I described a measure of this ambivalence in terms of the liminality of law vis-à-vis the (naturalized) domain of violence and necessity and the (humanized) domain of reason and word. From these rather general points about the relations between nature talk and the law idea I now turn toward an examination of the situation of judging and the predicament of the practice of legal discourse as it confronts the trouble with nature.

CHAPTER FIVE

THE NATURES OF LEGAL PRACTICE

INTRODUCTION

Imagine that you are the judge. You speak the word of law. You are the bringer of justice or order. You are dealing with troubles of one sort or another. These troubles may come to you from anywhere. They began their journey in the "extralegal" world and were transformed into prosecutions or civil suits. The troubles that you are to deal with – to resolve, in some sense – come to you already translated into terms that you, the speaker of law, can competently handle. The pleadings, motions, briefs, or oral presentations cast the troubles in the idiom of legal discourse. They may involve virtually any topic. They may be relatively simple or extremely complex. You may find your tasks relatively easy or profoundly difficult, difficult intellectually and even emotionally. The civics class version of your task is that you are to "apply the law to the facts," but you know that there is much more to it than that. Though you will be guided by at least two different, contending interpretations of the law, of the facts, and of how to best apply the former to the latter, the task is yours. You have a lot of work ahead of you. If you are a trial judge you have to conduct the trial. If there is a jury you have to guide and instruct its members. If you are an appellate judge you may have to produce a public document that purports to lay out your reasoning. If you are a member of a tribunal such as the Supreme Court, you have to persuade and be open to persuasion by your colleagues. And, of course, you have to judge. You have to exercise your capacity for judgment in a most concrete and practical way. To be a judge is to have an immense

amount of power. This is why the troubles have been brought to you. You may compel people to transfer property to others. You may take children away from parents. You may send people to prison for decades. You may release them from the grip of authority. You may authorize or refuse to authorize evictions, deportations, or executions. All in the name of the law. This is no walk in the park.

The situation of judging is at least as variable and complex as the situation of doing science. And what a judge does in this situation is conditioned by a number of factors that pertain to the topic of this book. The theme of this chapter is the problems attendant on the fact that the situation of judging in an American context is "humanistic" in at least two important ways. The first concerns what law – and so the practice of judging – must assume about the human subject who stands before the law. The second sense concerns the practice of judging itself. Each poses at least theoretical, and sometimes quite practical, problems for judging. In some sense, the problems are opposed to one another. Importantly, the problems that I shall be describing are instances of the problem of nature. The argument that I want to make is rather complex. It would be helpful, then, if I spelled out the general arc of this argument here so that its fuller treatment can be more easily followed. As in previous chapters my focus is on prominent descriptions, justifications, and critiques of practices. In this case I want to examine how the practice of judging is understood and to emphasize the contested character of those understandings.

In the first section I describe the humanistic view of the individual human subject that is not only assumed by law, but is also a condition of intelligibility of law (and of the practice of judging). This subject has been called "the legal subject," "the modern self," and the "core self." It probably corresponds to the sort of self you feel yourself to be. Then I discuss two contemporary posthumanist challenges to this vision of the subject. The first challenge follows from the invention of the postmodern subject; the second follows from the naturalized subject associated with recent antidualist scientific projects. The first challenge is relatively easily dismissed by law (though it could, perhaps, become more of a threat if it came to be generally accepted by legal subjects as more accurate or more experientially valid than the traditional or modern subject). In any case, it warrants discussion here simply to show that the humanistic subject is not the only available subject; that subjecthood is, in fact, rather fiercely contested; and that the practice of judging cannot be neutral with respect to competing subjects (i.e. competing

conceptions of the human) without jeopardizing the conditions of its own intelligibility.

The second challenge is perhaps more troublesome insofar as naturalized, physicalist renderings of mind, human behavior, or being itself raise the specter of determinism. As many scholars have pointed out, these scientistic renderings of the human not only erase the subject as we know (and live) it, they also transform the foundational categories of legal thought into, at best, useful fictions. They transform emergence stories into quaint origin myths. In addition they highlight a potentially destructive divergence between law and science. Because science is the authority on matters of nature, including the nature of human bodies and brains, and because it is understood in terms of the continual progression of increasingly accurate knowledge about nature, then, according to some, this divergence threatens to transform legal visions of the subject into increasingly outdated fictions. As the divergence increases, the legal fictions may become more transparent and less "useful," with the authority and legitimacy of law diminishing proportionately. This is not simply the "age-old" problem of determinism vs. free will. As we shall see in Part II in contexts such as genetic screening, biologically based criminal defenses, and the medicalization of crime and punishment, these are practical problems that have to be engaged with *now* from within the situation of judging. In examining these sorts of issues we may see instances of law's attraction to and/or repulsion from naturalism or scientific representations of nature. This predicament may be encountered with relative infrequency now. The traditional modern subject remains the only one to be taken seriously by law. However, any given case may provide the occasion for arguing about what it means to be that sort of subject. If the postmodern subject is so far safely excluded and if the materialist subject is relatively contained, the traditional subject as the central character of legal stories is nonetheless protean.

Following this discussion of the problem of the humanist subject in law, I turn to what may be a more fundamental problem of legal humanism. This is one that has been acknowledged as a problem for a long time. In fact, "solving" – or at least containing – it has been the central preoccupation of American jurisprudence. This problem is the problem of the subject who is engaged in legal practice, the subject who finds herself in the situation of judging. In this section I first set out in what sense judging is in itself a paradigmatic humanistic endeavor. Then I discuss why this is a problem for conventional legal theory. It concerns the instability of the distinction between law and politics. In

sum, the problem, as conventionally framed, is that to the extent that judges appear to be acting "like subjects," the depersonal voice of law (and therefore the legitimacy of what it utters) may be compromised. The distinctions between law and politics, right and might, reason and desire are thereby effaced. Put another way, the problem is how plausibly to portray what judges do, say, and cause to happen as being "objective" rather than "subjective." The problem of the subjectivity or humanness of judges can come up in countless ways. One important way has to do with the more specific practices of interpretation or the making of meaning under conditions of indeterminacy.

After simply stating the problem I move rather quickly through a series of prominent solutions to the problems of objectivity and indeterminacy. I present them as a historical sequence of regnant theories, but this is not an important part of my argument. What is important is that these various solutions to the political problem of the "all-too-human" character of judging each enlists visions of science in attempts to depoliticize legal interpretive practice. Then I discuss commonly identified difficulties with each of these solutions. Up to this point my topic has been the practice of judging, but the more specific focus of the discussion has been on jurisprudential prescriptions for that practice. The two are closely related, but not identical.

The next section takes some of the products of legal theory (specifically, the approaches to adjudication known as "formalism" and "realism") and treats them more as elements of style in judicial renderings of reality. As such, they are resources or tools brought to the practical task of judging and the production of those authoritative representations that are judicial opinions. But here again, the problem of nature does not go away. It is merely dealt with or displaced. In fact, I suggest that in contests between (more or less) formalistic and realistic representations of a given set of troubles we may see the same problem played out in the register of style or aesthetics. Realism is marked by a greater willingness to look "beyond" the law, beyond the word toward the world, toward "facts," toward "nature" in order to stabilize legal meaning, that is, in order to tame the political problems raised by the specter of indeterminacy. In particular, in cases involving physicality, realist judges may be more willing to incorporate scientific representations of nature in order to achieve the necessary appearance of objectivity. In contrast, formalism has a more pronounced tendency to stay within the confines of legal words, concepts, and the interrelations of words and concepts. To return to the painting metaphors of chapter 4,

formalism can be seen as a sort of abstract antinaturalism to realism's naturalism. It effects, at the level of style, a performative repudiation of (scientific representations of) nature. It is comparatively unconcerned with physicality and may indeed pass over the material world in silence. It demonstrates and enacts the primacy of word over world. It thereby attempts to preserve the integrity, autonomy, and authority of law vis-à-vis science. In a final short section I look a little more closely at the commonalities and differences between law and science as authoritative ways of knowing. This again exemplifies the perniciousness of the problem of nature and resonates with the antithesis of *nomos* and *physis* with which chapter 4 began.

What I seek to do in this chapter, then, is follow "the nature problem" to as near the heart of law – the situation of judging – as I can. Where we might most clearly examine law's nature is in the encounter between the legal subject and the judge. The task of judging involves, along with everything else, first, maintaining, as far as possible, the integrity of the legal subject. This, again, is crucial for maintaining the intelligibility of law. Second, it involves suppressing the subjectivity of the judge so that the legal event does not appear as two subjects confronting each other. The liminality of law is most clearly revealed in the legal event whereby the individual subject is counterposed to legal objectivity. To put this another way, the task is to prevent the dispersal of the legal subject or its collapse into physicality *and* to prevent the collapse of judgment into an expression of subjective desire. Plaintiffs come before the judge in order to enlist legal necessity in order to compel or constrain others. Prosecutors come before the judge in order to enlist legal necessity and, often, legal violence. Defendants stand before the judge with their own claims of legal necessity to resist being compelled, constrained, or hurt. But in order for what follows from judgment to be necessary (not arbitrary) and as a manifestation of *legal* violence (not brute force) it must be firmly anchored and subordinate to the word.

LAW AS HUMANISM

The troubling subject of law

As I argued in the previous chapter, the *idea* of law is an integral element in drawing and maintaining the distinction between and opposition of human and nature, as well as in portraying the emergence of the former from the latter. Consequently, the idea of law is also

crucially *dependent* on this distinction and on a particular and increasingly controversial vision of what it means to be human. Of course, when we speak of law we mean more than an idea and more than a discourse or set of representations. Law as a social phenomenon is institutionalized and empowered. Law as discourse articulates law as power. Law names a set of practices, a culturally specific set of practical engagements with the world. Conventionally, the principal tasks that these institutions are given, or set for themselves, are the maintenance of order and the realization of justice. The practical workings of law connote regulation, punishment, protection, and, when harnessed to democracy, voice or collective self-determination. As a form of power law operates on people, on their relationships, and on things (including their bodies).

The image of the human self that occupies the heart of law emerges most clearly in connection with the criminal law and its emphasis on the nexus of responsibility (self-control) and punishment (desert). But it also more generally underlies the very idea of rights as being founded upon uniquely human qualities. Property rights, civil rights, human rights all refer back to either the will and intentions of autonomous subjects or to some other distinctively human characteristics. As John Lawrence Hill notes, "the case for personal liberty crucially depends upon the core self of classical liberal thought" (1997, 308–309) and "the first element of the core self is personal freedom, or what is popularly known as freedom of will" (323). Further, "The central idea underlying the concept of the unity of the self is the notion that there is a will that stands over and above one's various, often conflicting desires" (327). This image provides the foundation upon which justifications of the exercise of legitimate force or compelled material redistributions are built. As legal theorist Kent Greenawalt reminds us, "[I]f legal interpretation is fundamentally normative, that is, if it deals with questions of what people should do, [and, I might add, may exercise force to compel them to do it] an aspect of much legal interpretation is constructed of what people are like and what they aim to achieve" (1992, 75). The basic tenets of subjectivist humanism provide the foundation for these constructions of "what people are like."

"Humanism" entails *both* the idea that the individual human subject has sufficient unity and stability to sustain the attribution of consciousness, will, and intentionality over time, *and* "the idea that human acts can not all be reduced in materialistic or deterministic fashion to forces beyond our control" (Hill 1997, 292). According to Hill, the

"humanist paradigm is the paradigm of folk psychology, the view that persons have minds, that we make decisions, and that we are responsible for our actions." Like others, he further identifies "the idea of the person, or the self" as "the most important concept in moral and legal thought" (292). Legal discourse would thus seem to require a conception of the human subject that includes these characteristics as a condition of its own intelligibility. This subject is the principal subject of liberal, humanist modernity. It corresponds to the self that distinguishes itself from nature in the emergence stories. Law requires that those to whom its commands are addressed be thinking, intending, autonomous, moral subjects and that they have sufficient will, self-control, and freedom to be held accountable for their actions and promises. Without this neither blameworthiness nor praiseworthiness (merit or desert) make any sense. Without this sort of subject, law as it is conventionally understood cannot be. It is the existence of the self so construed that distinguishes humans from nonhumans. It also distinguishes the sort of law identified with *nomos* from the physical laws that govern the behavior of tornados, woodchucks, viruses, and antibodies. This commitment to a humanist vision of the self commonly entails a commitment to dualist conceptions of nature. Dallmayr frames the issue like this: "[H]umanism in its customary meaning was an outgrowth of Western philosophy and more specifically, Western metaphysics; metaphysical thinking, in turn was marked by the predominance of the subject–object polarity: in other words, by the proclivity to treat the entire world as an assembly of objects or phenomena amenable to inspection by a detached mind or consciousness" (1981, 32). Placing greater emphasis on the nature question, Cahoone says,

> [W]ithin a subjectivist framework it is more or less inevitable that nature and physical reality have no *inherent* value, and that subjectivity be taken as possessing greater inherent or moral value than nature . . . In general, subjectivism implies that the individual thinking subject is the only intrinsically valuable worldly entity, and consequently, the center of all value within the bounds of the finite world. (1988, 24)

This humanist view of humanness is, of course, centered on the primacy of the immaterial over the material; on an image of mind as separate from and controlling body. It has been interpreted as a metaphysical repudiation of the body even as the body is a primary site of punishment. Law, then, as conventionally portrayed, is incompatible both with strong forms of determinism which locate causal efficacy

beyond the control of individual agents, and with any social philosophy which rejects the idea of a "core" or unitary self. A deterministic world, that is, a world in which strong forms of determinism are (or are believed to be) accurate, may be "lawful" in the sense of exhibiting regularities, but it would also be one in which law in a normative or jurisprudential sense would be a farce. Such a vision of law would likewise not be tenable in a social world understood as being populated by radically fragmented and unstable "selves." While antihumanist social thought is at least as old as the Counter-Enlightenment and the rise of Romanticism, in our time humanism is under attack from at least two very different philosophical sources. So too, then, is a view of law and legality predicated on humanistic visions of the sovereign self. The first source of critique is associated with the strand of social thought identified as structuralism and its unruly progeny, poststructuralism and postmodernism.

The postmodern subject

Speaking of structuralism as "a broad, interdisciplinary movement whose heterogeneous components are held together chiefly by their common opposition to subjectivity and to the conception of man as a self-centered and self-directing agency," political philosopher Fred Dallmayr says that "in the eyes of some thinkers, self centered humanism is a raging virus whose effects are still spreading through Western life . . . according to still others, the humanist legacy is already moribund if not defunct – and only seems to thrive, due to cultural lag and ideological artifacts" (1981, 21). (One might note the naturalistic metaphors used to advance this claim: what work, for example, does "virus" do in this picture?) Dallmayr is here discussing the structuralisms of Marx, Lévi-Strauss, and their followers. These are social ontologies which seem to privilege structure over (humanist) agency. Agents, selves, subjects are just along for the ride.

While structuralisms repudiate the plausibility of subjectivity as conventionally understood in humanist thought, poststructuralism and postmodernism repudiate the coherence of these structures without recuperating the subject. In contrast to the idea of the self as a unitary, cohesive, self-knowing psychological entity, the self in postmodern thought is more likely to be regarded as "multiple," "shifting," "flexible," or even incoherent. The dominant self, the idea of the subject, and the very category "person" are viewed as cultural, historical products constituted by various discourses – not least of which is legal discourse.

Jennifer Wicke, for example, describes Lyotard's view of "subjects [as] bundles of activated discursive shards, where there is never to be any one exclusive or overpowering identity" (1991, 464). In the view of legal scholar James Boyle, postmodernism

> emphasizes the multitudinous, cross-cutting definition of each of us as subjects, the determinants of class and race and age and group and religion and sexual orientation and role and mood and context constitute us in a changing pattern from moment to moment. From their varied intersection spring the postmodern self. "I" am merely the place where these things happen. (1991, 521)

In a more apocalyptic tone john powell [*sic*] notes that "from a jurisprudential standpoint, the implications of rejecting the self as unitary, stable and transparent are immense and pervasive. While it is impossible to know the myriad ways in which this rejection will impact law, it is certain that the implications will go to law's very foundations" (1997, 1485). Wicke agrees: "[T]he neutralization of identity into a quiver of self-inventoried alternative personalities leaves the legal subject in pieces" (461). With this emphasis on contingency, contextuality, and fluidity the self would seem to be characterized by a form of radical indeterminacy. Clearly, all is not well with law's chosen subject.

The problem for law might then be that this construal of the subject provides *not enough nature* (essence, order) to give foundation to an intelligible human subject. In postmodern renderings the subject is constituted by *discursive* shards and by the intersection of *categorical* "positions." It is not centered on physicality so much as decentered with respect to representations of the physical through suspect procedures of "naturalization." In any case, from a conventional legal perspective, the antihumanist, postmodern subject is an "unnatural" absurdity that law cannot seriously entertain. It entails the evaporation of the "I" who makes a promise and signs a contract; the "I" who has investment-backed expectations; the "I" who cheats, lies, kills and the "I" who doesn't; the "I" who deliberates or premeditates; and the "I" who might complain that her rights have been violated. The postmodern subject is a vapor to which the attribution of rights is as senseless as the attribution of consciousness to the shadow of a small passing cloud and to which the assignment of responsibility is as meaningless as the assignment of guilt to the man in the moon. The postmodern legal subject is an unintelligible whirlwind, a psychedelic phantasm who is neither a "who" nor even really a "what." It is ungraspable even to itself, because,

of course, there is no self at either end of the grasping. If the postmodern subject were an accurate rendering of humanness – or, if it were generally accepted as accurate – law as it regards itself would be impossible. The possibility of both order and justice would also evaporate. "By rejecting the modern self, postmodernism strikes at the very foundation of modern jurisprudence, the legal subject. Consistent with modernism and social contract theory, the law is largely premised on the notion of an *a priori* self whose 'neutral' rights have priority over social good. This self, however, is clearly a fallacy" (powell [*sic*] 1997, 1509). It must be said that, although these ideas have a certain currency in elite academic circles, including, as the above sources indicate, *legal* academic contexts, they do not seem to have affected the workaday happenings of law. But, if, as Boyle states, "contemporary legal and political argument can best be understood as a debate over the essential characteristics of the subjects whose actions these arguments describe and proscribe" (1991, 524), this debate is largely implicit in the ways in which the detailed characteristics of the subject are filled in by judges.

The materialist self

Even apart from these sorts of questions, "legal thought has," in Hill's view, "struggled . . . with the vexing question as to where to draw the line between the self and the world" (1997, 296). In the context of the present work, this is the trouble about how and where to draw the line between "human" and "nature." Where does one make the cut? This is particularly difficult now because not only is the idea of the unitary self the target of profound skepticism within the legal academy, but so is the very notion that there is any line between "the self" and the physical world. As Daniel Dennett phrases the options, "[O]n the one hand we have the image of the agent, the doer, the locus and source of action rather than mere reaction . . . On the other hand we have the image of the physical human as no more salient, really, than domino number 743 in a chain of a million dominoes" (1984, 76).

The second source from which challenges to legal humanism emerge has the potential, perhaps, to hit closer to home – especially as it derives from a different form of humanism itself. This source is science or, perhaps more accurately, *scientism* as manifest in such modes of thought as sociobiology, which tends to treat human behavior as determined by genetic or evolutionary imperatives (Wilson 1975); behaviorism, which challenges the usefulness of the concept "mind" (Skinner 1974; Hill 1997), or, more recently, eliminative materialism. This last source is a

philosophy basing itself on contemporary neuroscience which dismisses the very idea of "mind" as other than physical. One potentially troubling aspect of this theory is the assertion that "there is simply no such thing as beliefs, desires, and intentions, or any other mental states and that we all operate under profoundly incorrect views of human cognition and behavior" (Lelling 1993, 1492).

In *Punishment and Responsibility* (1968) H. L. A. Hart writes, "It is characteristic of our and all advanced legal systems that an individual's liability to punishment, at any rate for serious crimes carrying severe penalties, is made by law to depend, among other things, on certain mental conditions" (28). In this view there must be a "mind" that is construed as the free originator of actions. The trouble is that, as Lelling says, "as science begins to explain the deeper secrets of nature, it becomes increasingly difficult to attribute a phenomenon to some ethereal, inscrutable ingredient ['mind'] and leave it at that" (1993, 1493–1494). That seems to suggest that the very foundations of law, the ascription of responsibility, and many of the more common justifications of punishment become, at least, problematic. In his influential essay "Causation and the Excuses" (1985), Michael Moore puts it this way: "[T]he law demands more than that we pretend people are free and thus hold them responsible as if they were. A just legal system requires people to be truly responsible" (1530). In an article pointedly titled "Can Law Survive Cognitive Science?" (1991), Rebecca Dresser writes:

> Much of our system of legal rules and responsibilities absolutely depends on the presumption that people have precise, content-identified mental states, that these states cause behavior, and that others can determine when a person has or had a mental state of a particular content . . . Cognitive science could herald the abandonment of *mens rea* and all the other subjective mental states determinations so crucial to the law. (35)

Of such scenarios, she asks, "Would we indeed lose the normative moral framework in which law makes its home?" Steven Stich, a proponent of eliminative materialism, answers "yes." "If we had to renounce folk psychology," he says, "we should probably have to reject notions of personhood and moral agency as well" (1983, 242). In which case, according to philosopher Lynne Rudder Baker, "moral and legal practices would become senseless" (1987, 130).

Pragmatically, as well as morally, there are consequences of the naturalization – or dehumanization – of mind. Dan-Cohen emphasizes the

point: "If we learn that law applies some of its most draconian measures to the operation of our free will, we may respond by progressively contracting the latter's domain. We may increasingly describe actions in a deterministic vocabulary designed to place them at the periphery of the self or even completely outside its boundaries" (1992, 1002). The "we" here, one supposes, includes criminal defendants, defense attorneys, expert witnesses on human behavior, and the judges and juries that they seek to persuade. Again, what is at stake, among other things, is the dualistic vision of reality assumed by subjectivist humanism and all that depends on that vision. John Hill claims that

> determinism does not pose a challenge to the core self simply because determinism may negate the case for free will, where free will is itself a basic element of the core self. The determinist world view constitutes a much more basic assault on the notion of the self insofar as determinism plays havoc with any principled distinction which might be drawn between the internal and external worlds. Determinism provides not only that everything we do is a function of antecedent causes, but that everything we are is a function of these causes, and is thus a product of the external world. If determinism is true, then there may be no principled way of including some aspects of our nature as part of who we are in some essential way, while excluding others. (1997, 332)

The problem is that this view obliterates the distinction between inside and outside. Nature wins because only nature is left standing.

Initially it seems as though these materialist and postmodern criticisms point in opposite directions, and to some extent this is an accurate statement. The legal subject appears at the beginning of the twenty-first century to be pulled asunder. From one side it is rendered as radically indeterminate, as fluid, shifting, and multiple. From the other side it is radically determined and fixed. Neither of these pictures is acceptable to law as neither can provide the justificatory foundation for the tasks of law, either as a "site" of the larger cultural project of enlightenment, humanist, liberal modernity or, in its own terms, of providing order and justice. But seen another way, they are, perhaps, versions of the same posthumanist story. This is a story centered on the essential unfreedom of individual humans. In one version of this story subjectivity is not the unmediated experience of the core and unitary self but is simply the effect of social structures (structuralism) even if the intersection of these structures is itself indeterminate (poststructuralism). Materialism simply locates the source of unfreedom in physicality rather than sociality

or historicity, but the status of the subject as cultural myth is the same. And again, the problem for law is the same.

Those whose job it is to work with and within legal discourse must fend off challenges to their preferred legal subject in order to maintain the very intelligibility of law. This is especially so in that branch known as jurisprudence, whose specific task is the production of justificatory renderings consistent with the larger cultural project of Enlightenment, humanist modernity and sufficient to plausibly legitimize the organized use of force. That is, workers within the conventional legal paradigm must continually reassert and reaffirm – if even implicitly – what is, after all, a controversial, if still hegemonic, conception of the human vis-à-vis nature. As we shall see, materialism is the greater threat in part because of the social significance of scientific discourse vis-à-vis the more suspect elite discourses of philosophical antihumanism.

The point for us is simply that law is not and cannot be neutral with respect to at least *some* arguments about "humans and nature." To the extent that some conceptions of nature are incompatible with the humanistic subject they threaten the intelligibility of law – at least in its own terms. A particular difficulty arises, however, because of the peculiar relationship of law to science as distinct but mutually reliant forms of knowing, a topic to which I shall return below.

The subject of judging

Modern legal thought is humanistic (or, in Cahoone's term, subjectivist) in another no less fundamental and perhaps more problematic sense. While the relationship of law to its subjects requires a humanistic vision of the self insofar as it assumes, enforces, and reinforces the idea of free will and the repudiation of naturalistic determinism, the specific cultural practices associated with adjudication involve or manifest precisely those features of humanness most highly esteemed by humanist traditions of social thought. As a practical matter – and also as a matter of conventional analysis – what judges do occupies the epicenter of law. Judging – and the very capacity for judgment – draws on those aspects of *human* being – rationality, deliberation, the discovery of truth, the creation and ascription of meaning, a moral sense, and, perhaps, compassion – which for dualists most sharply distinguish humans from the rest of creation. Indeed, as one legal scholar put it: "What makes us human is our ability to shape and interpret rules according to the contexts in which we find ourselves" (Wolfe 1992, 382–383). Judgment is a

core component of what Hannah Arendt called "the life of the mind." While animals and machines may discern, only people judge.

Judgment is a cognitive activity. It is understood and experienced as a process, an unfolding composed of moments of assessing, distinguishing, weighing, or balancing. A judgment is also a result. It is the point at which the process culminates. And judgments are, of course, consequential. Judgment, according to philosopher Mark Thomas Walker, "is the very paradigm of voluntary action" (1996, 103). It is a doing and it is done. Of course, within either poststructuralist or materialist frames of reference there is no problem with this picture that a summary dismissal cannot handle. The denial of humanist conceptions of mind from whatever source would apply to judging as much to believing or willing. But within humanist frames of reference, and more specifically within conventional modern legal thought, subjectivist aspects of judgment are the source of serious (political) concern. Judges, the critics from either side might say, are not the subjects that they think they are.

We all judge, but those whose role, title, or identity is Judge do so within different institutional and ideological contexts from the rest of us. Trial judges or members of appellate tribunals represent the voice and power of the state. They are presented with facts about trouble in the world – including lower court rulings as facts – for review. In adversarial systems they are presented with contending construals of facts, of law, and of their relationship. They sift and weigh. They confer. They apply law to fact. They reason and attempt to achieve closure. They interpret and render – that is, *make* – judgment. They compel on the basis of judgment. In appellate courts they often also produce a reckoning of judgment in the form of an opinion which purports to trace the reasoning which compelled the judgment. As a textual artifact the judicial opinion is a device whereby the force of reason and meaning is transformed into the justification for the exercise (or withholding) of physical power. Many judgments obligate legal subjects to do something they would rather not do or to have done to them something they would want to avoid. And virtually every such obligation carries with it, explicitly or implicitly, an "or else" that most often refers to physical pain or dispossession.

Among the core ideological or contextual elements of professional judging is the Rule of Law idea. This idea posits as a fundamental condition of legitimacy the view that law (and the judicial articulation of law) does not emerge from the subjective or interested points of view of whoever happens to be occupying the institutional role of judge. Law

and its coercive commands are legitimate only insofar as law can be characterized by generality, neutrality, stability, and consistency, that is to say, "objectivity." As William Edmundson puts it:

> In liberal treatments of adjudication and the "rule of law," the common supposition is that the state can legitimately exercise its vast coercive powers against the individual only if it does so on the basis of preexisting legal rights and duties. This stricture, traceable to John Locke, is the key component in the liberal's conception of the rule of law. (1993, 560)

But, he continues, "Unless there are specific legal rights and duties that preexist a judge's decision, which are there for her to get right or wrong, the legitimacy of that decision is problematic from the Lockean standpoint. This Lockean Stricture on legitimate state coercion is a commitment so deep that it is least acknowledged even where it most dominates liberal theorizing" (593).

A sharp distinction between politics and law is axiomatic in modern legal thought. When "politics" is understood as the arena in which a multitude of subjective interests and desires collide and in which compromise can occur it is the antithesis of law. Politics is about the heat of clashing wills. Law signifies the singularity of cool reason. Another part of the ideological context of American legal practice concerns its relation to democracy, between "making" law and "applying" law. Maintaining the plausibility of this distinction has been a central preoccupation of American legal theory and practice. While politics produces legal directives such as statutes, ordinances, and regulations (and while judges are either elected themselves or are political appointees), once a bill becomes a law judges are obligated to apply it in an objective, neutral – that is, nonpolitical, disinterested – manner. Because the United States is a constitutional order, it was determined that no product of the political process may be at variance with this fundamental, foundational component of law. The doctrine of judicial review – invented by judges – empowers judges to invalidate these lesser legal directives if they are seen not to comport with the constitution. In constitutionalized contexts, then, law is not only *other* than politics, it is *higher* than politics, as reason is a "higher" human faculty than will.

The Rule of Law idea is often described as nothing less than the foundation of civilization to the extent that it implicates real constraints on those who govern – including, of course, judges. As we saw in the preceding chapter, Freud chose the appearance of the Rule of Law as signaling the birth of civilization. The Rule of Law is always contrasted

with the Rule of Men, that is, rule according to brute force of will. "It is the claim of our political tradition that authority is not vested in individuals who may exercise it arbitrarily, but in laws, which individuals apply without personal discretion. We are governed by laws, not by men, because legitimate government must rule by 'settled, standing laws' not by Absolute Arbitrary Power" (Zapf and Moglen 1996, 486, quoting Locke). In more practical contexts, the sharpness of the distinction between law (and here again the focus is on judging) and politics entails the necessity of insuring that when judges judge they are speaking the law and not acting politically or according to their own subjective preferences. That is to say, in some meaningful sense they may not be "men." There is, then, the problem of how to provide the necessary assurance that we do, in fact, live under the Rule of Law. The objectivity, neutrality, legitimacy, stability, predictability, and consistency of law and the possibility of its successfully performing its functions of maintaining order and engendering justice are all located in the person who happens to be judging. If this cannot be sustained then the judge's "IT IS SO ORDERED" may be too transparently seen and experienced as brute force parading around in a black dress. One difficulty of sustaining this vision concerns the problem of indeterminacy: the instability, context-dependence, and ambiguities of legal meaning. Mark Tushnet, a prominent critic of the Rule of Law myth, says:

> As I take the indeterminacy thesis, a proposition of law (or legal proposition) is indeterminate if the materials of legal analysis – the accepted sources of law and the accepted methods of working with those sources such as deduction and analogy – are insufficient to resolve the question, "Is this proposition or its denial a correct statement of the law?" If a litigated case turns on an indeterminate legal proposition, a result favoring either the plaintiff or the defendant is equally well supported by the legal materials. (1996, 342)

And Steven Burton, a prominent exponent of the possibility of neutral judging, acknowledges what is at stake should indeterminacy be found to be rampant in legal practice.

> A key tenet of constitutional democracy requires official power of any kind to be used only when the specific use is justified. Related Rule of Law values require judges, in particular, to use their powers only when applying the law . . . But it is hard to understand how a judge is applying the law when it is indeterminate and the outcome is discretionary. Discretionary judicial decisions can seem indistinguishable from more obvious kinds of domination. (1992, 14–15)

Given the ideological and practical conditions and given the high stakes, this is by no means an easy job of work.

This is the constitutive problem of conventional American jurisprudence. It informs important aspects of legal education and professional practice. The central questions are: Is it possible to depoliticize judging? If it is, how is it to be done? In a sense, every occasion of judging puts this question into play. In the United States there are numerous institutional and procedural arrangements whose existence presupposes the reality of the problem. Among the most important of these is the interlocking, hierarchically arranged system of appellate courts. But, in an important sense, these institutional arrangements may simply serve to relocate the problem. Indeed, in appellate contexts the job of insulating the legal from the political may be even more difficult. Here, troubles are more likely to be "hard cases" and the play of dissenting, concurring, and reversing opinions more clearly reveals that a particular "final" judgment was not, in fact "necessary" at all but was simply one among a number of plausible alternatives. The aggregate documentary product may be more clearly, if implicitly, informed by divergent theories – that is, by contested understandings – of law, of reality, or of the practice of judging itself. Appellate court decisions are quite easily interpretable as irreducibly ideological.

Desubjectification in theory

The problem never goes away. The problem is that judges are human as "human" is conventionally understood by subjectivist humanism. The basic task of maintaining the boundary between law and politics has involved a (so far) never-ending search for objectivity, for something that could constrain the subjectivity of judges and the manipulability of legal meaning. The textual products of judges are therefore driven by a necessity for necessity. That is, because the practice has been constituted as *definitionally* antipolitical there exists a political necessity for some figure of determinacy sufficient plausibly to depoliticize practices whose end is often the coercion of legal subjects. To quote Edmundson again: "[L]iberal legal theory is trapped in a conceptual dilemma – liberal theory must exclude normative judgment from adjudication to keep judging neutral, but it must admit normative judgment into adjudication to make it determinate" (1993, 574). But note, it is not "law" per se that needs to be justified or legitimated in particular cases. It is the actions and consequences of judging, of articulating the meaning of

law, that need justification in the face of available, plausible competing interpretations.

Historically there have been a number of candidates for where to find the requisite determinate constraining force. It has been located in language, in logic, in the force of convention, tradition, history, craft, or professionalism. It has been found in accounts of social reality and, what is most important for the present project, in science stories about "nature." Nature, it turns out, is one of the principal devices for depoliticizing and legitimizing legal practice and the violence that often follows from judgment. (I should add here, though, that while it is possible to say some things about the general capacity – or incapacity – of judgment and about the general institutional and ideological contexts within which legal judgments occur, the instances of judgment are always and irreducibly situational. Judgment is always judgment *of* or *about* something.)

A central problem of legal theory, then, can be described as the problem of humanness. It can be seen to be a version of the problem of the subject. It is revealed most clearly in regard to the problems of interpretation, the indeterminacy of legal meaning (and so, the contingency of what the subject says). Modern legal theory – if not so directly legal practice – is preoccupied with this problem. Here I just want to sketch, in the same cataloging fashion as earlier sections, some of the efforts to theoretically naturalize some aspect of the legal so as to provide the grounds for plausibly constraining the wayward judicial subject and "solve" the political problem at the heart of modern American law. But while my initial focus is on the self-conscious practice of legal theorization, the ways in which these theoretical debates have played out are less important than the fact that a range of *practical* styles of reasoning, narrative devices, and rhetorical techniques have emerged out of these debates. In the context of my larger project my focus is the varieties of naturalization of and in law.

Formalist solutions

Broad surveys of professional American legal theorization conventionally tell a story of the rise and fall of various schools of legal thought. These stories may begin with nineteenth-century tensions between natural and positivist conceptions of law. Here positivism seems emblematic of the move to denaturalize the legal. The ascension of positivism in opposition to natural law ideas itself replicates the emergence stories I discussed in chapter 4. On the other hand, as one scholar has written,

"[T]he positivist thinking that pervades our view of law . . . sees law as a static structure out there and different from us: an abstract system of rules, principles, doctrines and so on, which have an existence independent of the process of their creation, construction and application" (Davies 1996, 40). This neatly expresses the tendency of American jurisprudence to oscillate between denaturalizing and renaturalizing law. This is perhaps an expression of the liminality of law vis-à-vis nature as manifested in the resister of theory. The last third of the nineteenth century witnessed the secularization of higher education and the related professionalization of legal education. As I mentioned in chapter 4, the scientization of legal study associated with the work of Christopher Langdell at Harvard posited "the law" as an interrelated system of principles and rules that was "object"-like and so amenable to something resembling scientific analysis. The relocation of legal education in universities provided some of the sociological contexts for the search for a "scientific" basis for legal education.

> Significantly for the future of the legal academy, Langdellian law professors supposedly offered two distinctive services (or products) that were unavailable elsewhere yet needed by American society. First, the Langdellians produced scientific knowledge of law through their legal scholarship, and, second, they produced competent lawyers by rigorously training students in the now highly specialized field of scientific law . . . With natural law thus repudiated, they necessarily sought to ground the legal system elsewhere. Specifically, the Langdellians became rationalists, relying predominantly on abstract reason or logic. (Feldman 2000, 92)

Just as chemical and botanical analysis, guided by rigorous adherence to method, yielded irrefutable facts about nature, so methodologically rigorous analysis of "the law" was to yield correct propositions about legal relations.

The method of this legal science has come to be known as "formalism." Formalism is itself a contested term in contemporary legal thought. In Michael Rosenfeld's words, formalism "maintains that something internal to law rather than some extra-legal norms or process determines juridical relationships and serves to separate the latter from nonjuridical social relationships including political ones" (1992, 170). That is, by neutralizing the subject and naturalizing the object, formalism buttressed the antipolitical character of legal practice. Roberto Unger describes formalism as "a commitment to . . . a method of legal

justification that contrasts with open-ended disputes about the basic terms of social life, disputes people call ideological, philosophical, or visionary. This formalism holds impersonal purposes, policies, and principles to be indispensable components of legal reasoning" (1983, 1). But "formalism" also names a style of judicial reasoning or judging. "Within the formal style," writes Pierre Schlag, ". . . the space of the individual subject is narrowly circumscribed because any active contribution of the individual subject could only interfere with (not help maintain) the objective order of meaning" (1991, 1634–1635).

Formalism or conceptualism is a stance with respect to the task of judging that places the preponderance of work on the elucidation, clarification, or purification of legal meaning that inheres in doctrines, rules, statutes, constitutional provisions, deeds, contracts, and other legal texts. The gaze of the analyst is as wholly "internal" to the domain of the legal, the lexicological, as it can possibly be. What formalism is good for is the apparent erasure of the analyst or judge as an active creator of meaning – and so, as an agent in the transmission of violence that may follow from that meaning. It allows the view that the judge is conveying the essence of the legal object. These essences and their logical, necessary connections *compel* the judge to find and enunciate legal meaning. In important – or at least sufficient – ways there simply is no subject at work. Therefore, there is no problem. As in the natural sciences, any competent analyst should find the same law. Likewise, in theory, there is no problem of indeterminacy because properly analyzed legal problems admit of only one right answer. In a sense, the postmodern subject could be the ideal judge to the extent that this subject names the depersonalized effect of an overarching, structural discourse. Its serviceability is limited, though, by the understanding of the radical contingency and instability of how the discourse would manifest itself in any given case.

Realist solutions

Almost from the beginning the scientistic naturalization of legal practice that formalism sought to provide was subjected to criticism from within the legal academy. As Oliver Wendell Holmes Jr. famously put it in 1881: "The life of the law has not been logic it has been experience" (1). In 1906 Roscoe Pound, then Dean of the Harvard Law School, denounced formalism as "mechanical jurisprudence" and sought to replace it with a "sociological jurisprudence." From the 1910s through the end of the 1930s criticisms of formalism became sharper and originated from an increasingly diverse range of sources. Most narratives of

twentieth-century American legal thought identify the coalescence of antiformalist critiques in the 1920s and 1930s as Legal Realism (Duxbury 1995; Feldman 2000).

For the purposes of the present discussion there are two things to note about the realist challenge to formalism. First, as initiated by Holmes and Pound, and as explicitly asserted by many who self-identified with realism, realism was predicated on the (provisional) *humanization* of judges. "The place to begin," wrote the prominent realist Karl Llewellyn, "is with the fact that the men of our appellate bench are human beings . . . Behind decisions stand judges; judges are men; as men they have human backgrounds" (1960, 53). Or, as the scholar-jurist Benjamin Cardozo put it, judges are "subject to human limitations . . . [They] do not stand aloof on these chill and distant heights . . . The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by" (1921, 168). For some contemporaries, this realist humanization of judges (and judging) implied the demolition of the Rule of Law idea and the demythification of law. As such, realism was denounced as nihilistic and relativistic (Kennedy 1941). For the realists, though, the critique of formalism was simply a necessary first step in the reformulation of the basic problem of law so as to render it soluble. In fact, for many prominent realists the problem with formalism was that the image of science that informed "legal science" was *not scientific enough*. "The debate between formalism and realism was less a debate between a naturalism and an anti-naturalism as it was an argument about alternative approaches to naturalization" (Duxbury 1997, 68). Pound made the stakes clear when he wrote in 1908 that "Law is a science in order to eliminate so far as may be the personal equation in judicial administration to preclude corruption and limit the dangerous possibility of magisterial ignorance" (1908, 608).

But by the 1930s, perhaps alarmed by the realist disavowal of "principle" as the guiding force of law and of the constraining force of rules on judges, Pound had become a critic of "the newer jurisprudence." Setting up his target, he wrote, "By realism they mean, fidelity to nature, accurate recording of things as they are, or wished to be, or as one feels they ought to be . . . faithful adherence to the actualities of the legal order as the basis of a science of law" (1931, 697). "There is nothing upon which the new realist is so insistent as on giving over all preconceptions and beginning with an objective scientific gathering of facts" (700). This was all to the good, but where the realists went wrong, as Pound saw it,

was in their renunciation of the significance of the underlying animating principles of law. Realists, according to their critics, were courting nihilism.

In a response defending realism, Llewellyn echoed this theme. "Before rules, were facts; in the beginning was not a word but a doing" (1931, 1222). Realists, he said, "want law to deal, they themselves want to deal with things, with people, with tangibles; with definite tangibles and observable relations between definite tangibles – not with words alone . . . They want to check ideas and rules and formulations by facts, to keep them close to the facts" (1223). Later, Felix Cohen, another realist, attacked formalism as "transcendental nonsense" and pronounced: "[A]ny word that can not pay up in the currency of fact, upon demand, is to be declared bankrupt, and we are to have no further dealings with it" (1935, 823). Similarly, Cardozo wrote, "A jurisprudence that is not constantly brought into relation to objective or external standards, incurs the risk of degenerating into . . . a jurisprudence of mere sentiment and feeling" (1921, 106). The imagery of "degeneration" here is significant in light of the emergence stories examined in chapter 4. As Gary Peller has said in "The Metaphysics of American Law," realists believed that "Determinacy could be achieved by focusing on the objectively observable tangibles present in the cases, which determined the true similarity or difference that the legal categories obscured. Legal activity then could be seen as determinate to the extent that it was a derivative function of these facts" (1985, 1242). The significance for the internal problem of legitimacy was that, "Unlike politics, law could be determinate because it could be ruled by facts, the predictable, observable, real-world consequences of particular decisions in the objective social world" (1253).

This obsession with facticity itself did not go unchallenged even, and especially, by other realists. I shall return to this below. The immediate point is that realism represented an alternative projection of science (and its depoliticizing, desubjectifying capacity) onto the practice of judging. Where formalism was modeled on an image of deductive science, realists modeled their image of practice on empirical science. The science of realism was based on a conception of social science that itself drew on images of empirical physical science. "Many realists . . . in their reaction against formalism, attempted effectively to displace one dominant conception of legal science by replacing it with a different conception" (Duxbury 1995, 11). In fact, what some realists wanted to do was to be able to *predict* legal actions (how people respond to law, how

judges were likely to act) and to engineer legal rules in order to create desirable outcomes. Science was a powerful icon precisely because science was demonstrably powerful in predicting and controlling the unfolding of desirable futures. Formalism and realism, then, were generationally specific varieties of the same solutions to the same underlying political problem.

One significant differentiating characteristic, though, is revealed in how the two approaches were organized in terms of the "inside/outside" boundaries of the legal. Where formalists set up sharp boundaries between law and nonlaw and focused nearly exclusive attention on the former, taking as their objects of analysis legal concepts, categories, boundaries, and internal relations, the realists insisted on the dependence of words, concepts, and rules on extralegal facts. The words of law and the commands of law must be subordinated to the facts of reality. They insisted on the primacy of the world. To determine the facts that would constrain the words they advocated greater reliance on the products of (initially, mostly *social*) sciences. When we consider below contemporary expressions of formalism and realism not as "schools" or "theories" but as available *styles* or *narrative techniques*, the significance of the distinction between them for my argument will become clearer. For now I can say that formalism connotes a tendency to reason from words to world, while realism connotes a tendency to reason from world to words. In effect the formal style says, "given that this is what the words say, this is what the world must be like," while the realist style says, "given that this is what the world is like, this is what the words must mean." But, as critical legal scholars pointed out some time ago, there is no neutral position from which one might adjudicate these competing styles.

While to some extent the realist paradigm irrevocably changed the terms of legal scholarship, formalism has in its own way endured. Likewise, the problems that each sought to address – the humanness of judges and indeterminacy or plasticity of rules – remain. But let's return for a moment to the realist answer. One part of the answer, as we have seen, was to put faith in facts. I shall return to this shortly. Another part of the answer that I want to mention briefly was the notion that practice would constrain itself. In *The Common Law Tradition* (1961), Llewellyn, after humanizing "the men of our appellate bench," continued by saying that "one of the most obvious and obstinate facts about human beings is that they operate and respond to tradition and especially to such traditions as are offered to them by the crafts they

follow . . . Tradition grips them, shapes them, limits them and guides them" (53). What arises from immersion in the craft of judging is what he called "horse sense." This was "the balanced shrewdness of the expert in the art." It is, more pointedly, "a depersonizing and stabilizing factor in judging" (121). Lest this anchoring in conventionalism seem an unambiguous gesture toward a second nature argument, though, he also said that "men also make use of tradition, reshape it in the very use, sometimes manipulate it to the point of artifice or actual evasion if need, duty or both seem to require" (53). This proviso, of course, undoes whatever "gripping," "shaping," and "limiting" was supposed to be accomplished and throws us back to "horse sense." Less equivocally, as Benjamin Cardozo put it in *The Nature of the Judicial Process* (1921): "[L]et some intelligent layman ask [a judge] to explain [judging]: he will not go very far before taking refuge in the excuse that the language of the craftsmen is unintelligible to those untrained in the craft" (9). But, for Cardozo, a subjectivist conception of judging, "exaggerate[s] the element of free volition. It ignores the factors of determinism which cabin and confine within narrower bounds the range of unfettered choice" (170). Again, beyond an appeal to conventionalism and other rather unspecified "factors" there is little to convince the skeptic.

Within the larger modern cultural configuration law has predominantly been construed as antinature, though, as we have seen, the naturalization of law has also been a recurrent thematic. Within the specific cultural domain of professional American jurisprudence whose focus of attention has centered on the figure of the judge, though, the problem of humanness and its relation to contingency, indeterminacy, and legitimacy has been a more immediate and explicit concern. The problem, in its various expressions, has commonly been addressed through varieties of naturalization. The mainlines of American jurisprudence are illustrative of the constitutive role of nature talk and science talk in legal discourse. They exemplify the abiding attraction and serviceability of "nature" to render law and legal practice in particular ways so as to be plausibly responsive to its fundamental political problem. Where formalism seeks to naturalize "the law" as a unified, systematic object of analysis and to describe the analyst in the neutrality conferring idioms of scientism, realism draws on a vision of "external" empirically discernible facts to do the same job. Here, though, the practitioner is perhaps conceived as being less in the image of a laboratory scientist and more as an engineer crafting the tools adequate to the task of legal and social reform. While the vision of science differed markedly, the work

that scientizing law was to accomplish was the same. As philosopher of technology, Lorenzo Simpson says, "The world, the object domain of modern science, is transformed into a picture, a representation, over which we, the subjects of inquiry, stand. We, the subjects for whom the world is a picture, are out of the picture. That is, we lose our place in the world" (1995, 35). This distancing is precisely what law requires. "Science . . . requires us not to risk who we take ourselves to be, but rather to set ourselves aside" (40). But Simpson also says that "This metaphor entails a distance between 'man' and world. When the world comes to be grasped as a picture, it loses its claim on us (and nihilistic consequences follow)" (35). This was precisely Pound's worry. Also, in each, though in different ways, one can discern traces of the deeper constitutive ambivalence vis-à-vis nature. Positivism as initially an anti-naturalism was turned by legal science into a variant of naturalism and realism as initially signaling a rehumanization of judging attempted to naturalize law along different lines. Both pulled and repelled by science imagery and nature talk, the main lines of American legal thought simply manifest the same ambivalences at work in the culture more generally.

THE AESTHETICS OF REPRESENTATION

Professional legal theorization is one sort of practice and judging is another. Clearly they are sociologically connected in a number of ways. But, as I suggested above, at the level of practice, formalism and realism are less important as "theories" than as styles of reasoning or as discursive or narrative devices for addressing exigent tasks of stabilizing legal meaning and manufacturing necessity, domesticating indeterminacy, and grounding the legitimacy of the texts (the judgments) within which they are found. This will be clearer when, in Part II, we examine judges confronting the nature problem directly.

Look at the facts

Facts are wonderful things. Even cold facts, hard facts, brutal facts can give comfort. Facts are what truths are made of, or, perhaps, truth itself is only congealed facts. To have a fact is to possess a flake of certainty. They are solid, sure, and sometimes weighty. They are object-like. As such they may anchor judgment in an earthly "real." To face facts is to be constrained. Legal facts come in many different forms. One way of looking at law is to see it as enacting a sort of transubstantiation

whereby words – signatures on contracts, subparts of complex regulations, phrases from previous cases, or constitutional fragments – become solid, weighty, cold facts which can then be returned to the world of words: propositions, arguments, reasons, or commands. In that literary genre that is an appellate court opinion, facts may be retrievable from a number of sources including the troubles that gave rise to the case, or the documents surrounding the history of a statute (according to which legislative intent is given the solidity of factness). But facts may also be retrievable from beyond the trouble situation or institutional contexts. They may come to law from the larger store of what is known. One significant source of facts – and so, objectivity, stability, and constraint – is science. "In its promises of neutrality, predictability, and certainty," write Dreyfuss and Nelkin, "science holds extraordinary appeal for the legal system" (1992, 338). Facts – science facts, nature facts – may come to law rather directly through expert testimony or briefs or through the research that preceded legislative enactments. Or they may arrive indirectly or announce themselves through what a judge herself simply claims to know or has learned. It is not at all uncommon to find works of social science or popular natural science cited in appellate court opinions. This is the textual sign of realism.

In many cases "nature" is not an issue at all and in many legal arguments "facts of nature" play little or no role. But in some cases "nature" is precisely the topic of dispute and facts of nature play a crucial role – even by being absent. As we shall see in Part II, in cases concerning "nature" in one sense or another, divergent views about what nature means may be irreconcilable. The point is what "nature" does in judicial renderings of reality. Here, "nature" frequently takes the form of scientific representations of nature: "facts of nature." As I said above, one way of producing the necessary necessity of a legal judgment is formalistically to confine analysis to the domain of "the legal" – the domain of meaning, and, through a transparent or "plain meaning" theory of language, to confer facticity, stability, and the power to constrain both words and interpretation. In one sense this may be seen as an attempt to *naturalize* semantics, to treat words or concepts as solid, stable objects, as naming natural kinds. This is facilitated by the scientization of the analyst. But, in another sense, this sort of conceptualism can be seen as an antinaturalism to the extent that it rejects the relevance of physicality. The legal realists made precisely this argument when they ridiculed the formalist style as reliant on the "thingification" of words (Cohen 1935, 815).

Words, they argued, are *not* things or facts in the same sense that empirical, observable – what Llewellyn called "tangible" – facts are. Conventionally, the domain of meaning is the domain of the distinctively human. To confine legal analysis to words and their relationships is to work within the confines of the nature/human distinction. It is to perform rhetorically the terms of the basic distinction by repudiating the "extralegal" facts as they are made available by scientific representations of nature and by demonstrating the primacy of mind over matter. Formalism enacts the fundamental premises of humanism: that we control ourselves through the creation of the right sort of symbolic and normative universe. But realism is not necessarily antihumanism – though, depending on what "facts" are on the table, it can be – but from a formalist perspective, realism may be blind to the dangers of relying on nature. It raises the specter of a tyranny of facts devoid of human (normative) significance. It raises fears about a reign of scientists.

The realist move is selectively to incorporate representations of nature so as to stabilize legal meaning and confer determinacy on judgment. I want to be clear here. I am, for expository purposes, reifying "formalism" and "realism" as if they name opposing camps. To some extent they do. In Part II we shall look at contrasting formalist and realist readings of the same situation. But more interesting is that the tensions between them may be discernible *within* a text, within a single line of reasoning, within one rendering. There may be a tension produced by opposing the pull of "meaning," words, form, on the one hand, and the pull of "nature," facts, physicality on the other hand. This tension can be seen as a sort of restaging or proxy performance of the basic conflicts between the human (the realm of meaning) and nature (the realm of facts about physicality). Here, at the level of discourse, formalism as antinaturalism performs a repudiation of "nature." Nature as scientific facticity is excluded from the terms whereby reason unfolds. Realism – again, simply as style or even gesture – occupies the position of a *relative* naturalism insofar as it exhibits the selective incorporation of nature and so implies at least a recognition of the constraining or compelling force of physicality.

There are risks to either strategy, as opponents of each emphasize. Among the risks of selective incorporation is that the turn toward facts – the turn toward nature – may exacerbate rather than eliminate indeterminacy. One prominent realist (and federal circuit judge), Jerome Frank, asserted, for example, that "facts are guesses."

> What is the [Fact]? Is it what actually happened between Sensible and Smart? Most emphatically not. At best, it is only what the trial court – the trial judge or jury – thinks happened. What the trial court thinks happened may, however, be hopelessly incorrect. But that does not matter – legally speaking. For court purposes, what the court thinks about the facts is all that matters. The actual events, the real objective acts and words of Sensible and Smart, happened in the past. They do not walk into court. (1949, 15)

And, giving this a proto-postmodern twist, he added, "The trial court's facts are not 'data,' not something that is 'given'; they are not waiting somewhere, ready made, for the court to discover, to 'find.' More accurately, they are processed by the trial court – are, so to speak, "made" by it, on the basis of its subjective reactions to the witnesses' stories" (24). The trouble with facts, so construed, is that they are, in a sense, wild, disorderly, and difficult to domesticate. As Frank and many other more recent critics have noted, facts are themselves representational and the indeterminacy of representation comes with any statement of what "*the* facts," or the *relevant* facts are. Moreover, even when there is agreement about the facticity of propositions, there may still be disagreement about which facts, how many facts, or how the facts should fit together. While one rendering of the facts may appear to give determinate shape to a rule or judgment, one more fact or a different "weighing" or "balancing" of the facts may destabilize that judgment or create the appearance that an alternative judgment is determined by the facts. And where, one might wonder, is the neutral position from which to judge *which* among competing renderings of the facts is the singularly correct rendering? The simple point here is that for some legal thinkers faith in facts is misplaced and only exacerbates – to the extent that it conceals – the problem of the humanness of judges. On the other hand, and quite apart from the problem of indeterminacy, there is also the risk in some situations that incorporating some representations of nature may exacerbate the problem of determinism vis-à-vis the legal subject. Thus, as we shall see in Part II, genetic reductionism, biological defenses in criminal cases, and the medicalization of punishment make this risk palpable. There is also, as we shall see, the risk that, in deferring too much to the cultural authority of science, law might diminish its own authority.

But formalistic repudiation of nature is also perilous. This repudiation may be explicit but it is often tacit. It is commonly accomplished more through silence, by performatively rendering physicality as absent. For one thing, facts – that is, what the world is like or what is known

about the world – may *matter*. Simply ignoring what is known about reality or explicitly denying its relevance runs the risk of arrogance and the appearance of know-nothingness. For example, legal scholar Andrew Lelling, speaking of ongoing revolutions in neuroscience writes that "the law is maintaining its own view of human behavior while scientists fill in an increasingly different reality" (1993, 1529). Still, the risk may be worth it if what one achieves is a sense of integrity, certainty, and safety by not getting too close to "nature." The resistance that formalism gives expression to may be, more immediately, a manifestation of more widely held anxieties about science and its tendency toward materialist, reductionist, deterministic visions of human reality. Strangely, then, formalism (usually, but not necessarily, aligned with political and cultural conservatism) may exhibit strong family resemblances to the radical cultural studies of science position that I discussed in chapter 3.

LAW AND SCIENCE

The practices, projects, and institutions of law have to be understood as embedded within the cultural matrices of American modernity. This is a culture that is characterized by a deep ambivalence about what it calls "nature." But as I have stressed throughout this work, it is a decidedly unbalanced ambivalence. The culture (not least in its self-portrayal as "civilization") is predicated on the conceptual "separation" of humans from nature and the control or domination of the latter by the former. This apparent control is largely founded upon the production and application of knowledge through the institutionalized instrumentalities of science and technology. Donald Kelley (1990) may be able to read tensions between law and science back into pre-Socratic thought but it must be admitted that the specific form of their relationship is historically contingent. Both modern law and modern science are core elements of what has often been called the Enlightenment project that tells us what "modernity" is. The relationship between law and science – in all of its open-endedness and complexity (in a social order whose most distinctive features include the massive physical transformations of the material world and the intensive bureaucratization of so much of daily life that mark the last 150 years) – must be seen in terms of its own historical, practical, and political singularities. It will not do, then, simply to speak of the hypostatized categories "law" and "science" as timeless – one might say "natural" – essences. That said, a few general comments

can be made about them *as* historically situated and changing institutional practices. Not the least of these is that, while law and science are conventionally understood in terms of their historical separateness or relative autonomy, as we have seen, at least from the legal side (and in different ways from the science side as well), there have been recurring bouts of separation anxiety.

Law and science are commonly regarded as distinct ways of knowing. If, as Aronowitz says, "science is a discourse that narrates the world in a special way" (1988, 34), then law is a way of narrating the world in quite different – but no less special – terms. In some ways they are alternative ways of rendering the real. Law and science prototypically take different objects of knowledge as core concerns and the difference tracks a central reading of the human/nature (*nomos/physis*) distinction. But when their distinctive gazes converge on a common object such as human bodies, minds, or behaviors, what is seen through one set of concepts may not even resemble what is seen through the other. (Where a participant in one practice sees neurotransmitters, synapses, or frontal lobe lesions, a participant of the other practice sees choice. Where one sees habitat instability and a quantitatively measured decrease in biodiversity, the other sees the interplay of property, investment-backed expectations, and regulatory authority. Where one sees a genetic disorder, the other sees negligence. Where one sees zoophilia, the other sees the abominable and detestable crime against nature.) The practices have distinctive procedures for producing and affirming truths and their commonly articulated purposes or goals are also very different. If part of the *attraction* of science for law is in its capacity to deliver facts and objectivity and to desubjectify the judge, part of what *repels* law about science derives precisely from the perceived denormatization which can be read as nihilism – the denial of meaning as dehumanization. Again, the tensions between more or less formalistic or realistic styles of legal representation may express this predicament.

Also, and crucially, the project of science is ideologically organized around the notion of progress as constant revolution. Conceptualized as forward moving, it posits a continuously receding horizon marking the boundary between the known – the epistemically domesticated – and the unknown. As Lelling says, "[T]his philosophical divergence between law and science can generate tension. Immersed in history and drawing its strength from gradual elaboration, the law is content to change by precedential increments, while scientists continually search for re-explanations" (1993, 1484). Being revolutionary it is always

(potentially) destabilizing, destroying, creating, and replacing. And if the focal object of science is "nature," its implicit object is often "the human" and *its* place vis-à-vis "nature." Physical sciences may be seen as organized activities through which successive renderings of "the human" are, generation after generation, serially inscribed and erased. Landmarks on the trail of science as conventionally told – Copernicus, Darwin, Freud, Crick and Watson (and, in other stories, Aldo Leopold and Rachel Carson) – are all identified by the discarded figures of the human that they inherited.

Law, in contrast, is conceptually organized around the conservation of meaning and order and the promotion of stability. While it may have its own "revolutions," these are extraordinary events. Given the revolutionary world in which law operates – and the proliferation of problems with nature that are brought to law as a result – these conservative tasks of law may be made significantly more difficult. No wonder there is an impulse to ignore these scientific revolutions and locate the historical center of legal interpretation in the seemingly more secure hold of 1789 or 1865 or even 1950. No wonder there is sometimes a mistrust of facts as encountered in the newest scientific representations of nature. As Jerome Frank warned, facts may not be so stable and solid after all. They keep changing. There are too many of them. Moreover, science talk is translated only with difficulty into the categories of law. Sometimes natural facts cannot be made to fit without the legal forms – that is, the categorical repositories of legal meaning – becoming distorted, aborted, or broken. Better, then, to abide in the less dubious certainties of plain meaning, clear intentions, and a past that never changes but always grows longer.

Lest the practical, institutional, and ideological differences be too sharply drawn, there are also strong commonalities, to say nothing of a long tradition of cooperation and mutual support between the practical domains of professional law and science. Indeed, in many contexts it may make sense to talk about the operation of a singular law–science nexus. Each domain is, of course, deeply concerned with something called "objectivity," though the precise meaning of the term may have important local variations. For each, objectivity is sought through fidelity to methods or procedures that are thought to control individual or idiosyncratic bias. For each, the objectivity requirement is a response to the contamination problem. That is, however else they may differ, each is constituted through its distinctiveness, isolation, or autonomy from the political. And each may serve the needs of the other in this regard.

Richard Redding writes, "It has been said that law is an empty vessel, relying on other disciplines to fill it with substantive knowledge . . . Increasingly, law looks to science to fill its vessel" (1999, 585). Science, as we have seen, may serve law as a source of objectivity, and authoritative representations of nature may be used to purify and rhetorically depoliticize legal products. As Dreyfuss and Nelkin argue, "For the law, the predictability of science is especially seductive. Influencing future behavior is, after all, the crux of lawmaking . . . The appeal of scientific explanations in law also reflects a need to reduce ambiguity. Science seems precise, and appears to avoid subjectivity and to limit the role of interpretation" (1992, 342–343). By the same token, science may rely on law to solve *its* political problems by assigning and enforcing rights such as proprietary rights, by shielding politically or morally controversial scientific practices behind doctrines of freedom of inquiry and free speech, or by constructing procedural barriers that inhibit challenges to scientific practices. Think, for example, of animal experimentation, genetic engineering, cloning, and weapons research. Looked at this way, science is no more autonomous from law or politics than economic activity is – to the extent that these are distinguishable. Rather, the practices of science are legally constituted. They are constituted *as* science by legal actors using legal tools. And one form that this legal constitution takes is the authoritative conferral of autonomy – and the large measure of self-regulation that this implies – itself.

I should like now both to summarize and to foreshadow the specific episodes to be presented in Part II. Judges do not judge in the absence of controversy. Troubles happen in the world. Many of these we can identify as being troubles with nature, troubles about nature, or troubles with science and technology. They are brought to law – the citadel of antinature. Judges have to respond. They cannot not respond. How they respond is constrained by the constitutive commitments of the practice and the ever-present concern for legitimacy. How a judge responds is shaped by historically devised styles and interpretive techniques. Among these are more or less formalist, more or less realist renderings of the situation. These give greater or lesser attention to words (legal categories) or to aspects of the extralegal world of physical processes. How these are put together, how, within a given text or between texts, the relative primacy and proportion of word and world, law and fact are worked out, is generative of judgment. In cases involving troubles with the materiality of life we may see greater or lesser reliance on and deference to science or scientific representations of nature. We may

see greater or lesser attention to "nature" as a stabilizing force vis-à-vis indeterminacy of meaning and the politics of judging. But the *legal* realist desire for stabilizing, objectifying facticity is itself dependent on a version of *scientific* realism. It presupposes that what science is delivering is pure, unmediated facts. It assumes a particular view of scientific practice. The science that law needs to solve its internal political problem is simply a messenger. The messages that it is to bring to law are themselves uncontaminated by subjectivity, interest, or ideology. The facts are not themselves "discursive." As we saw in chapter 3, this is a controversial point of view. It requires either a blind eye or a leap of faith. Science critics would argue that what science brings to law is a different form of politics. Very often, as we shall see, judges refuse to make that leap. They note that experts disagree. They disqualify what scientists say. They choose for themselves which claims might fit the law. In these situations, judges might be seen as enacting the primacy of law vis-à-vis science. Just as a case may provide the occasion for producing renderings of the human vis-à-vis nature, it may also provide the occasion to produce renderings of law vis-à-vis science. That is, it may be an occasion for producing self-portraits of law and the practice of judging.

CONCLUDING REMARKS

The argument of this chapter has been that the central practices of modern American law – those associated with judging, legal interpretation, and the production of judicial texts – have a fundamental commitment to the basic tenets of subjectivist humanism. As such, they cannot be neutral with respect to at least some conceptions of "the human," of "nature," and of their relationship. With respect to the subject who stands before the law, judges may simply assume (and impose) the characteristics of the traditional modern subject. But while the postmodernist subject is simply not assimilable to the legal imagination, the materialist subject, backed up as it may be by the authority of science, may be more problematic. With respect to the subject who is doing the judging, the situation is more delicate. The ways in which the cultural practice has unfolded can be understood in terms of various solutions to the political problems of judging. There is a range of jurisprudential solutions which provide plausible stories about the desubjectification of judges and the objectification of judicial utterances sufficient to depoliticize the practice and underwrite the legitimacy of the utterances

and of what follows from those utterances. There is also a range of related representational devices, styles of presentation, or strategies with which judges themselves may participate in their own desubjectification. One of these entails positing the words of law as possessing in themselves sufficient clarity, stability, and objecthood to, in effect, speak themselves. Another seeks to import and incorporate the requisite objectifying materials from "outside" the law, from "beyond" the subjectivity of the judge. These more "realist" renderings may turn toward social science or history where appropriate. In other situations, though, the source of the necessary necessity may be the natural sciences. Science may be called upon to deliver objective representations of nature in order to stabilize indeterminate legal meanings and to reinforce the legitimacy of the practice.

The main point is that legal practice, as cultural practice, partakes of the same general ambivalence vis-à-vis nature as is characteristic of the culture in which it is embedded. The dominant side of this ambivalence is as antinature. But occasionally, law is attracted to "nature" and naturalism as a source of necessity (objectivity) and negativity (desubjectification). The ambivalence of legal practice vis-à-vis nature may be seen in its institutional ambivalence to science. It may also be discerned in contrasting styles of judicial representation. But also, because of its own constitutive commitments, this wider cultural ambivalence has a peculiar "local" flavor. That is to say, the nature problem is not extrinsic to law and legal practice. How could it be? Law and legal practice are not extrinsic to the culture that has "the nature problem" as one of its foundational constitutive elements. Likewise, as the studies in Part II will show, law is not extrinsic to the dynamics of material transformations. Rather, nearly everything that happens with respect to human engagements with the material word in America is mediated by – made meaningful with reference to – legal forms such as property, liberty, and legal authority.

The problem of nature does not go away. In most legal cases by far, it is safe to say, the problems that I have been addressing do not register as problems at all. Most episodes of legal meaning-making proceed with very little, if any, reference to the material world. Law simply exhibits its antinature character by rendering physicality as absent. The world of substance is largely irrelevant. Troubles between people are articulated in terms of doctrinal categories pertaining to property, contract, tort, administrative procedure, constitutionalism, criminal codes, and so on. Often enough more "realist" styles of reasoning may reach out to

sociology or economics or other producers of social facts. Sometimes, though, the troubles that are brought before the judge concern aspects of the physical world. Here, again, formalism "deals" with physicality by excluding it or ignoring its relevance. More realist approaches may selectively incorporate fragments of nature facts as provided by scientific discourse about nature.

But the material world itself is changing. Our time is one characterized by radical transformations of the physical world occasioned by the prominence of science-technology-commerce. And the political world has also changed. Our time is also characterized by the proliferation of nature politics concerning everything from engineering, science, wilderness, pollution, sexuality, reproduction, genetic modification, and the medicalization of social life. Judges, like all of us, are operating under conditions of radical novelty. They may increasingly be brought face to face with the possible incompatibility of science stories and legal categories. Judges may be required to look at science, scientific representations of nature, and the physical transformations associated with science more closely. Given the "internal" preoccupations, commitments, and anxieties of legal practice, responding to these may be more salient than responding to whatever the underlying *material* disputes are. *How* troubles are responded to may have less to do with what is happening in or with respect to the material world than with law's own problematic relation to "nature," to science, and to the foundations of its own claims to authority and legitimacy. And, finally, it is important to remember that law is not simply discourse. It is not merely one discourse among others. Law names an institutionally structured practical relation between discourse and power, word and the material facticity of violence. What judges say is worked (by others) into the fabric of the material world – onto landscapes and bodies. Judges, then, do not merely participate in the social construction of "nature." They participate in the dynamic transformation of the physical world by virtue of how they direct the force of law.

PART II

RENDERING NATURE

CHAPTER SIX

IT'S A SLIPPERY SLOPE: LAW AND THE FORCES OF NATURE

INTRODUCTION

Before law, before justice, before rights and duties, responsibility and interpretation, before even life: there was nature. Imagine we never were, or not yet are. All is matter and energy; pure physicality. Earth differs from other planets and heavenly bodies only in the details of how matter and energy work themselves into configurations of form and process. On this watery, tilted planet – the planet with soil – wind, water, and ice; gravity, inertia, and seismic pressures; evaporation and condensation; freeze and thaw were all at work long before footprints appeared; long before egg or bone. And even now, if humans and all of the animals and plants were to disappear, the forces of nature would continue to cut, lift, push, and drop. Following a total ecological collapse winds would blow, rain would fall and gather into tree-shaped networks, waves would beat against and reshape beaches and bluffs. Rock, sand, silt, and clay would be put into motion and laid to rest. Our works would be buried, their elements reclaimed. These earth-shaping forces and processes and the forms that they produce are emblems of nature at its most autonomous, indifferent, and enduring. All cause and effect; no reason or purpose. These are the elements: earth, air, fire, and water. Nature shapes itself gently, continuously; abruptly or episodically – blindly or, we might say, senselessly.

Imagine we never were. Or, imagine yourself standing before a prehistoric, prehominid diorama at a natural history museum. A volcano perpetually erupts in the middle distance. A plume of black smoke shoots high into the air. A river of lava flows in your direction. But, it is

eternally arrested. It is not burning, flowing earth. It is only paint and wood. You have nothing to fear. Now put yourself in the picture.

With humans in the picture, everything changes. Now nature, even as pure and massive physical force, is demoted to "environment," *our* environment. With humans in the picture pure force becomes intelligible as violence. Without us, only event; with us, disaster. Without us, mere movement; with us, it is a scene of fear and suffering.

Imagine the Pacific coast of North America before names or maps or trails. Imagine a steep coastal bluff covered in grasses. Wave upon endless wave batters the rocks below. Imagine time-lapse photography: one year per second; 3,600 years pass in an hour. Diurnal and seasonal rhythms are imperceptible. After a couple of hours, though, changes can be seen. The shape of the line marking the land–sea boundary shifts this way and that. Bluffs peel away in slivers or slump in clumps. Earth falls into the sea. Sea level rises and falls. Earth emerges from the waves. Earthquakes break sea stacks in a second. But you are not there. You are only imaging this. Now, imagine that you *are* there. This is not a picture. You are not watching a movie, you are watching from your living-room window as the floor tilts and the furniture glides westward toward the window. With you in the picture everything is different. Time slows down almost, but not quite, to a halt. The house groans and then slams into your neighbor's house.

Geomorphologists, the scientists who study the natural forces that have shaped the surface of the earth, have developed a wonderful vocabulary to describe this natural sculpting of landscapes. The terms of this art include pingo, thalweg, esker, and knick point. The phrases for describing landslides are particularly evocative, if a bit dismal: slope failure, progressive failure, mass wasting, earthflow, creep, slump, and scar; toe erosion and headward incision. This is predominantly a lexicon of loss and instability. Slopes don't just slip or move, they fail. And elsewhere, rivers overtop banks. The waters rise and rise – ten feet, twenty feet above bank full, thirty feet and more. Floodwaters can dissolve village after village and wash thousands of people out to sea. And elsewhere, whole mountain sides become unglued, crash into valleys, go up onto the next mountain over, and then fall back into the valley burying whole towns. And elsewhere, the earth itself lunges and interrupts a million lives. Lesser disasters only look that way if they are not yours. Lightning strikes, sinkholes swallow, tornadoes rip, hurricanes demolish, waves pound and mangle. Foundations crumble, roofs fly away or cave in, cars roll away like soda cans, and bedrooms get turned

inside out. When quiet returns the world is a wreck. Nature went on a rampage, we say. Nature went out of control.

NATURE'S TRIALS

The case against nature

In his essay *On Nature* (1874/1923), John Stuart Mill Jr. offered a refutation of Romanticism, which he described as a normative view of the social that was grounded on a valorized view of the natural. For our purposes *On Nature* can be seen as a prototype of a prevalent, and arguably hegemonic, construction of "nature." It is also one that, though usually shorn of much of its rhetorical excess, continues to inform visions of natural force and of human relations with much of the physical world. Mill's target was those generally conservative prescriptions that would hold "nature" to be a guide and standard of human behavior and institutions. The nature at work in the form of Romanticism at issue was, at root, a theological notion. Nature was the name of God's creation. To renounce nature was to repudiate God, to put "man" in God's place and, at least in Mill's caricature, to risk God's displeasure. Mill thought that this view was both muddleheaded and dangerous so he set out to set the matter right clearly and analytically. "Nature, natural, and the group of words derived from them," he wrote, "have made them one of the most conspicuous sources of false taste, false philosophy, false morality and even false law" (3). Part of the problem, he discovered, was that "nature" was ambiguous. The task he set himself was to take "so vague a term" as "nature" and "subject [it] to . . . searching analysis, submit it to the ordeal of [a] powerful dialectics" (4). He wrote that "language is as it were the atmosphere of philosophical investigation, which must be made transparent before anything else can be seen through it in the true figure and position" (13). So, as an initial matter of rolling up his analytical sleeves before he set to work, Mill suggested that reason might control language and that language, rendered suitably transparent, might allow for controlling the work that "nature" does. In a first step toward disambiguating "nature" he stated that

> we must recognize at least two principal meanings in the word Nature. In one sense, it means all the powers existing in either the outer or the inner world and everything which takes place by means of those powers. In another sense, it means, not everything which happens, but only what takes place without the agency, or without the voluntary and intentional agency, of man. (8)

But it is clear that the problem, for Mill, was graver than one of simple analytic confusion. After all, it concerned the formulation of "false philosophy" and "false law." The real and pressing problem was the sort of reactionary political work that "nature" was being called upon to perform. Anything that he or other more enlightened people might view as "progressive" could almost by definition be condemned as "unnatural," and, as such, as an affront to the Supreme Creator.

In the first part of his essay "nature" is simply an "is." It is either the name for everything or the name for everything that is not of the domain of the human. But there comes a point midway through the essay when the rather pedantic voice of the philosopher gives way to a somewhat more impassioned voice, one that has more the tone of a prosecutor giving a closing argument.

> In sober truth, nearly all the things which men are hanged or imprisoned for doing to one another, are nature's everyday performances . . . Nature impales men, breaks them as if on the wheel, casts them to be devoured by wild beasts, burns them to death, crushes them with stones . . . All this Nature does with the most supercilious disregard both of mercy and justice . . . She mows down those on whose existence hangs the well being of a whole people . . . Even when she does not intend to kill, she inflicts the same tortures in apparent wantonness . . . Everything, in short, which the worst men commit, either against life or property is perpetrated on a larger scale by natural agents . . . Even the love of "order" which is thought to be a following of the ways of Nature, is in fact a contradiction of them. All which people are accustomed to deprecate as "disorder" and its consequences, is precisely a counterpart of Nature's ways. Anarchy and the Reign of Terror are over matched in injustice, ruin and death by a hurricane and a pestilence. (29–31)

This being the case,

> the ways of nature are to be conquered, not obeyed: that her powers are often toward man in the position of enemies, from whom he must wrest, by force and ingenuity, what little he can for his own use, and deserves to be applauded when that little is rather more than might be expected from his physical weakness in comparison to those gigantic powers. All praise of Civilization or Art, or Contrivance, is so much dispraise of Nature: an admission of imperfection, which it is man's business, and merit, to be always endeavouring to correct or mitigate. (20–21)

This, of course, presupposes a particular vision of "man." "The best persons have always held it to be the essence of religion, that the paramount

duty of man upon earth is to amend himself. But all except monkish quitetists have annexed to this in their minds . . . the additional religious duty of amending the world . . . the material; the order of physical nature" (25–26). It follows, then, that

> the doctrine that man ought to follow nature, or in other words, ought to make the spontaneous course of things the model of his voluntary actions, is [irrational and] immoral . . . because the course of natural phenomena being replete with everything which when committed by human beings is most worthy of abhorrence, anyone who endeavoured in his actions to imitate the natural course of things would be universally seen and acknowledged to be the wickedest of men . . . the duty of man is to co-operate with the beneficent powers, not by imitating them but by perpetually striving to amend the course of nature – and bringing that part of it over which we can exercise control, more nearly into conformity with a high standard of justice and goodness. (64–65)

Nature, now feminized, is no longer simply an "is," but both a "she" and an "ought not." Nature is rendered as evil, as indiscriminate, as criminal. Mill's nature is centered on force and violence, not on spring rain, gentle breezes, and sunshine. The focus is on unjustifiable violence, violence without reason.

It is rather easy to read these passages as an effort to gather together what he finds most reprehensible about humans and symbolically to expel them. Mill rhetorically externalizes them by projecting them onto "nature" and simultaneously effecting a purification of the remainder: man. It is difficult to ignore the almost hysterical tone of these passages. Not content, after all, to argue dispassionately against holding nature as a standard of conduct, Mill wants to crush it. He wants to do more than submit the concept "nature" to "the ordeal of [a] powerful dialectics." He wants to subordinate its referent – the physical world – to human will and control. In fact, he suggests that that is what makes us human. "[T]he very aim and object of [human] action," he wrote, "is to alter and improve Nature" (19). That is what we are here for. And indeed, "if the artificial is not better than the natural," he asks, "to what end are the arts of life?" (20). What emerges from Mill's canvas is a particularly heroic figure of the human against a backdrop of a tyrannical nature. The hero confronts the amoral brutality of nature and masters it (her) with all the cunning of Odysseus in contest with the Cyclops or the Siren. The hero of the story of progress, though, is not Homer's Noman, but the civil engineer, the drainer of marshes, the builder of

bridges and dams, the tamer of nature's force and violence. Mill's party of progressive humanism, of course, won the day against the Romantic nature lovers. They also won the world. And deep into a future far beyond the horizon of his imaginings, we live in that world.

The Romantic voice has not disappeared, but it has changed. The term "romantic" is now, perhaps, most often encountered as a term of opprobrium with all of its antiprogressive, reactionary, sentimental, or know-nothing connotations. It is leveled at environmentalists, animal rights activists, and others who claim – or who their opponents claim that they claim – to be speaking "for" nature. In the last third of the twentieth century, though, critiques of the total war against nature gained a rejuvenated respectability. The multidimensional environmental and ecological crises became too obvious and costly to continue. For many, the ideological commitment to a vision of human–nature separatism and antagonism that Mill's essay *On Nature* expressed came to be seen as a central conceptual support that had its material consequences in public health catastrophes and economic inefficiencies. But, far from an expression of Romantic reaction, the main lines of environmentalist thinking in our era have emphasized the short-sighted stupidity of the nature conquerors. To the extent that analysis of environmental degradation is coupled with a critique of actually-existing capitalism – if not capitalism per se – environmentally aware thinkers are more likely to frame their arguments in terms of clear, rational, scientifically sound arguments against the sort of emotive force associated with "corporate greed" or the irrational and self-destructive "love of profit."

In defense of nature

If Mill is nature's prosecutor, a contemporary critic such as John McPhee (1989) might be cast as a sort of public defender answering Mill's indictment with a fuller understanding of "the facts," an accurate accounting of the costs, and a more farsighted view of what is at stake. In his essay "Los Angeles against the Mountains," one of three that comprise his book *The Control of Nature*, McPhee describes the northern edge of Los Angeles as "a war zone" (203). He writes: "The front line of the battle is where the people meet the mountains – up the steep slopes where the subdivisions stop and the brush begins" (192). The specific topic of this essay is the relationship between a natural phenomenon and efforts to control it. The natural phenomenon, though in his telling it is now far from "natural," consists of debris flows (massive slurries of rock, water, and anything that can be carried along with it) that periodically gush

out of the canyons of the San Gabriel Mountains onto the plains below. Human agency, in his story, takes the form of the massive expenditures of money and effort that are deployed to control the debris flows in order to make the mountain slopes safe for real-estate development, investment, and human habitation. In McPhee's telling, these practices often simply make matters worse. Here is one of many descriptive passages:

> As the six-ton truck approached the gate, mud was oozing through. The basin above had been filled in minutes and now, suddenly, boulders shot like cannonballs over the crest of the dam, with mud, cobbles, water and trees . . . the debris flow came through the chain-link barrier as if the links were made of paper. Steel posts broke off. As the truck accelerated down the steep hill, the debris flow chased and caught it. Boulders bounced against it. It was hit by empty automobiles spinning and revolving in the muck. The whole descending complex gathered force with distance . . . The truck finally stopped when it was bashed against a tree and a cement block wall. The rear window shattered . . . The two men crawled out through the window and escaped over the wall. (198–199)

A principal theme of the essay is the absurdity of Los Angeles's "war" against nature. McPhee details the costs in lives and resources, and the futility of maintaining a willful blindness to the limits that nature puts on human activities. "Nature" here names not only a type of event – debris flows – seen in isolation, but a complex, interlocking system of processes and forms. Extreme geomorphic events are described as the products of the convergence of seismic, geologic, hydrologic, botanical, and meteorologic forces and factors that have worked for millions of years to produce the landscapes that humans entered merely thousands of years ago and that have been "developed" only in the past few generations. A modern-day Mill might say that people brought order to this violent landscape through fire suppression and stream channelization and other massive public works projects. They domesticated it, breaking it into tiny parcels and transforming these parcels into homelots. These efforts included the construction of more than two thousand miles of underground conduits to replace the natural drainage, and hundreds of dams and "debris basins" – some larger than football fields – designed to catch the "debris." To be effective, debris basins have to be cleaned out and the material – hundreds of millions of tons of rock – has to be transported and deposited somewhere else. Because sediment is not reaching the sea Los Angeles's beaches are being sand-starved and are eroding. This necessitates buying enormous amounts of sand from

elsewhere and, again, delivering it to the beaches. What McPhee is describing is an engineered "replacement" of what geologists call the sediment delivery system. And still, in spite of, in Mill's words, "bringing that part of [nature] over which we can exercise control, more nearly into conformity with a high standard of justice and goodness" (64–65), the debris continues to gush forth – destroying, injuring, killing.

> The snout of the debris flow was twenty feet high, tapering behind. The huge dark snout was moving nearly five hundred feet a minute and the rest of the flow behind was coming twice as fast, making roll waves as it piled up forward against itself – this great slug . . . . this discrete slug, this heaving violence of wet cement. Already included in the debris were propane tanks, outbuildings, picnic tables, canyon live oaks, alders, sycamores, cottonwoods, a Lincoln Continental, an Oldsmobile and countless boulders five feet thick. All this was spread wide a couple of hundred feet, and as the debris flow went through Hidden Springs it tore out more trees, picked up house trailers and more cars and more boulders, and knocked Gabe Hinterberg's lodge completely off its foundations. (McPhee 1989, 218–219)

One way of understanding these events is to say, as some of McPhee's informants do, that nature "was on a rampage," it – or she – went "out of control." Another way is to say that humans – specifically governmental agencies – did not control nature sufficiently well. This is a claim that plaintiffs typically make. McPhee quotes one public official as saying, "After we busted our butts for months trying to help people, we ended up being sued by the people we tried to help . . . They said in court that . . . we did not stop Mother Nature in her tracks . . . Here they . . . sue the city for not keeping the mountains from eroding" (251). Another way of making sense of this, and this is McPhee's understanding, is that it is the dream of control that is out of control. The voice of resigned reason in his narrative belongs to science. The voice says, "Know nature and know the limits of your powers." If we see McPhee's essay as an answer to Mill's charges of treachery, the defense that comes to mind is duress. Then again, if Mother Nature *is* a "she," then a version of the battered woman's defense suggests itself. In any case, as attorney for the dammed [*sic*] McPhee would demure to the facts, the violence, the devastation. Given the extreme sort of domination, though, he might say that "nature" had no choice but to explode. Millian diatribes notwithstanding, it is not "nature" that will be called to account. As the public official quoted above noted, when people have trouble with nature

they often look for some human agent to whom responsibility might be attached.

Doing things with tort

The world is a wreck. What had been painstakingly separated (the environment out there in the chaparral and canyons, the human world over here with the houses, streets, cars, and lawns) is now a jumble. All is waste and suffering. But is the wreckage best seen as the aftermath of a rampage by Mill's criminal, as the leavings of McPhee's abused slave, or as something else? What to make of it? How to make what is broken whole? How to separate out the human from the inhuman and put it back together in the right way? There are tools for putting these things back together: bulldozers, earth movers, and trucks. But these are not the only tools. There is also tort – doctrines, rules, and techniques of legal interpretation. These are tools of a different trade. These tools are used to answer a simple question: "Who pays?" But there are a number of important antecedent questions, such as "Who, if anyone, is responsible?" and "Is causal responsibility coextensive with legal liability?"

A tort system is a cultural artifact. Like "nature" and law more generally, tort is both an artifact and a tool for crafting other artifacts such as "liability." It is a tool of a particular sort, a tool for making a particular sort of sense. It is a tool for putting broken things back together. Tort is also a device for ordering relationships among strangers, for distributing risks and burdens, incentives and disincentives. It is a tool for doing justice. It is, more specifically, a tool for projecting and enforcing conceptions of reasonableness. Because tort is used for so many things (it is less like a hammer in this regard and more like a Swiss army knife or word processor) it is not surprising that it is a very complicated sort of device.

We might imagine a range of systems that a culture – our culture – might have. We might imagine one in which some notion of strict liability occupied the conceptual center of gravity. In this system anyone who *could* be construed as being causally responsible for bringing trouble, for example a landslide, into the world, *would* be held legally liable for rectifying the problem regardless of questions of negligence or fault. Or we might imagine one with a rich set of immunities such that only malicious acts resulted in liability. The politics of tort reform is structured by these sorts of themes. Modern tort law has elements of both of these but it is perhaps centered on the idea of negligence. Strict liability and absolute immunity are exceptional situations. In most circumstances,

in order to be compelled to remedy the damage done, one must first be determined to have acted negligently, carelessly, or unreasonably with respect to someone, say a neighbor or stranger, to whom one owed a duty. Importantly, strict liability and absolute immunity are legal forms that close off questions about what actually happened in the world. The *form* more or less determines the outcome. In contrast, negligence opens up questions of fact, of what went wrong. In cases involving troubles with forces of nature, finding negligence (or not) often necessitates the interpretive work of disentangling the human element from the natural. The practical work of disentangling is accomplished with form and narrative. It is a prerequisite for reconstructing a wrecked world. But, of course, there are different ways of disentangling and different ways of reconstructing.

The more specific tools of tort include formal rules and doctrines. Images of duty, injury, negligence, remedy, and the rules for linking them together are at the core of tort law. They constitute the formal grid through which trouble events are perceived and represented. They are organized through answering questions such as: Did the defendant owe a preexisting duty to the plaintiff? Was there a legally cognizable injury? Did the defendant cause the injury? Did he or she act unreasonably? In the toolbox of tort there are also a number of more specific devices for construing "cause": proximate cause and remote; joint, concurrent, successive, or superseding cause; prime, moving, and efficient cause, and so on. These are tools for discursively taking apart chains of events, making them legally meaningful, and putting them back together again in ways that make sense. In situations in which strict liability or absolute immunity might be put into play, questions of causation are less important but in negligence cases they occupy the center of the story. Causal questions beget narrative answers. Narrative both gives content to form – by filling in the "negligence" box with a story – and is itself organized by form – by directing what sort of story needs to be told. Causal narratives, then, may require bringing a degree of realism to the task of making sense. They require a sequential representation of "the facts," tellings of how events unfolded, what someone did, could or should have done.

We can look at force of nature cases – disaster cases – as offering contrasting narratives that are employed to direct (or deflect) the force of law. Plaintiffs and defendants, of course, have differing goals and tell differing stories or paint differing views of the same scene. If possible, one party might want to stay within the frame of the form: strict liability or absolute immunity, and not fall into the riskier framings of causal

narrative. In representing cause, however, plaintiffs will generally give greater prominence to human agency. They will endeavor to locate key moments of the story within the human domain. Defendants will generally want to minimize human agency – or at least *their* agency, and, if possible, give greater prominence to nature as prime mover or determinant of events.

One handy tool for defense strategies is the Act of God defense which functions to locate the crucial moment in the cascade of troubles in the realm of nature, beyond the defendant's control. Denis Binder (1996) writes that "The act of God defense generally entails the following requirements: the unforeseeability by reasonable human intelligence, and the absence of a human agency causing the alleged damage" (13). While nominally displacing cause to the domain of the supernatural, in a more secular legal world blame is assigned to nature. As one state judge put it, in order for the defense to be applicable the harm must happen "by the direct immediate, and exclusive operations of the forces of nature, uncontrolled or uninfluenced by the power of men and without human intervention" (Binder 1996, 14). In effect, the defendant says, "Yes I had a duty to the plaintiff and yes the plaintiff was injured but I did not *cause* the injury, the rain or the waves or the wind or gravity caused it. I was merely a helpless witness." As far as possible, the defendants take themselves out of the picture. The Act of God defense positions nature as a barrier, a limit, to liability and to compulsory retribution. But like many legal lines this one can be broken down into finer-grained distinctions so as to reattach legal responsibility to the defendant. One legal analyst who favors abandoning the concept says,

> Nature's blows may be sudden and unexpected. The storm may leave a trail of destruction, devastation and tragedy. Both the victims and the defendants may be surprised and shocked by the awesome force unleashed by nature. Yet, the catastrophe will not necessarily constitute an unforeseeable act of God. Forces of Nature are not synonymous with acts of God, which have a more limited interpretation in the law. (Binder 1996, 16)

Arguing about the boundaries of an act of God yields divergent construals of human–nature entanglements, the relative control of humans vis-à-vis nature and of nature itself.

The set of rules and categories, distinctions and narrative conventions that make up tort law constitute a complex device for making

events legally meaningful. We can *do* things with tort, powerful things. We tell stories, nature stories. We paint word pictures about human–nature entanglements and struggles. The pictures are made out of the formal and narrative materials specific to the genre, but they can be arranged in a variety of ways. In force of nature cases, the objective is to produce a convincing rendering of a figure on the landscape. Contending renderings can be contrasted along a number of different dimensions. We might ask, for example, How is causation portrayed? How long is the causal chain? How far back in time does it go? How many links are there in the chain? How are the links connected? How, in what light, are these links evaluated? Once an element of human agency is attached to the chain does it stay attached or can it be severed by the force of nature itself?

The cultural products that are legal arguments and opinions, crafted, as they are, by the cultural tools of tort law, can be described in terms of composition, lighting, perspective, and framing (that is, in terms of what is included and excluded). But again, they are geared toward establishing the relative prominence of a figure of human agency against a background of nature. We might imagine one rendering in which the figure of the human is very prominent, such as in the painting by Thomas Hart Benton or Grant Wood; or one in which the human element is reduced to comparative insignificance, as in the landscape by John Constable. The figure of the human may be portrayed as a rather heroic one controlling and dominating – humanizing – the landscape or it may be rendered as a more pathetic creature overwhelmed by nature's awesome force. This can be done within the conventions of one cultural practice with pigment, oils, canvas, and brush and within the conventions of another cultural practice with tort, doctrines, and construals of causation, precedent, and fragments of expert knowledge. Here is an example of contrasting renderings.

LOS ANGELES AGAINST THE OCEAN

Quite apart from debris flows and earthquakes southern California is also the locale of numerous more run-of-the-mill landslides. Particularly along the coast, geologic instabilities, overdevelopment, and the constant action of waves combine to create a dream landscape for geomorphologists and civil engineers and a nightmare landscape for property owners. In the late 1940s and 1950s the County of Los Angeles was

extending Crenshaw Boulevard into the affluent area of Palo Verdes. This meant cutting into hillsides, moving millions of tons of earth from site to site and reconfiguring preexisting landscapes in dramatic ways. On 20 August 1958, 120 acres of "land" – soil, trees, rocks, water, bugs, and lizards – "slid downhill and toward the ocean" (*Albers* v. *Los Angeles County*, 38 Cal. Rptr. 308, 1964, 310). When this landmass came to a rest, seventy-eight homes had been damaged or destroyed. The consequences for the people involved were, of course, devastating. Rather quickly, people who had been neighbors became plaintiffs. They were not simply having "trouble with nature." That there was a connection between the roadbuilding activity and the devastation of plaintiffs' homes was beyond dispute. In a sense the slide itself was simply a mediating event which linked the roadbuilding and the destruction of property. "Cause" per se, then, was not an issue in the legal cases which developed out of the Palo Verde slide. What was an issue was what to make of the connection between *physical* causal responsibility and legal liability. In essence plaintiffs argued that participation in the physical chain of events was sufficient to render the county legally liable – and therefore responsible for damages. The county's position was that while its employees or contractors were, strictly speaking, involved in a physical sense they should be excused because no one had acted negligently. And because no one had done anything wrong, the county should not be obligated to pay. In legal terms the question concerned whether the standard for assessing liability of public actors – acting for the public good – should be one of "strict liability" or "negligence."

At trial the county was found to be not only physically responsible for the landslide but legally responsible for the resultant damage as well. Plaintiffs were awarded more than 5 million dollars. The county appealed and the lower court judgment was affirmed with one dissent. The majority based their opinion on a theory of strict liability. What is significant for our purposes is how the reasoning of the majority and dissenter proceeded, and what conceptions of humanness and nature were appealed to – or rather, the rhetorical work that "nature" was enlisted to do in order to reach a resolution.

The majority opinion, written by Justice Fox, opened by noting that the fact that the defendant had "caused" the damage to plaintiffs' property was beyond dispute. The county's "earth moving actions . . . had in fact caused the slide and caused the resulting damage to the property rights of plaintiffs" (*Albers*, 310). The damage was a "direct and

natural" consequence of deliberate acts. They then acknowledged, though, that the "invasion" of property and property rights had not been intended. Moreover, there had not even been a "reasonable foreseeability of harm." No one "knew or should have known" that the actions of the construction crew "would divert the natural forces of support in the soil" (312). Disposition of the case, therefore, did not turn on foreseeability. But while the county neither intended to harm plaintiffs nor acted in an unreasonable manner, they did intend the initial act which set into motion a chain of events which did harm plaintiffs. "The damaging act itself was an intentional part of a proposed public improvement" (314). Once the deliberate nature of the act was established, judgment of liability inevitably followed. The key to the case was that "the intentional dumping of substantial quantities of excess [earth] at critical locations had so acted upon the delicate balance . . . as to trigger the present slide" (311). In the majority's view responsibility attached to the intent of the initial act to control nature and remained attached even though there were consequences that went beyond or exceeded those intentions. If the initial act was within defendant's control it was of no legal relevance that events had spun out of control.

Textually, the judgment was grounded on an interpretation of an earlier case, *Reardon* v. *San Francisco* (6 P 317, 1885). The dissent positioned its finding of no liability by distinguishing the facts of the Palo Verde slide from those at issue in *Reardon*. In Justice Roth's view the doctrine established by *Reardon* required negligence and foreseeability in order to find liability. In *Reardon*, wrote Roth, "it was or should have been apparent . . . to a reasonably prudent man that in the natural or normal course of things there would be injury" (323). If *Reardon* had any precedential value it was because it had established foresight as a basis for liability. In the present case, as the majority recognized, the consequences of the county's initial act were not only unknown but unknowable. As liability was limited by the lack of knowledge, so responsibility ought to be measured by the reach of knowledge. For our purposes one interesting part of this opinion is the view that the landscape through which the road was being cut – Crenshaw Boulevard in Palo Verde – "constituted an abnormal condition of nature" (329). This phrase, which is of considerable rhetorical interest, merits comment.

The phrase itself is taken from the transcript of the trial court proceedings. The majority employed this locution in its description of the area as an "ancient landslide covering 560 acres subject to movement"

(310). They also cited a geologist's reference to the underlying formation as "a geologic banana peel" and cited as well a US Geological Survey Professional Paper written in 1946. (Why knowledge of this paper did not constitute knowledge of the slope sensitivity was unexplained.) For the majority this "abnormality" of nature here was not relevant. For the dissent, however, it was crucial. The abnormalness limits knowledge. It limits an actor's view down the chain of anticipated consequences, limits an accurate assessment of human capacity, and limits control in unseen ways. Normal nature, it seems, is transparent, abnormal nature is opaque. Defendants should not be accountable for events which, because of facts of nature, were beyond their control.

In the accounts offered in this case there are many elements of "humanness" and many elements of "nature" that are woven, teased apart, and rewoven together in order to reach judgment. Within the background story of what goes without saying, nature, of course, is the object of transformation and humanness is rooted in the imagination, planning, and intentional stance of initiating a project or development. Nature is both the (normally) inert landscape and physical force. Of all of the things that could represent humanness, intentionality is given primacy in both accounts: the larger intent of developers and public officials to reconfigure the landscape, to extend Crenshaw Boulevard; the plan of the engineers to dig this particular curve; the judgment of the crew supervisor to place this load of dirt at this precise spot. Woven into the story as well are other ingredients concerning knowledge. Reference is made to normal – in fact "natural" – engineering and construction practices, to what is known about "normal" geologic formations. Nature is rendered as the necessary (in the sense of inevitable consequences) and normal (in the sense of unexceptional). This is why the locution of "abnormal nature" is so striking. It is an exceptional or, in a sense, an *unnatural* nature where normal is predictable and controllable. Nature in this reading is almost deviant or freakish. Indeed, in one passage of the majority opinion the dirt itself is quasi-personified as the judge states that because of the steepness of the angle cut into the hillside "the material refused to remain stable" (311).

These are stories about human engagements and entanglements with nature. The stories start with the human intent to transform (develop or dominate or humanize) the landscape of Palo Verde. Key to the realization of intent is knowledge of normal transformations. But nature here is rendered as a blind force which escapes the intended chain of consequences, escaping human will, spinning out of control, and

overpowering human intention. In the dissenter's view nature is constructed as relatively independent and autonomous. The human role in the unfolding of the landslide is comparatively modest. In the majority's interpretation humans are a more prominent figure on the landscape. If we assume control over nature, they suggest, we are responsible for losing control. The strict liability standard assumes mastery of nature as normal and trouble as exceptional. The negligence standard is somewhat more modest.

THE REASONABLE MAN MOVES TO TOWN

There are other more specific elements of rendering figures on the landscape with the tools of tort. As we have seen, within a given rendering, the line giving definition to the figure of the human is sketched in the idiom of control and knowledge. The Act of God defense, as we saw, "rests on the twin pillars of lack of predictability and lack of control" (Binder 1996, 37). Positioning the "moving cause" of a disastrous event "within" nature and so "beyond" the knowable or controllable, places the defendant beyond liability and outside the coercive reach of the state. Locating cause "within" the human domain, within the range of the foreseeable, controllable, or intentional serves to locate the defendant within the sphere of liability and obligation. Of course, what is ultimately controllable is the defendant's physical actions. His mind should have told his body "Don't do that!"

Then there is the crucial temporal element that lends perspective to the scene. In telling causal stories the teller – the attorney or judge – directs our attention backward toward the defendants looking forward into their future (our past, before the disaster, before the slope slipped). They are portrayed in the process of acting, committing an act that will have consequences whether intended or not. The defendants are positioned as gazing down an idealized chain of consequences; as the court in *Albers* said, down the "normal and natural consequences." As the defendants initiate the action they are imagined to be grasping the future. The defendant "foresees." Because they are capable of foresight they are responsible for the specific future that their actions will bring into being. (But the legal figure that is rendered in the tonalities of tort is not only the defendant or the plaintiff.) The principal figure on the legal landscape is the reasonably prudent person. This figure knows the world, knows his powers, and knows the limits of his powers. He has a clear line of sight into the nearest reach of the future, down the chain of natural

and normal consequences. Above all, he is, as his name underscores, reasonable and prudent. Generally speaking, defendants will render the reasonable person as a self-portrait and plaintiffs will emphasize the divergences between what the reasonable person would have done and what the defendant in fact did.

A defendant's task, then, is to disentangle the human from the natural in the idioms of causation, control, and knowledge. So, nature will be rendered as unknown, unknowable, or uncontrollable. The defendant, against this nature, is the very emblem of the reasonable person. A plaintiff 's task is to resist these naturalizing moves and to render nature as transparent or controllable. In the plaintiff's rendering the slope didn't fail, the defendant did. He failed to conform to the image of the reasonable person.

Consider this case in the local history of law's nature in California, *Sprecher* v. *Adamson* (636 P 2d 1121, 1981). Like many people in Malibu, Peter Sprecher lived in a house that was built on an active landslide area. In 1978 spring rains triggered what the California Supreme Court called "a major movement of the slide" (1122). Sprecher's house slid down hill, rotated, and slammed into his neighbor's house. His neighbor sued Sprecher and Sprecher, in turn, sued the owners of the undeveloped upslope property alleging negligent failure to correct or control the slippery slope. The path of litigation, in a sense, described a sort of chain reaction moving in the opposite direction of the landslide. The defendants, Adamson Companies, et al., moved for a summary judgment citing a well-established common law rule that a property owner has no duty to remedy a natural condition on his or her land in order to prevent harm to an adjoining owner's property. While there was no disagreement as to either the facts or the law, Sprecher urged the court to change the rule. In effect, he asked the court to repudiate a rule that would allow nature to be a barrier to responsibility. In the trial court, summary judgment was granted to the defendants and this judgment was affirmed by the state court of appeals. There being no preexisting duty, the defendants' failure to correct the slope conditions was deemed reasonable.

In the state supreme court the justices acknowledged that because the condition was natural the defendants had a complete defense against liability. Duty and liability, that is, were directly determined by reference to the natural/artificial distinction. We are only held accountable for what occurs in the human domain. If the condition had been artificial, the defendants would have had a duty to the plaintiff and negligence

could have been alleged and determined. Being natural, there is no more to say. But the court asked: Does this make sense? Or in my terms, can the natural/artificial distinction be productively used to make sense of it? Is this the sort of sense we want?

In answering this, the court drew upon an image of a different sort of erosion, if not a slippery slope; one in the register of form. Nature as a guarantor of absolute immunity in cases like this had been the rule since time before mind. But, the court noted, in 1968, there began to be a shift in California tort law toward a "balancing" analysis. Instead of summarily recognizing absolute immunities rooted in nature, courts began at least to make inquiries about other factors such as foreseeability or certainty of injury, the closeness of the connections between a defendant's actions and the resultant harm and the possibility of the presence of moral blame. This was a shift away from using nature as barrier or limit toward integrating elements of humanness into the scene. In other states courts had begun to question the utility of the nature/artificial distinction in urban contexts. What may have made sense in a medieval agrarian setting might not make sense – or make the wrong kind of sense – in a late-modern, urban context. It might be that in cities "nature" ought not to be a barrier to the attribution of responsibility. It might be that nature wasn't really natural at all in cities. From these doctrinal rumblings in lower courts and in courts in other jurisdictions, the California Supreme Court detected a "progression," and a "general trend" toward rejecting the natural/artificial distinction as meaningless (1124). The court drew an analogy with the difference, or lack of difference, between being hit by a falling tree or a falling pole. The former is – or ought to be – no less under the control of the landowner. That the tree is "natural" really has nothing to do with it. What matters is ownership and the degree of control that can be inferred from owning. While the historical justification for the rule rested on a distinction between harm (misfeasance) and failure to prevent harm (nonfeasance) and, beneath that, a distinction between what is willed and what is unwilled, the court noted the "inherent injustice" in holding that "an owner may escape liability by letting nature take its course" (1125). Owing to the doctrinal shift, the inherent injustice and what it simply called "a more modern perspective," the court discovered obligations that flow from mere possession of land or "the right to control" land (1126). Nature, in one sense then, is irrelevant. The landscape had become humanized by possession, by being the object of rights. Events such as the landslide in Malibu should be made meaningful by asking

the right questions about human entanglements: Was the slide foreseeable? Was the cascade of events ever within the defendants' control? The rule giving primacy to nature not only provided a barrier to liability but also blocked inquiry. But, in another sense, nature remains all-important.

In what, for my purposes, was a nicely worded passage, the court said that the general trend reveals "an erosion of the doctrinal underpinnings of the rule." Just as erosion of the toe of a slope removes subjacent support that may precipitate a landslide, so this metaphorical erosion of doctrinal underpinnings removes support for a rule and precipitates a significant shift in legal form. The shift results in a failure, a slumping, of the natural/artificial distinction in liability attribution and a collapse of "nature" as an absolute barrier. It sets in motion a realignment of legal force. The defendants – and other similarly situated defendants in the future – now find themselves exposed to the force of legal coercion and ensnared in a web of legal obligations. Another way to see this, though, is that the reasonable person has been brought up to date, less lord of the manor, now more urban, more modern.

The state supreme court's rendering deals directly with the question of form over narrativity. It repudiated nature as limit. It did not – and could not – find that the defendants were negligent; it only directed that questions of negligence, causation, knowledge, and control not be summarily closed off. It directed that the figure of the human be placed closer to the foreground of the picture and that the lower court supervise the filling in of the details. And this is done with "facts," with narrativity.

In briefs and pleadings both parties introduced fragments of expert testimony, renderings of nature and of human–nature entanglements. Plaintiffs, in effect, used representations of fact to assert that the defendants knew or should have known about the instability of the slope, knew about the danger it posed to the plaintiff, and did nothing about it. They asserted that relatively simple and inexpensive measures could have averted the disaster. Defendants' experts claimed, however, that even *studying* what might be done would have been prohibitively expensive and that, in any case, the conditions were such that it would not have been possible to control the landslide. This being so, the defendants did exactly what a reasonable person would have done: nothing. The court decided that the disagreement was too close to call and that they should fight it out in the lower court. In a concurring opinion Justice Robinson agreed that "nature" should no longer be used as a

shield to block the asking of questions. But he felt that the present case was not a good vehicle for the task. In this case nature was too strong. The slide area was "very large, very deep, very old." The slope had been sliding "for aeons" (1130). He could not imagine what the defendant – or anyone – might have done to reduce the damage caused by the natural conditions. Still, these were triable questions and not ones to be dispensed with by the simple deployment of form.

Sprecher can tell us something of the work that nature performs in law and the work that law does in the interpretation of nature. Under pre-*Sprecher* rules, "nature" not only limited liability but was also used as a shield against scrutiny of any degree of human agency. For landowners, duties to others arose out of acts of artifice and the intentionality that the artifacts represent, and not out of the play of natural forces which "no human being had a hand in creating" (1130). Nature, as the name for what is prior to human agency, was located beyond human control and so owners and defendants were positioned beyond the nomic web of obligation and the events themselves positioned beyond the reach of legal analysis. This is some of the work that "nature" had done. The California Supreme Court decided that this work was no longer what was required. One interpretation would be that in repudiating nature in this sense the court was saying that landslides and other natural disasters were not really, or at least "purely," natural at all. Because the land was owned – even if it was not "developed" – it was better seen as situated within the domain of human agency or intentionality. Because ownership and possession entail "the right to control," then "nature" cannot be used to sever this right from a correlative *duty* to control. In effect, if one is not willing to accept a portion of what Mill identified as "man's duty to modify the physical world," then one may not accept the *right* to control it either.

What *Sprecher* seems to be saying is that if someone, call him "man," enters the landscape in order to work his will on it and to profit from that, then he already *is* within the nomic web of rights *and* duties. These duties, though, are not abstractions or contingencies. They are affirmative obligations to specific others such as downslope neighbors. These duties are discharged by undertaking transformative practices oriented toward controlling, subduing, mastering nature. He must know what the modern, urban, scientifically informed reasonable person is able to know. This entails duties to inspect, to pay for accurate geologic or civil engineering knowledge. He must control nature as the reasonable person would control it. He may not simply "let nature take its

course." *Sprecher* updated the reasonable person. Traditionally, the reasonable person would have left well enough alone. He would confine his attention and efforts to the world of artifacts and would only be (held) responsible for what could be construed as flowing "naturally and normally" from his intentions. The new reasonable person takes action to modify the physical world in accordance with due regard for others.

CHAPTER SEVEN

DOCTRINAL WILDERNESS AND THE PATH OF INTERPRETATION: LAW AND WILDERNESS

INTRODUCTION

Paul Gruchow, writing in *Boundary Waters: The Grace of the Wild*, describes moments of a solo venture in the Boundary Waters Canoe Wilderness Area of northern Minnesota:

> I launch my canoe, enter it, put down my paddle, pull against the water, and slide down forward into the unknown . . . I have been paddling since early morning. The muscles in my arms are weary; my legs, which I have alternately stretched and tucked under the seat of my canoe, are cramped; and I am hungry. I have passed through early mists down the winding Kawishiwi River, have glided so stealthily past a bull moose feeding on water plants in a marsh that I did not disturb his breakfast, have examined the residences of beavers, have admired the bloom of irises, have savored the melody of a white crowned sparrow, have made the acquaintance of a loon so near that I could peer into the startling scarlet of its eye, have threaded a bewildering maze of islands and ventured across open water in the dazzling glare of the high morning sun: I stop out of consideration for all that has transpired, that I might lock it in memory . . . [I] have vanished into the forest, taken a proper place in it. [I] stand there belonging, anointed with the heavenly, the homely, grace of wildness. (1997, 23, 43–44, 71)

These words are evocative, but they are, after all, only words. We cannot feel the ache or hear the sparrow. We do not vanish. We are not there. And indeed, some argue that words such as Gruchow's do not draw us into the wilderness so much as keep us that much further away from it.

The words invite us to *imagine* our own absence, our own disappearing, but they also call us more surely, if more subtly, to inhabit the world of words itself. On some readings of what wilderness is about, words *about* wilderness anchor us more firmly within what environmental activist-philosopher Jack Turner has called "the abstract wild" (1996). In so doing they only exacerbate our alienation from nature.

There have been, of late, a lot of words written about wilderness. Many of these words deal directly with the politics of wilderness: arguments for or against preservation or exploitation, for example. And many of these intersect with or are expressed in terms of legal discourse. They may take the form of statutes, regulations, executive orders, legal briefs, and judicial opinions. But other, more novel wilderness stories are emerging out of the academy. At the beginning of the twenty-first century scholars from a number of disciplines have been participating in what has been called "the Great New Wilderness Debate" (Callicot and Nelson 1998).

One way of understanding this debate is to see it as an argument about whether wilderness is found or made, that is, whether this figure of nature is itself "natural" or artificial. To assert that it is found – what I shall call the conventional view – is to read wilderness-as-nature as being strongly other than and, more specifically, prior to humans or to significant figurations of humanness such as civilization, history, or progress. Wilderness, on this view, is nature's place. Wilderness simply *is*. It is real; and *what* it is is what the world was – and had always been – before humans encountered and transformed it. The traditional debate has been between those who value it as such (or who call us to acknowledge its intrinsic value) and seek to preserve it, and those who regard it as a figure of nature to be subdued, improved, or developed. The contemporary debate is different. This debate is more about reference or the relationship of the wild to the word. Those who regard wilderness as made locate it among other artifacts. Wilderness, they say, is a product, an invention. It is, in fact, not only *not* natural but *un*natural. And if wilderness is made, if, that is, it is a social construction, it is largely made out of words. On this reading, Gruchow may more accurately be understood as participating in its construction and reproduction. In writing and publishing *The Boundary Waters* he is drawing on and putting into circulation conventional representations of wilderness, of nature. And, as with any figure of nature, he is engaging in the construction of a contestable figure of humanness itself. On this constructivist reading, wilderness is by no means antithetical to the word, it is

inextricable from the discursive representations through which it is made to appear.

Contemporary arguments about the wilderness idea, then, engage the root distinction in two different registers and the debate concerns the relation of these two registers. In one register there are disputes about the distinction and relationship between the domains of human and the nonhuman "on the ground" in the material landscapes called or experienced as wilderness areas. These disputes are the conventional ones about preservation and development. Social actors – environmentalists, paper companies, mining concerns, bureaucrats – have divergent views about how to act in the world. They may argue about the *value* of wilderness but they seem to agree on what in the world it is that is being evaluated and what, generally speaking, the word "wilderness" refers to. But in another register there is a parallel dispute about whether the distinctions that "wilderness" marks are themselves natural or artificial. Wilderness may be understood to be an unmediated, prediscursive reality, a natural nature or it may be understood as having no "independent" existence outside of the categories that have been invented. Presumably these two registers and their connection have practical import. If wilderness is "real" – and if that reality consists of a landscape that is "untouched" by humans – then it can plausibly be "preserved" by minimizing the impact of human actions in these places. But if it is made, if it is primarily a thing of discourse, then we cannot "preserve" it from its creators. Of course, we might be able to make the sort of wilderness we desire by minimizing transformative actions. But subsequent generations will also be able to remake and unmake whatever wildernesses they may desire simply by operating on the inherited concept. One of the many ironies of contemporary wilderness debates is that the first line of defense among preservationists is to preserve the integrity of the *word* by asserting that wilderness is *not* simply a word. This argument, which I shall discuss below, is that the word has a real-world referent and, moreover, that the meaning of the word is itself clear and unambiguous. Thus, an important part of the politics of wilderness has taken the form of arguments about the relation between wilderness and words.

These issues intersect with law in two places. First, law is a set of tools through which wilderness is managed, regulated, exploited, and, perhaps, preserved. In a sense, such wilderness as may exist is dependent upon or protected by law words or the complex of statutes, rules, and regulations according to which social power is distributed with

respect to these places. But there is another sort of wilderness that is integral to legal discourse itself, and in the practice of adjudicating disputes about what happens in the world of things this wilderness may be of greater concern to judges. This is metaphorical wilderness as it pertains to the practice of interpretation or meaning making. Another irony of wilderness discourse is that while there has been a cultural shift in the evaluation of wilderness (broadly from negative to positive) it is the historically pejorative connotations that have been "preserved" in the metaphor. Thus interpretive wilderness continues to signify incoherence, indeterminacy, confusion, or meaninglessness. Metaphorical wilderness is thus antithetical to law. In adjudication it is this wilderness that must be overcome, brought to order by force of reasoning.

This chapter examines the work that "wilderness" as a figure of nature does in legal discourse and the work that this does in the political construction – or preservation, or destruction – of the segments of the material world called wilderness.

THE CONVENTIONAL WILDERNESS

Forces of nature such as were encountered in the previous chapter are ubiquitous. They are occasionally dangerous and are subject to control. Wilderness presents us with a different, but not unrelated, figure of nature. Wilderness, in the conventional view, is nature's place. It is a place where, ideally, nature's forces rule without constraint. Generic wilderness is a place from which humans – or at minimum, the transformative power of property – are to be generally absent. Specific wilderness areas such as the Boundary Waters of northern Minnesota exemplify wilderness as the nature that nature writers, like Gruchow, write about, the nature that nature lovers love and the nature that those who long to "get back to nature" get back to. This character of "getting-back-to-ness" highlights a crucial temporal aspect of wilderness. Conventional readings of wilderness portray it as a place of the past, a wild place. It symbolizes not only what is other than civilization but what was prior to it. From one perspective it symbolizes the place from which "we" – modern, civilized, urban, Americans – emerged. But from another it symbolizes where we have never been. Supreme Court justice William O. Douglas described it this way in his book, *A Wilderness Bill of Rights* (1965): "Wilderness is the vista that faced those who topped the Appalachia going west. It is nature's labyrinth of down logs, primeval stands, meadows, and swamps whose creation preceded man. Wilderness

is the earth before any of its wildness has been reduced or subtracted" (29). For wilderness advocates it is often seen as a place whose defining quality of wildness is something that we need to keep in touch with. As William Cronon (1995) has written, "For many Americans wilderness stands as the last remaining place where civilization, that all too human disease, has not yet fully infected the earth" (69).

As many writers have recently discussed, this conventional wilderness idea is a place of valorized negativity. It is defined as a place of absence. In the quote from Cronon it is characterized by the absence of the disease of civilization. What makes – or keeps – a wilderness is the absence of people and our artifacts. It is *un*civilized, perhaps *un*charted, *un*confined, *un*changed by human hands, and, crucially, *un*developed. A key term used to define wilderness is "untrammeled," which has been glossed as "unshackled." And the shackles here are the repressive bonds of civilization itself. The contemporary version of the conventional view thus carries traces of an antimodernist bias, perhaps even a hint of misanthropy. The negativity of wilderness, even and especially when it is positively valued, connotes temporal priority. The "un-" in the operative definitions means "not yet." Wilderness, we are often told, is "primitive," "primeval," "ancient," or "virgin." It is *untouched*.

Wilderness is also, in various ways, a place where necessity reigns. This is clearest in discussions of wilderness ecology where interrelations among organisms and habitats are determined by the unfolding of physical processes. Wild places are not designed, they are not the manifestation of intention or will. Rather, they are the result of nature simply taking its own course. According to pioneering ecologist Arthur Carhart: "Wildland would be a portion of the earth's surface on which it is readily evident that the topography and ecological associations living thereon exist in relationships determined predominantly by natural laws and forces" (1961, 15–16). As one federal judge put it, "These are delicate, sensitive places where the often mysterious and unpredictable processes of nature are to be preserved" (*Sierra Club* v. *Lying*, 662 F Supp. 40, 1987). For this judge it follows that "[M]an must tread lightly in these areas, in awe and respect."

Wilderness, again, is not only a geographical concept, not only a place, but centrally, it is a temporal concept as well. Conventionally it is a place of pastness. It is not just outside of or beyond civilization. It is *before* it. From an ecological perspective the temporality of wilderness may be seen in the complex temporalities of the physical processes and the interrelationships of its constituent parts as measured in terms of

evolution, ecological succession, natural disturbance, seasonal and diurnal rhythms. "What is significant about wilderness," writes Robert Elliot, "is its causal continuity with the past" (1982, 87). Wilderness connotes a naturalized time embracing eons, centuries, years, and seasons. This sort of temporality is contrasted with the unidirectional "march" of human progress and development. Once these temporal relationships between species, habitats, and wider ecosystems are significantly interfered with they cannot, in most cases, be put back together. And even if in some sense they may be, what is "put together" would, by definition, no longer be "wild." It would no longer be natural or a manifestation of "nature." Thus when one reads discussions of intrusions into wilderness areas, one frequently encounters invocations of the "irreparable," "irretrievable," "irrevocable," or "irreversible" consequences. One false move, and it is lost forever.

TRADITIONAL WILDERNESS

What I have been calling the conventional view of wilderness is conceptually centered on a rather sharp distinction between wilderness and the signs of humanness: civilization, history, progress, the market, the artificial. It is now commonly evaluated positively in contrast to these forces, at least rhetorically. But mass wildophilia, as historians have documented, is a comparatively recent cultural phenomenon. "Wilderness," before the emergence of romanticism and environmentalism, was traditionally regarded as a place of darkness and danger. As Cronon says, "To be in a wilderness was to be 'deserted,' 'savage,' 'desolate,' 'barren' – in short, a 'waste,' the word's nearest synonym. Its connotations were anything but positive, and the emotion one was most likely to feel in its presence was 'bewilderment' – or terror . . . Wilderness had once been the antithesis of all that was orderly and good" (1995, 70–71). In what Light and others call "the classical conception" wilderness was regarded as "unknown evil at the edge of civilization" (1995, 196). As such it was a place to be "subdued, conquered and, crucially, cultivated, transformed into something useful." Only when it began to be generally acknowledged that the American wilderness was almost entirely gone – or when recreational "uses" became more significant forms of leisure activities – were the words of wilderness prophets such as John Muir heeded and "preservation" efforts seriously initiated. Now, at the beginning of the twenty-first century, more than 100 million acres of wildlands have been, as they say, "set aside."

This does not mean that there has been a complete inversion of the evaluative categories of wildness. Antiwilderness forces, in fact, are thriving. Rather, wilderness and its values and uses are now an explicit object of contestation. Wilderness is now one "use" among others to which federal public lands are put. Those who desire a primitive wilderness experience are now one constituency among many others. And perhaps few advocates of wilderness are entirely anticivilization in a hermetic sense (or if they are, except for the Unibomber, they don't tend to write about it). What conservationists are against is the totalizing grip of civilization. They want to preserve reservations or safety zones where the wild, the whole, the free might flourish. In our time, then, there is a fairly intense and multidimensional politics of wilderness. There are well-organized antiwilderness forces as well as pro-wilderness organizations ranging from the radical to the moderate with differing, sometimes incompatible, reasons for valuing the wild. What needs to be emphasized about this conventional wilderness is, first, that however it is evaluated it is regarded as prediscursive and, second, that the word "wilderness" refers to that prediscursive reality in a rather direct, unproblematic way. Wilderness is as "wilderness" describes it as being and the word itself has a plain, clear, unambiguous, that is determinate, meaning.

WILDERNESS AS ARTIFACT

Recent theoretical explorations of the social constructedness of "nature" have had a significant impact on how philosophers and environmental historians have come to view "wilderness." In his classic study of *Wilderness and the American Mind* (1982), Roderick Nash emphasizes not only the shifting historicity of the imagined wilderness but also its enduring subjectivity and indeterminacy. With respect to this question of reference, the idea, he wrote, is "heavily freighted with meaning of a personal, symbolic and changing kind," and that "because of this subjectivity a universally acceptable definition is elusive" (1). That is to say, the word – and therefore what in the world it may refer to – is radically indeterminate. More recently, scholars such as J. Baird Callicott (1998), William Cronon (1995), and Paul Faulstich (1994) have argued that "the received wilderness idea" as articulated, for example, by William O. Douglas or the Wilderness Society, is not only subjective but is also and necessarily ideologically loaded. They argue that "the trouble with wilderness" as a figure of nature is seen in

what – rhetorically – the idea does. For these avowed environmentalists, the trouble with the conventional reading concerns what the idea presupposes and reinforces about how we look at the world and ourselves in the world. As a consequence of this, the trouble relates to how it affects how we act in and toward "the environment." The claim is that wilderness has no pre- or extradiscursive referent.

Cronon puts the matter succinctly. He argues that:

> Far from being the one place on earth that stands apart from humanity, it is quite profoundly a human creation . . . It is not a pristine sanctuary where the last remnant of an untouched, endangered, but still transcendent nature can for at least a little while longer be encountered without the contaminating taint of civilization. Instead, it is a product of that civilization . . . Wilderness hides its unnaturalness behind a mask that is all the more beguiling because it seems so natural. As we gaze into the mirror it holds up for us, we too easily imagine that what we behold is Nature when in fact we see the reflection of our own unexamined longings and desires. (1995, 69–70)

Callicott says that the romantic understanding of wilderness that is expressed by conservationists "perpetuates the pre-Darwinian Western metaphysical dichotomy between 'man' and 'nature,' albeit with an opposite spin" (1998, 348). But, in Cronon's view, "There is nothing natural about the concept of wilderness. It is entirely a creation of the culture that holds it dear, a product of the very history it seeks to deny . . . In virtually all of its manifestations, wilderness represents a flight from history" (1995, 79). And the problem, again, is not just muddled thinking.

> [T]he real trouble with wilderness is that it quietly expresses and reproduces the very values its devotees seek to reject. The flight from history that is very nearly the core of wilderness represents the false hope of an escape from responsibility, the illusion that we can somehow wipe clean the slate of our past and return to the tabula rasa that supposedly existed before we began to leave our marks on the world. (80)

In the flight to an imaginary history from our real and present historical circumstances, "we evade responsibility for the lives we actually lead. It becomes unlikely that we will make much progress in solving [environmental] problems if we hold up to ourselves as the mirror of nature a wilderness we ourselves cannot inhabit" (83). In particular, the conventional view "makes wilderness the locus for an epic struggle between malign civilization and benign nature, compared to which all other social, political, and moral concerns seem trivial . . . Presumably

[including] any environmental problems whose victims are mainly people" (84). In the end, the trouble with wilderness is that "Any way of looking at nature that encourages us to believe we are separate from nature – as wilderness tends to do – is likely to reinforce environmentally irresponsible behavior" (87).

And these are not the only troubles. The wilderness idea is also alleged to be ethnocentric both in its erasure of indigenous North Americans from "history" and, through the globalization of the American wilderness ideology by way of international conservation programs, its impositions on peoples of poorer countries who can ill afford the luxury of a purified, sanctified "nature" in their midst. It is also interpreted as classist (having been invented by and for elites) and as predicated on discredited masculinist ideologies (having been invented to stave off the alleged feminizing effects of urban life). As Cronon says, "[I]n the wilderness, a man could be a real man" (78). What is being criticized here is the sharpness of the distinction; what is being asserted is that "wilderness" emerged out of a specific set of social, political, and historical conditions.

THE PRESERVATION OF THE WORD

Advocates of "the received wilderness idea" have responded to these critiques in various ways. One response to constructivist attacks is simply to reassert, as does Dave Foreman of the Wildlands Project, that "wilderness areas are real," and to charge revisionists with giving aid and comfort to the enemy. Exposing the discursivity and artificiality of wilderness uncouples it from nature and leaves it exposed to interpretive destruction. Once the idea behind the places is discredited, he argues, "others will reap the whirlwind [that the critics are] sowing to try to open existing Wilderness Areas to clear-cutting, roads, motorized vehicles, and 'ecosystem management,' and, more dangerously, to argue against the designation of new wilderness areas" (1994, 346). Reinforcing the clarity of "wilderness," then, is the first bastion of defense. If the word wavers, the places themselves may fall.

Another strategy is to concede that the word "wilderness" is an invention and to shift attention to the quality of "wildness" that the word may or may not accurately capture. According to conservation biologist Donald Waller, "If wilderness is, admittedly, a very human construct laden with cultural meaning, wildness is just the opposite: that which is not and cannot be, a human construct. Wildness existed before human

cultures expanded and will exist long after human cultures have vanished" (1998, 445). What is interesting is that, for Waller, the beauty of "wildness" over "wilderness" is that it signifies a determinate physicality. Moreover, while wildness may be natural it is by no means inaccessible. "Fortunately," he says, "we can define 'wildness' in terms that are much less prone to misinterpretation and misuse than our use of 'wilderness.' In particular, it seems appropriate to define an organism's, or a habitat's, wildness in terms of its ecological and evolutionary context, that is, its habitual relationship to other organisms and the surrounding environment" (457). What is so attractive about abandoning "wilderness" and embracing "wildness" is that while the former needs to be interpreted, and is therefore often misinterpreted, the latter can be measured.

In either case, wilderness or wildness, conservationists make the implicit pragmatic assertion that in order to keep it we need to insist on the reality, the naturalness, the nonconstructed, nonartificial essence of what the term designates. The integrity of the world is a function of the integrity and coherence of the word. If we blur the conceptual lines, if we acknowledge the subjectivism, ideology, or indeterminacy of the language used to describe and evaluate the world, we make it that much more likely that we shall lose the world. If wilderness simply and obviously means an area that is incompatible with, say, logging or mining, then "preserving" it has some obvious implications. If such incompatibilities are understood as relative, subjective, or ideological, then there may be very different material consequences. And, in the end, once it's gone, it's gone.

But perhaps we need to go more deeply into the wild to see of what utility or disutility these arguments about semantics or reference might have. For advocates of wilderness preservation these are not simply nature's places, but places where *wildness* may be encountered and must be protected. But what is it that we encounter? "Wildness," in Rothenberg's words, "is that other least human realm of nature" (1995a, xiii). Poet-philosopher Gary Snyder says, "To speak of wildness is to speak of wholeness" (quoted in Aplet 1999, 353). To be civilized, as even Freud acknowledged, is to be broken. And wildness – what nature is – contrasts with the civilized in a more specific way that casts the latter as the captured, the domesticated, the shackled. In Aplet's words, "Freedom is the key quality of wildness." Therefore, "the essential requirement of wilderness is that it be set free" (1999, 352). *It*, the place and all that takes place within it, is "free." It is, in fact, "self-willed" and "subject to its own self-order" (355). The freedom of wilderness is, to

borrow from Isaiah Berlin's treatment of political freedom, both positive and negative. It is both freedom *to* and freedom *from*. To be wild is to be free to *remain* autonomous and integral. In order to remain autonomous it must be free from the transformative forces of civilization and conventional progress. The arrival in the wild of the signs of civilization announce the end of autonomous nature. Turner writes that managed, so-called wilderness areas hasten the demise of nature. "'Nature ends' because it loses its own self-ordering structure, hence autonomy, hence wildness" (1996, 109). As a place where true freedom reigns, humans may visit and, under appropriate conditions, partake of that freedom, perhaps even "go wild" – but only for a while.

But if this is what wilderness is about, some argue, then wilderness may no longer exist at all. It may already be too late. One version of this argument has it that what goes by the name of "wilderness" is more accurately described as a theme park environment, a sort of naturama. It is managed, in fact "stage managed" (Talbot 1998). As it has been regulated to death, its wildness has been eviscerated. Rojek, writing of "ways of escape," says that, "Far from offering us experience of pre-social nature, unscarred by history, class or politics, [official wilderness areas] are, in fact, social constructs, man-made environments in which nature is required to conform to certain social ideals . . . it must be the exact opposite of the metropolis. The parks are stage representations of nature" (1993, 198). Similarly, Talbot refers to wilderness areas as "museumized nature" and cites Vogel's description of them as "pieces of nature withdrawn from the natural order" (Talbot 1998, 326). According to wilderness philosopher-guide Jack Turner, "The wilderness of the Wilderness Act permits the state to control fires, insects, diseases, and animal populations, build trails for human use, graze livestock and mine ore. These environments are not wild. They are too designed, administered, managed and controlled" (1994, 172). And if they are not "wild" then they cannot be true "wilderness." Then too, there is another perspective on wilderness law that turns on what may be an even deeper, more fundamental, unresolvable contradiction. This argument suggests that precisely in the act of making it legally meaningful – even if the purpose is to preserve it – wilderness is destroyed. Simply by attempting to name it, its specificity is violated. Answering the question "what is wilderness?" signals and hastens its disappearance. To manage, to regulate, is to bring to order by way of rules, words. Here, the nature/human antithesis is cast more explicitly as an antithesis of the wild and the word.

NEOROMANTIC WILDERNESS

This seems to be the position of some advocates of *wildness* – the quality that wilderness is supposed to preserve. On this view, *language* is a principal signifier of the presence of the human and the domain of the wild is specifically antithetical to that of the word. Seen in temporal terms, the wild is prelinguistic and the prelinguistic is the wild. As wilderness philosopher Max Oelschlaeger writes, "Linguists have a word for the power of language: displacement. It is the way by which [the human species] created and entered [our] second world, the cultural realm that conceals our origin, our home from us . . . It is through language generally and through literacy more particularly, that we have been alienated from the first world" (1995, 51, internal quotes deleted). That is, to the extent that language mediates our engagement with nature, nature remains inaccessible to us. And while he adds that "it is also through language that we can return," others are less sanguine about the possibility of wording ourselves back to the wild.

Words, we say, capture meaning. With words we order. In a sense, we domesticate and confine. Irene Klaver, for example, writes that, "Whereas 'wilderness' as a collective noun has been turned into a steady state with well defined boundaries, 'wildness' . . . signifies what is *not* determined and *not* easily grasped, much like mist lingering in the landscape. The wild is *not* confined and does *not* confine, just as the silent does *not* define and is *not* defined" (1995, 121, emphasis added). She continues: "The unnamed and untamed slip between the borders into the 'darkest woods, the thickest and most interminable swamp,' or 'impermeable, unfathomable bog,' escaping human measurements of words, definitions [and] numbers" (124). This, of course, is precisely contrary to Waller's conception of wildness as determinable, measurable, orderly, and relatively unambiguous. Likewise, Jack Turner says, "We understand [wildness] intuitively, [it] evade[s] definition, analysis and measurement because [it] refer[s] to our experience of the material world rather than to the material world itself" (1996, 15). And for Rothenberg, "Once we have found the wild, it remains hard to speak of it" (1995b, 214). There may be a measure of irony in defining wildness as that which cannot be defined. But perhaps the idea is to point to the limits of language – to assert that language even *has* limits – to assert that there are qualities that exist, and can only exist, beyond those limits. Perhaps the idea is to suggest that we are confined within a prison-house of words. In going beyond the limit, in trying to capture the uncapturable, to control that

which is the antithesis of control, we are left with words alone. We are further removed from – alienated from – the true wild. This, at least, seems to be the thrust of Turner's "rant" against "the abstract wild."

And if words capture and reduce wildness, confining it within an artificial semantic ecology, legal words – rule words – more specifically capture and ensnare their objects within seemingly rigid webs of power: authority, prohibition, permission, and sanction. By the use of law words wilderness is hunted down, captured, confined, and preserved. It is, in the words of the Wilderness Act of 1964, preserved "subject to existing private rights" (16 USC §§ 1131–1136). Law words capture for the explicit purpose of control. It is instructive that Rothenberg glosses "wild" as

> more than a named place, an area to demarcate. It is a quality that beguiles us, a tendency we both flee and seek. It is unruly, that which won't be kept down, that crazy love, that path that no one advises us to take – it's against the rules, it's too far, too fast, beyond order, irreconcilable with what we are told is right. (1995a, xvii)

When Thoreau wrote in *Walden Pond* that "in wildness is the preservation of the world," according to Rothenberg, "[h]e did not mean wilderness. He meant the breaking of rules" (xvii). The wild of wilderness is here specifically set in opposition to the law, to words and rules. Law and its textuality are primary signifiers of the human. For wilderness to remain wild it must be unnamed and untamed, untrammeled and untouched by law.

Thomas Birch explores and develops this argument more thoroughly. In "The Incarceration of Wildness: Wilderness Areas as Prisons," he asserts that wildness, "by definition . . . is intractable to definition, [it] is indefinite" (1990, 8). Drawing the line between the legal (the discursive, the textual, the social, the historical) and the wild in the starkest of terms he writes, "Wildness itself, to the mind of the law bringing imperium, is lawless; it is the paradigm of the unintelligible, unrepentant and incorrigible outlaw" (9). Wildness is not just other to or beyond law. It is against or in opposition to law. Legal wilderness designation, in attempting to name the unnameable, destroys wildness. "To create legal entities such as wilderness areas is to attempt to *bring the law to wildness*, to bring the law to the essence of otherness, to impose civic law on nature" (7). "Yet, according to the dictates of the imperium, which claims total control, wildness must be, or at least must seem to be, brought into the system, brought under the rule of law" (9). Wildness, then, is

that which is most radically other to law and, conversely, "the essence of otherness is wildness" (11). "What was once the wasteland of wilderness, the 'outside,' is brought inside the imperium as legally designated wilderness reserves, thus making a proper place for wildness in the universal system of universal control" (15). "The real point," Birch insists, ". . . is that wildness, and now the wilderness reservations that the white imperium has created in obedience to its traditional story of law bringing, is an adversarial other to be subdued and controlled" (20). Meaning is brought to wild places "by whatever means necessary, *ergo*, force and violence" (13).

Discussing the Forest Service's program of inventorying potential candidates for wilderness designation (Roadless Areas Review and Evaluation), Birch says that "The purpose of the RARE process was to search out and evaluate the utilities of all remaining wildland in the national forests with the goal of determining its allocation and disposition, thereby giving it definition, bringing meaning into its nothingness, so that nothing remains unmanaged waste outside of the imperium" (21). But again, "Wildness is logically intractable to systemization. There are no natural laws of wildness" (22). And in any case, "the imperium wins whether a tract of land is classified as legal wilderness or not, because the imperium has been allowed to get away with setting the terms of debate" (22). The end result of bringing law and meaning to the unnameable wild is that "self-determination is not permitted for nature, even in legally established wilderness reserves, in spite of much rhetoric to the contrary. Instead, wild nature is *confined* to official wilderness reserves" (5). "Wilderness reservations are 'lockups.' The place that is made is the prison, or the asylum. When this place is made and wilderness is incarcerated in it, the imperium is complete" (9). There is, then, no "outside" of the system of control and domination founded on violence. Even that most "outside" of places, the wilderness, is as firmly inside as any other place. In fact, more so. Naming by law does not simply destroy wildness, it turns it into its antithesis: a place of discipline, order, and domination. From this neoromantic position the wild and the word are not only distinguishable but are diametrically opposed. Whether the meaning of wilderness is indeterminate or not its relation to the reality of wildness is determinate.

Birch's argument is deliberately provocative, in its own way "wild." In the end, though, he draws back from some of its implications by recasting wilderness areas as, after all, "holes or cracks, as 'free spaces' or 'liberated zones,' in the fabric of domination and self-deception that

fuels and shapes our contemporary culture," and as providing "a crucial counterfriction to the machine of total domination, slowing it down and creating a window through which a postmodern landscape of harmony may be found" (25). Likewise, preservation efforts are acknowledged to be "an essential holding action" with "subversive potential." For our purposes, though, his argument is of interest not only for what it asserts about "the wild" but also for the vision of law that it presupposes. (This is a vision that, I imagine, is not shared by the Board of Directors of the Wilderness Society.) It is an expression, albeit in inverted form, of the conventional construal of law (as word) as antinature. Perhaps there is no getting away from this.

This brief excursion tells us something about wilderness today. Our wilderness, like everything else in the culture, has become, according to some – with both fear and hope – "postmodern." To others, though, the postmodern deconstruction of "wilderness" is simply a sideshow that might enable the all too modern destruction of wild places. Where, though, does law stand with respect to wilderness?

LOST IN THE LEGAL WILDERNESS

To return to the scene with which this chapter opened, after Paul Gruchow launched his canoe he not only paddled past pine and spruce forests in a wilderness defined by the absence of (other) humans. He also, as Birch correctly insists, paddled through a land and waterscape that is saturated with legal meanings. He may have been away from the city but he was by no means outside the system of law. He was in the United States, not beyond the frontier. He was in the State of Minnesota, in St. Louis County, in Superior National Forest, in the Boundary Waters Canoe Wilderness Area, perhaps in the Portal Zone, the Little Sioux Roadless Area, or in Compartment 38 Block (see *Minnesota Public Interest Research Group* v. *Butz*, 358 F Supp. 584, 1974). He was in a landscape made meaningful by countless legal directives and agreements. He was very much in what might be called a textual wilderness. Where he was and what he did there were conditioned by (interpretations of) constitutions and treaties, the Wilderness Act of 1964, the legislative enactments that established the Forest Service, the Superior National Forest, and the Boundary Waters Wilderness, the Administrative Procedure Act, the National Environmental Protection Act, and countless other regulations through which this place is managed. The wilderness is also made meaningful by a series of court cases, each rooted

in many other cases relied upon as precedent and by doctrines concerning such things as standing, ripeness, and statutory construction. The wilderness is also made meaningful through formal interpretations of rights. Law most definitely and forcefully is *in* the wilderness. And the wilderness is a thing of law. The canoeist was paddling through a thicket of legal meanings no less dense than the virgin forests that surrounded him. But is this wilderness as easily penetrable? Can he glide as soundlessly, wordlessly through this as he might the waters of the Kawishiwi River? And what, after all, does this "legal wilderness" have to do with the beaver, the iris, the loon, and the moose?

The cornerstone of the legal thicket is the Wilderness Act of 1964. Wilderness areas had previously been established by agencies such as the Forest Service and the National Park Service but the directives that established them were as revocable as any other administrative regulation. This, for advocates of wilderness preservation, rendered them too vulnerable to the shifting forces of policy change. The Wilderness Act of 1964 made preservation a matter of congressional policy. Most of the legislation was, in fact drafted by the president of the Wilderness Society, Howard Zahniser. In this act Congress created the National Wilderness Preservation System. Initially it consisted of approximately 9 million acres. Now it embraces more than 100 million acres and is growing (Aplet 1999).

Section 2(c) of the act gives some sense of what vision of wilderness was incorporated into the statute. It reads, in part:

> A wilderness, in contrast to those areas where man and his works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped federal land retaining its primeval character and influence without permanent improvements or human habitation which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature with the imprint of man's works substantially unnoticeable; [and] (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation. (16 USC § 1131(c))

The Wilderness Act has subsequently been supplemented by a host of other more specific pieces of federal legislation such as the Eastern Wilderness Act of 1975. It is important to recognize that, as one federal judge has said, "Minnesota's vast northeastern 'forest-lakeland

wilderness eco-system' was formed by the timeless actions of nature during ages immemorial. The Boundary Waters Canoe Wilderness Area, on the other hand, was formed by the United States Congress in the crucible of the 1978 political season. The laws of nature shaped the wilderness; the law making of Congress shaped the BWCWA" (*Friends of the Boundary Waters Wilderness* v. *Robertson*, 770 F Supp. 1385, 1991, 1387). The BWCWA, like other such places, is a historical, political space. It was created, as the judge suggested, out of "the combat of competing interests." It therefore can be expected to bear the traces of political compromises.

The Wilderness Act itself contains a number of exceptions and exemptions that problematize the "untrammeled" requirement of section 2(c). Among these are "the continued use of aircraft and motor boats, hard rock mining, mineral leasing, grazing, access road construction and water development projects" (Woods 1998, 133). Even the two rationales of section 2(c) noted above may be in sharp conflict. As Mark Woods tells us,

> The preservation rationale enjoins us to preserve wilderness independent of human uses of it. What in wilderness do we preserve? Naturalness. The recreation rationale enjoins us to preserve wilderness so that we can use it for wilderness recreation and solitude. What in wilderness is worth preserving? Outstanding opportunities for primitive recreation and solitude . . . Primitive recreation today means multitudes of people with high-tech gear backpacking, hiking, horseback riding, skiing, snowshoeing, climbing, canoeing, kayaking, rafting, hunting, fishing, and photographing everything and everywhere possible in wilderness areas. (146)

Then too, section 2(c) specifically mandates the "natural conditions" be "managed." But as Turner says, "The wilderness of the Wilderness Act . . . [is] too designed, administered, managed and controlled" (1994, 172). Most importantly, there is something else besides nature that the Wilderness Act preserves. Section 4(c) states that all of the prohibitions and mandates that the act contains are "subject to existing private rights." And this includes those rights whose exercise may entail the destruction of its "primeval character."

The Wilderness Act itself, then, is a jumble of contradictions and ambiguities. According to Woods, "Written into the very language of the Act that established federal wilderness preservation is a political compromise that expresses antiwilderness values and that allows for and

legally sanctions the commercial trammeling and economic exploitation of wilderness." That is to say, "The first paradox of federal wilderness preservation is that its creation can legally sanction its destruction" (147). If this legal "wilderness" is ambiguous, then it is not surprising that rival political actors will raise contending questions and attempt to have these ambiguities resolved in their favor.

One perspective on the Wilderness Act is that, while admittedly flawed, it represented a watershed moment for the forces of conservation in America. Though by no means absolute, it signaled the incorporation into Federal Public Lands policy of an antiexploitation conception of nature–human relationships. And, by and large, the federal judiciary has performed well in beating back misinterpretations of the act's true purpose. On the other hand, Woods suggests that the statute that was seemingly intended to inscribe legal meaning onto the wilderness is itself so self-contradictory as to be meaningless.

There are, then, lots of practical "troubles with wilderness." For some economic actors such as paper companies, loggers, oil or mining companies, the problem, perhaps, is that wilderness still exists at all. Wilderness, understood simply as roadlessness, impedes the extraction of resources and at least increases the costs of production. Exacerbating the problem of *de facto* wilderness there is now the problem of *de jure* wilderness to contend with. Now it is not only steep terrain, remoteness, or dense vegetation that may hinder efficient exploitation but laws have been passed that have the effect of locking resources and commodities away from those who might otherwise have access to them. The rhetoric of antiwilderness forces commonly claims that these laws are the result of public lands policy having been hijacked by elites (usually from cities or the east) for the selfish reason of preserving massive pleasure grounds available only to the few. Where *de facto* wilderness limits development for physical, logistical reasons – otherwise, one imagines, it wouldn't have remained wild for as long as it did – *de jure* wilderness limits development for ideological reasons. And necessarily it does so by limiting – "taking" or "destroying" – rights. For others, though, the trouble with wilderness is that it doesn't exist – in either *de facto* or *de jure* forms – in sufficient amounts to do what needs to be done. This is the position of conservation organizations such as the Wilderness Society or the Sierra Club.

A pluralistic view of democracy might see all of these competing positions affecting policy debates which, in turn, cash out in the places that are called "wilderness." In policy debates we find arguments about what

"wilderness" means, about which places ought to count or not count and why, about how such places are actually designated. Once an area is designated there may then be further disputes about how it is to be regulated or managed. If wilderness, by definition, points to the exclusion of human artifacts what, specifically, is excluded? – machines? boats? chainsaws? cattle? buildings? trails? radios? rock-climbing equipment? fire suppression? insect eradication efforts? The question becomes: How pure is "pure"? How free does "free" go? These are some of the practical, rather mundane sorts of questions about which legal arguments over wilderness are concerned.

But there are other sorts of troubles with wilderness, troubles with the very idea. What I want to do in the remainder of this essay is to look more closely at this posited wilderness–law antithesis, but this time from the other side. If law – word, rule, order – is toxic to wilderness as the place of the wild, in what sense might wilderness be toxic to law? How might wilderness threaten the integrity or very existence of law? Given the starkness of the antithesis in question, I shall proceed along two paths. The first requires that we retreat deeper into the realm of signification, the second points us back toward the "facts on the ground."

METAPHORICAL WILDERNESS

There are different kinds of wildernesses. We have already encountered *de facto* wilderness and *de jure* wilderness. The one seemingly points to wild, integrated ecosystems, the other to legally designated spaces. The two do not necessarily overlap. But there is another kind of wilderness, metaphorical wilderness. And perhaps for someone engaged in the cultural practice of legal interpretation in a federal courthouse in Minneapolis, Denver, or Washington DC this wilderness may present itself as a more immediate concern.

One of the ironic features of contemporary wilderness discourse is that while normative evaluations of "wilderness" and even "wildness" have become more varied in the last two generations, *metaphorical* wilderness has retained the historic pejorative senses of the term. These remnants of past connotations are "preserved" within the metaphoric system itself. Deep within the metaphorical wilderness earlier associations with darkness, evil, danger, confusion, and "bewilderment" are seemingly frozen. For example, when we use constructions such as "moral wilderness," we do not normally mean to celebrate it as a place to "get away from it all." Rather, it is a state to be dreaded and avoided.

Literary uses such as "urban wilderness," "neon wilderness," and "Manhattan wilderness" play on the reversal of conventional dichotomies. But precisely in their reversal they serve to highlight the supposed disorder, chaos, evil, or incivility of cities and not their potential to provide "outstanding opportunities for primitive recreation." Similarly, a phrase like "sexual wilderness" conveys confusion, the absence of clear and stable rules of behavior. Of course, one may celebrate "wild sex," but this is really a different story. And the stale metaphor of "a voice in the wilderness" is used to signify a solitary speaker, one who utters words without interlocutors. Often it is used retrospectively as if the possessor of "the voice" were a pioneer – or a prophet – who had to wait for a community to arrive and hear the message. In arriving and hearing, of course, they erase wilderness.

The notion of "moral wilderness," again, portrays a state of confusion and pathlessness with respect to the right and the good. And taking morality to be another crucial and distinctively human attribute, to be in a moral wilderness suggests degeneration and regression. Animals inhabit a moral wilderness; the classic state of nature was a moral wilderness. The metaphor is productive and can be applied to anything from family life and intimate relations to war, that is to any domain where morality as a signifier of humanness ought to be but isn't.

Consider the following recent examples:

> If trends are not checked, Britain will become a moral wilderness filled with wild children. (Baker 1996, 12)

As the surrounding context makes clear, the speaker does not anticipate the realization of this vision with joy. Britain is not on the verge of becoming a place where Rothenberg's "crazy love" might flourish. Rather, it is a place beyond order. It is lawless, ruleless, a regression, perhaps, to the state of nature. Presumably it would be law as organized force that would play a leading role in "checking the trend."

> Couples today have the most rudimentary map of the territory through which life takes them. They are in a moral and psychological wilderness. (Dyn and Glenn 1993, 54)

The wilderness metaphor here conjures the danger of the unknown, the uncharted. The wayward couples are lost between the unprecedented and the unforeseeable. As informed by the more pervasive "life is a journey" metaphor they find themselves with no clear goal or direction.

> It is said that feral children raised in the wild are unable to speak despite an innate capacity. Likewise, children raised in a moral wilderness never learn to judge right from wrong. (Colson 1993, 24)

Here the real possibility of regression is highlighted. As in the first example, the focus is on children who are not being sufficiently socialized into the realm of rules. They are not signing on to the Freudian bargain. The inability to judge right from wrong, one senses, is not simply a problem concerning intellectual capacity, but a problem with consequences for behavior. Feral children act in a disorderly way. They become criminal adults. The contrast here plays on the antithesis of the wild with both language and the law. And it will be law as force that will be called upon to correct them. In addition to these, perhaps "private," wildernesses we may be warned against other more public ones. Owen Gilman, in his book *Vietnam and the Southern Imagination*, speaks of

> the physical and moral wilderness that was Southeast Asia. (1992, 176)

Though one may quibble with his characterizing a place that is home to tens of millions of people as a "physical wilderness," the sense of moral wilderness that he wants to impart is clear. Vietnam is less a real location than a metonym for American policies that were enacted there. The more commonly encountered metaphor from an American perspective is, of course, quagmire, which emphasizes images of being physically stuck. Describing Vietnam – the policies and the frame of mind out of which those policies emerged – as moral wilderness emphasizes lack of direction and moral bewilderment. Similarly, Christian Appy locates the American conduct of the Vietnam War within

> an ethical wilderness beyond the pale of civilization. (Appy 1993, 98)

This explicitly rehearses one of the principal contrasts of the wild with the civilized. And, as just wars are waged on behalf of civilization, one of the features of an unjust war may be its disconnection from law and legal procedure. Writing with respect to the Bosnia War Crimes Tribunal one journalist stated that

> Nuremberg reestablished amid the horror that war was not a moral wilderness. (Ajami 1996, 67)

And here again, it is law, legal procedure, and the order that it creates that is the tool for banishing the evil that "moral wilderness" is used to communicate. In ordinary English we may also encounter "the political wilderness," "the intellectual wilderness," and other fearful places.

Metaphorical wilderness may connote confusion but, as with other conventionalized metaphors, it is itself rather systematic and nonarbitrary. A common companion of the wilderness metaphor is the path metaphor. "Path" conveys a way *through* the wilderness, and directionality of motion. A path has an origin and, usually, a destination. It is a clearing. To follow a path is to rely on the work of predecessors who cleared it. Path also signifies replicability. In a domain such as a moral wilderness the path that isn't there is a form of rulelessness, wordlessness, lawlessness. Moreover, the path metaphor may confer linearity on reasoning. We follow the path of reasoning by way of logic – itself a sort of a metalaw. Ideally, that path is straight and it leads to the truth. Also, as we have seen, the wilderness metaphor is opposed to law as path – as word, rule, and order. Finding or making a path through the wilderness takes us out of the wilderness into the domain of law. This again comports with Birch's view of the law–wilderness relation, only the values are flipped. When metaphorical wilderness situates as "wilderness" those features that are conventionally seen as the distinctive markers of humanness (cities, morality, politics, intellectual life), it is in the juxtaposition of opposites that the metaphoricity of "wilderness" is most clearly seen. It is precisely in the crossing over – in the leakage of "nature" into what is most distinctively human – that the pejorativity or negativity resides.

What then of a "legal wilderness" in this overtly metaphorical sense? If wildness is antilaw and law the antithesis of wilderness, then what is the specific import of construing some aspect of "the legal" as wildness, as *not* law or as "antilaw"? When one points to a legal wilderness does one point to the bestial within law itself? The answer may be yes. Again consider some examples.

> I believe the majority of this court is leading us into a legal wilderness wherein I predict we shall become lost and will be required to wander through a maze of suits to try to find our way out and back to the clear ground where now we stand. (*Cottrell* v. *Faubus*, 347 SW 2d 52, 1961)

In this dissenting opinion the sense is clear. If we follow the majority off the beaten path we are lost. What is endangered here is legal clarity, certainty, and all that depends upon them.

> I dissent. Perhaps as a lone voice in the judicial wilderness who still believes that the responsibility for a criminal to adhere to the terms of his probation, and to be accountable for violations thereof, belongs to the criminal. (*Holtzman* v. *Texas*, 866 SW 2d 728, 1993)

This is a somewhat different image. Here the judge locates himself in the wilderness. He highlights his isolation. He knows where the truth lies and where the path is but still he is stranded.

> The trek started by Clarence Borel and Claude Tamplait has been marked by aimless wandering through the legal wilderness. The journey has taken its predictable toll.
> (*Cimino* v. *Raymark Industries*, 781 F Supp. 649, 1994)

Here again, the image is slightly different. The judges are not wandering, the litigants are. The implication is that they were not given clear guidance. There is no clear path. Again, this is no place to be. In the next examples,

> We are not blazing through a legal wilderness in this case for the law is well settled in this state. (*Wefel* v. *Westin*, 329 NW 2d 648, 1983)

and

> Section 504 is no first step into a hitherto uncharted legal wilderness.
> (*US* v. *University Hospital*, 729 F 2d 144, 1983)

the judges acknowledge the existence – and danger – of wilderness but assure us that the way is clear and that they or the legislators are on the right path. In the next example,

> To come to the same result after journeying through an uncharted judicial wilderness, dropping hints or attempting to set in concrete how future foreign relations cases might be decided, invites unnecessary and potentially dangerous incursions into the area.
> (*Goldwater* v. *Carter*, 617 F 2d 697, 1979)

we see the same metaphorical structure. The judge argues that other judges should have followed an alternative path. And at the border of legal theory and judicial practice Rosen says that Supreme Court justice Hugo Black

> led the Court out of the wilderness of legal realism and answered the charge that law is politics. (1994, 110)

As we saw in chapter 5, legal realism raised the specter of the indeterminacy and subjectivity of law and judicial practice. As it was legal theorists who led the Court astray, Justice Black got law back on track.

While in the broader culture the "wilderness" metaphor continues to signify confusion and the absence of a path of rules, in the specific cultural domain of law it signifies indeterminacy and the threat of meaninglessness. Freedom here is not emancipatory by any means. In the domain of law judges must be constrained by rules if they are legitimately to constrain others by rules. An unconstrained judge – a rogue, a maverick – has nothing to rely on except her own subjective preferences. An unconstrained judge is a political judge and unconstrained law is wild law. It is, therefore, not "law" at all. To find wilderness within the institutions of law is to find the negation of law.

Looked at this way, while the evaluation is quite different – in fact opposed – the story is exactly the same as that offered by Birch, Klaver, Turner, and Rothenberg. The wild and the legal are directly antithetical. The wild and the legal destroy each other by mere contact. They have, in these renderings, the relation of matter and antimatter. Where Birch wants a lawless wild, a wild uncontaminated by the merest traces of word, judges and legal scholars fear a law gone wild. Law is word – rule, order, precedent and method, and replicable paths. Without this, we're lost. As the examples show, legal wilderness as an expression of indeterminacy can be encountered in any area of law. When it is, it must be beaten back. As it turns out, metaphorical legal wilderness is particularly pernicious in the context of *de jure* wilderness. Indeed, given the contradictions that Woods claims are integral to the Wilderness Act of 1964 and given the thicket of other statutes with which it is entangled, indeterminacy here is rampant. And again, from the situation of judging, this may be the most salient problem.

In wilderness cases activists and litigants come to law so as to enlist state power in preserving or opening up for exploitation particular segments of the material landscape. In litigation attorneys – preceded, perhaps, by scholars – act as guides. In effect, they deny the wilderness character of wilderness law. In briefs, demonstrations, and oral argument they assert that the path of law is clear and that following the path that they identify will bring the judge to the correct destination. The path, again, is made of words and rules strung together by lines of reasoning or clear analogies. Dissenting opinions or opposing arguments may be characterized as absurd or ludicrous, as invitations to meaninglessness.

In these cases the path of law is demarcated by words such as "untrammeled," "primeval," "wilderness," and "subject to existing private rights." But, of course, there are always at least two possible paths and they always point in different directions. Judges may follow one path or the other but in any case in doing so they must tame the legal, that is, interpretive, wilderness, and bring order out of chaos, thereby creating a clear and settled place for law and practice. In the process, law itself may be purified.

One approach to clearing the legal wilderness might be to rely on an interpretation of the wilderness idea itself. But this would be to assume that the word "wilderness" has a sufficiently clear, stable, determinate, and objective meaning to provide an anchor for the path along which reasoning must travel. This is to say that, as indeterminacy presents an internal political problem, judges may use "wilderness" as a tool with which to solve that problem. In a situation such as this the wilderness idea itself may be a resource with which to hack one's way out of the wilderness of indeterminacy. But, as we have seen, wilderness is anything but clear, stable, and objective.

MAKING WILDERNESS WITH LAW

George St. Clair possessed mineral rights underlying 150,000 acres of the Boundary Waters Canoe Area (*Izaak Walton League* v. *St. Clair*, 353 F Supp. 698, 1973). In 1969, with the permission of the US Forest Service, his employees entered the BWCA, set up a base camp and began exploratory mineral investigations. St. Clair then gave the Forest Service notice that he intended to initiate core drilling in the area. Before the Forest Service took action the Izaak Walton League, a conservation organization with a longstanding interest in the BWCA, brought suit in federal court seeking a permanent injunction. The League claimed that Congress had effectively zoned the BWCA against mining. St. Clair argued that Congress had not intended to zone against mining. If it had, though, then this amounted to an unconstitutional taking of his rights in violation of the Fifth Amendment and that just compensation was due him. The League suggested that St. Clair was simply an opportunist who was more interested in exploiting the Wilderness Act than in exploiting the wilderness. The focal question of the case was whether mining could take place in a legally designated wilderness area.

The difficulty that Judge Roger Neville faced in answering the question stemmed not from an insufficiency of law in the wilderness but from

an excess. In reading the legal meaning of this landscape, Judge Neville worked through the following texts: congressional acts of 1891 and 1897 that established the national forest system, a presidential proclamation of 1909 establishing Superior National Forest, a Department of Agriculture regulation from the 1920s establishing a roadless area in Superior National Forest and one from the 1950s establishing the BWCA. These sources of meaning were supplemented by other federal statutes, regulations, and court cases as well as by a number of state laws. Traversing this thicket of directives Judge Neville discerned a relatively clear, unambiguous path. "The direction the Federal and State governments were taking," he wrote, "was by this time [the 1950s] clear" (708). And the clear direction was toward increasing preservation of the wilderness character of the area.

The most prominent landmark along this trail of legal meaning was the Wilderness Act of 1964. But, ironically, here the clear path disappeared. Looking closely at the act in connection with the antecedent directives what he found was confusion. "[T]he various statutory acts and administrative regulations including the most recent Wilderness Act of 1964, contain within themselves fundamental inconsistencies" (714). And the Wilderness Act itself, it seemed to him, was premised on "an inherent inconsistency" (715). Bringing this contradiction to light, he quoted extensively from the preamble of the act defining wilderness in terms of its "untrammeled" and "primaeval" character, as a place "where man and his works" do not "dominate the landscape," when "the imprint of man's work is substantially unnoticeable" (714). On the other hand, as later commentators such as Woods and Turner have noted, the Wilderness Act also says that preservation must be accomplished, "subject to existing private rights." How can this be? In attempting to untangle wilderness law Judge Neville seems to be confronting the specter of legal meaninglessness. "[I]t would seem that in enacting the Wilderness Act Congress engaged in an act of futility" (715). But this, of course, is an unacceptable conclusion. "To create wilderness and in the same breath allow for its destruction could not have been the real Congressional intent and a court should not construe or presume an Act of Congress to be meaningless if an alternative analysis is available."

What had to be preserved, in the first instance, then, was the integrity of legal meaning. What could not be tolerated was legal meaninglessness. "It does not seem to this court that it can presume that Congress intended a nullity" (715). His job was to banish meaninglessness and impose a clear, unequivocal meaning onto the BWCA. "The task of this

court is to divine the fundamental and prevailing intent of Congress." He claimed that it fell "in the lap of the court to determine which purpose Congress deemed most important and thus intended" (715). His task was to bring order to the wild by expelling wilderness from the law. He thus set out to make a clear path for the litigants and for subsequent courts to follow.

Not surprisingly, he solved the practical political problem by relying on a serviceable, if, as we have seen, contestable vision of nature. This was the conventional, Romantic vision that has been critiqued by Cronon and others. One significant feature of Neville's rendering is the forcefulness with which it was articulated; another was its repetitiveness, as if he were hacking away at the contradictions. What needed to be produced was certainty. "A wilderness purpose," wrote Judge Neville, "*plain and simply* has to be inconsistent with and antagonistic to a purpose to allow any commercial activity such as mining within the BWCA" (714). "Full mineral development and mining will destroy or negate the wilderness." Should mining be permitted, "the purpose and values of almost the entire BWCA is lost."

> *It is clear* that wilderness and mining are incompatible. Wilderness exists because man has not intruded upon it . . . Once penetrated by civilization and man-made activities it cannot be regained . . . The recovery period is meaningless for generations to come. The destruction is irreversible . . . mining activities and wilderness are opposing values and are anathema each to the other . . . Any use of the surface for the exploration or extraction of minerals becomes an unreasonable use because the surface is no longer wilderness and is irreversibly and irretrievably destroyed for generations to come . . . If the Act means anything, the BWCA was established by Congress to secure for future generations the beauty, pristine quality and primitiveness of one of the few remaining small areas of this Country. (714)

Wilderness and development (progress, civilization, history) are not merely different but "opposing," "antagonistic," "anathema." They are mutually negating. It is important for understanding law, I think, that this opposition is "beyond question." It "plain and simply has to be" by the very meaning of wilderness and development.

Judge Neville's Romantic reading of wilderness both reveals the contradiction inherent in the Wilderness Act and dissolves it. What is preserved in the first instance is the meaningfulness of law and the unitariness of congressional intent. The injunction sought by the

Izaak Walton League was granted. But whatever the degree of *de facto* wilderness that resulted, this was derivative of expelling metaphorical wilderness and purifying *de jure* wilderness.

But Neville's reading of wilderness and law was by no means the only plausible or necessary reading. It could be that he saw "opposition" and incompatibility – and saw it clearly, simply, and plainly – because of the vision of wilderness that he brought to the task of legal interpretation. Others have looked at similar situations and seen neither contradiction in law nor incompatibility between wilderness and development. Where one might see "antagonism" another might see "balance." And if there are problems in the wilderness, these may be the *result* of seeing opposition and contradiction. Consider the case of *Rocky Mountain Oil and Gas Association* v. *Andrus* (500 F Supp. 1338, 1980). Like *Izaak Walton*, this case concerned arguments about the compatibility of mineral exploration and development in wilderness areas. The posture of the case, though, was somewhat different. Here it was the federal government that prohibited development and the plaintiff was a trade association of oil and gas producers.

In 1976 Congress passed the Federal Land Policy and Management Act (FLPMA) which mandated a systematic inventory of federal wild lands. Like all general public land laws, the FLPMA restated the prevailing "multiple use" paradigm. Among the various "uses" to which wild lands could be put were wilderness preservation and resource extraction. The Secretary of the Interior was directed to identify roadless areas having wilderness characteristics consistent with the definitions contained in the Wilderness Act of 1964. Such areas were then to be surveyed by the US Geological Survey and the Bureau of Mines. A report was then to be presented to the president, who would then make recommendations to Congress as to the disposition of public lands. These are just some of the procedural moments in the making of *de jure* wilderness.

All of this takes time. So, during the interim, the Department of Interior identified a number of potential wildernesses or "wilderness study areas" and managed them so as not to impair their suitability for wilderness designation. As under the Wilderness Act of 1964 such wilderness management was to be "subject to the continuation of existing mining and grazing uses and mineral leasing." But such uses must themselves avoid "unnecessary or undue degradation" (1341). At first blush, the law of potential *de jure* wilderness might seem to express the same contradictions and inconsistencies that Judge Neville encountered in the Boundary Waters case.

The Solicitor of the Department of the Interior made sense of the statutes in pretty much the same way that Judge Neville might have. He promulgated an opinion – having the effect of law – that directed administrators to identify those roadless areas that obviously lacked wilderness characteristics and those that required further study. In this second set of places mineral development was to be prohibited if there was even a remote chance of "impairing an area's suitability for wilderness designation." As the solicitor wrote, "The Agency cannot permit the wilderness characteristics to be destroyed before those characteristics have been determined to exist" (1342). The Rocky Mountain Oil and Gas Association challenged the department's regulation – and hence the reading of wilderness that it incorporated – as being contrary to the controlling statutes. The regulation, they claimed, was "arbitrary, capricious and wholly erroneous" (1344), and should not be enforced.

Again, where one might reasonably see an incompatibility of wilderness and mineral development, plaintiffs suggested that these were not incompatible uses. Rather, the central incompatibility was that which existed between the regulation and the statute. The judge in this case, William Kerr, drew attention to what he saw as the core question. "The real issue in the case is the meaning of the clause 'subject . . . to the continuation of existing mining and grazing uses and mineral leasing'" (1344). But where Judge Neville had regarded a similar phrase in the Wilderness Act as evidence of a "fundamental inconsistency" and source of potential meaninglessness, Judge Kerr read it as an expression of "balance" and "compromise" (1340). "There is no question," he wrote, "that Congress has more than one policy . . . It is clear to the court that one policy should not displace the other." Congress "clearly attempted to strike a balance" (1346). There was no contradiction within the controlling statute. This follows not from reliance on the conventional Romantic view of wilderness but from adherence to the more traditional view that wilderness is *for* development. They are not incompatible at all. "Protection of the wilderness character of the land [must be] consistent with the use of the land for the purposes for which they are leased, permitted and licenced" (1346).

There was, though, contradiction between the statute and the solicitor's opinion. And here is where the trouble was. The trouble was that "the words [of the statute] . . . are negated by [the regulation]," the Department of the Interior's "interpretation . . . is contrary to the statute and therefore, congressional intent, the interpretation will not be upheld" (1344). Repositioning the source of incompatibility from

the world (wilderness v. mining) to the hierarchy of legal directives allowed Judge Kerr to identify the true source of danger and target of destruction. The vision of wilderness that the solicitor had incorporated into law not only "negates" the delicate balance that Congress had achieved. It also entailed "the destruction of an existing right" (1345). As a result of the regulation, plaintiffs face "irreparable financial harm" (1343). By prohibiting mineral exploration in Wilderness Study Areas, "a valid existing right is," he claimed, "completely and totally destroyed" (1345). And so, of course, is legislative will. For Kerr to hold otherwise "would destroy the intent of Congress" (1347).

As these passages show, Judge Kerr was, if anything, even more forceful in his imposition of clarity and certainty than was Judge Neville. Throughout the brief opinion one finds the path of law marked out by phrases such as "there is no question," "there is little doubt," "the statute is clear and unambiguous on its face," "the statute is clear and unequivocal," "the Solicitor's opinion is clearly erroneous," the prohibition of mining "is clearly an unconstitutional taking and is blatantly unfair to lessors." The defendant's contrary opinion – that mining and wilderness preservation are incompatible – is "ludicrous."

In *Izaak Walton* and *Rocky Mountain* judges were not only confronting questions about development and progress, they were also, and perhaps more immediately, confronting questions of indeterminacy and the potential meaninglessness of legal directives. As different as the interpretations were, each judge used an available conception of wilderness to blaze a path through a potential legal wilderness. Judge Neville in *Izaak Walton* assumed the incompatibility of preservation and development in the world and saw a contradiction in the legal texts. Judge Kerr in *Rocky Mountain* saw no incompatibility and therefore located the contradiction between the statutes and the regulations. The job for each was to banish contradiction. One way or another "wilderness" was serviceable.

CHAPTER EIGHT

WILD JUSTICE AND THE ENDANGERMENT OF MEANING: LAW AND ENDANGERED SPECIES

INTRODUCTION

Wilderness may or may not exist. If it does, naming it, confining it within a net of law words, may or may not obliterate it. In any event, the places called "wilderness areas" are not only places where the abstract or symbolic quality of "the wild" resides. They are also places where wild*life* lives. As Paul Gruchow paddled through the Boundary Waters he encountered other beings – loon, woodpecker, sparrow, moose – in *their* worlds. And, as we also saw, the maintenance of biodiversity has become one of the prominent arguments in favor of wilderness preservation. Wildness is embodied in the nonhuman, nondomesticated inhabitants of wildlands. But when we consider wildlife in its own terms, other figures of nature come into view. While the nature of wilderness is often of an almost spiritual sort, the emphasis on life more clearly implicates ecological and biological understandings of nature. Then too, wildlife is by no means confined to wilderness areas. Insects, birds, fish, amphibians, and mammals, large and small, common and rare, live all around us, right in our own backyards. And some of these animals – and plants – it is argued, would not exist for long if they were not caught in a web of legal meanings. Particularly important are the meanings associated with the Endangered Species Act of 1973 and related laws. It is, arguably, law that keeps them wild by helping to maintain the material conditions of their existence.

In the next chapter I shall look at other legal animals, the domestic and captive animals who inhabit the civilized world and who are

participants in the dynamics of progress. In the present chapter I shall discuss those on the other side, the wild side: grizzly bears, honeycreepers, owls, and butterflies, and see what we make of them. First, I shall situate these animals within one important understanding of "nature," that provided by the science of ecology. This means, of course, situating them within webs of material interconnections, "the web of life" as it is often called. But, just as there is a politics of wilderness, there is also a politics of endangered species. I shall therefore look at other ways of construing nature so as to make sense of these nonhuman beings and of humans. And, just as wilderness is both a physical location and a legal category, so a species on the edge of extinction, say, an Ozark brown bat or a Hawaiian crow, is both a physical entity in the material world and a representative of a legal figure, "an endangered species," that exists within a dense web of legal meanings. And what happens to the physical beings who fly, dig, growl, or lay eggs may depend on how this figure of legal discourse is interpreted and situated within a semantic ecology of words and texts. After sketching out elements of the politics of endangerment I shall examine legal cases where conflicting readings of nature and human, world and word, compete for legal validation.

THE NATURE OF ENDANGERMENT

"Nature," in what may be its most common figuration, refers to the wide nonhuman world understood as a singularity. A more specific, and scientific, figure of nature is given in the discourse of ecology. As wildlife biologist John Terborgh writes in *Requiem for Nature* (1999), "[N]ature, as I define it, is a web of interactions involving plants and animals in different combinations and in various relationships" (15). For him, nature and ecology are synonymous. This is a more complex, yet perhaps more determinate view of nature than the one informing the wilderness idea, but it is similar to the image of nature articulated by John McPhee in his *The Control of Nature* (1989). It is one that, at least in broad outline, has become familiar in the last generation, and one whose general acceptability has been facilitated by the authority of science. Ecology focuses attention on the physical mechanisms of the singularity of earthly nature. It implicates questions of time, space, and scale that diverge from more human-centered views of reality. These different understandings shape the politics of endangerment. Here I want only to provide the briefest sketch of an ecological view so that it can be contrasted with other perspectives that are brought to law.

Ecological nature emphasizes the systemic interconnections and interdependencies of parts of nature to the whole. The whole in question is the planet earth in relation to the sun and moon (the former as a source of energy, the latter in its effects on tides). The earth as a whole is comprehended as a singular unit through, for example, understandings of seasonality, atmospheric and oceanic circulations, the dispersal of species, and migration patterns. But the earth as a whole is composed of dynamic components such as biomes, ecosystems, habitats, and niches. Taking a terrestrial ecosystem such as the chaparral of southern California as a unit of analysis, some components such as slope, geology and soil, climate, moisture, and fire are not *alive* in the usual sense of the term, but others – plants, animals, microorganisms – are. Many of the processes through which the components are connected are therefore biological, metabolic, or genetic. The species is the basic unit of analysis in ecology. Food chains, nutrient cycles, relations of predation, symbiosis, and competition connect various species within and across communities. Mating, rearing, competitive and cooperative relationships connect individuals within populations or flocks, herds, schools, or swarms. The details of these interconnections depend upon the characteristics of the various species. The Karner blue butterfly is an endangered insect that lives in small and rapidly diminishing areas of the northeastern United States. Though the adult feeds on the nectar of many plants its caterpillar eats only the leaves of wild eastern blue lupines. And while the lupine is not threatened, it is dependent on a disturbance ecology which has historically required fire for regeneration. In the narrow overlap of the butterfly's range and the lupine's range fire suppression has resulted in a shrinkage of appropriate habitat and a numerical decline that has brought the butterfly close to extinction. These relationships are not lines on a diagram. They are material connections described in terms of physical processes. The point is that in an ecological view of nature a *kind* of organism, say a species of animal, is understood in relation to the world that it lives its life in *and* that world is understood in terms of the kinds of lives that constitute it. It is a strongly holistic view of reality.

When the unit of analysis shifts from ecosystems and communities to a particular species and its habitat, other features of the material world come into focus. The habitat of a species is the particular physical world in which it lives. Many organisms are relatively flexible with respect to habitat requirements. Think of squirrels, rats, and pigeons. Many, though, like the Karner blue butterfly, have a fairly narrow range of

acceptable conditions. Their metabolism may be so finely tuned to the details of their worlds, and the spatial range of those details so localized, that they are extremely vulnerable to disturbance, natural or otherwise. In fact, for some animals and plants the tightness of the connections between habitat and metabolism may be such as to render the distinction between body and world, being and world, problematic. For example, grooves on each hair of the sloth provide a habitat for a species of blue-green algae. In wet seasons the algal blooms give the sloths a green color that provides the mammal with camouflage in the rainforest canopy. They also provide nourishment for caterpillars of the sloth moth.

Animals such as the three-toed sloth are not simply inhabitants of their world. *What* they are really inseparable from *where* they are, or, indeed, *that* they are inseparable from what their worlds are like. A large portion of some animals' repertoire of behaviors – what it does with its life, what it eats, when and where it sleeps, how it moves, how it mates and rears its young, how it seeks out or avoids other plants and animals – is so place-dependent that were the place to change significantly it would no longer be able to exist. Not only are external behaviors integrally connected to habitats, but so may be the outward physical morphology of an animal itself. The shape of the beak, the placement of eyes, the length of the tail, the color of fur, feathers, or fins may be what they are because of where they are and what that place is like. So too their inner bodies, their organs having adapted over time to the specific conditions of diet, their ways of eliminating waste attuned to climate or microclimate. And, pushing still deeper into the body, ecologists may identify the workings of "instinct" in the details of an organism's nervous system, endocrinology, and genetics.

An ecological view takes the unity of the nonhuman world as axiomatic and, following the paths of interconnections up, down, and laterally, presents a picture that integrates the world of intracellular biochemistry with that of global climate change. In most ecological discourse humans are simply not in the picture – except as observers. As with forces of nature and wilderness, though, bringing us into the picture changes everything. As one view of nature among others, ecology has a high degree of presumptive legitimacy. Nonetheless, when humans enter the discussion this view may be resisted by means of other more entrenched understandings of nature. Before I turn toward ecological politics, though, I want to mention two other dimensions of an ecological view that contrast with more anthropocentric perspectives on wild animals. These are naturalized time and naturalized space.

Where wilderness discourse may tend to position nature as a static space where pastness is preserved, ecological discourse situates species and their worlds within nested time frames characterized by dynamic change. The longest time frames are those that reference naturalized temporal processes such as evolution, speciation, natural selection, and adaptive symbiotic coevolution. Read backwards, these processes go back to the origin of life itself. These time lines may be characterized, in turn, by graded, incremental transformations, by abrupt or catastrophic changes, or by lines of continuity stretching back millions of years. One part of this concerns the rate of natural extinctions. Embedded within evolutionary-genetic time are the dynamic rhythms of ecosystem changes associated with succession, climax formation, natural disturbance, and the periodic expansion and contraction of habitats and ranges. Over shorter periods change takes place according to seasonality, the life cycle of populations and individuals and diurnal patterns of light and darkness. These temporal dimensions of ecology are of central importance to political, moral, scientific, and legal arguments about endangered species.

So are the spatial dimensions. Ecological understandings of animals are, as I noted, based on an understanding of naturalized space – the niche, the habitat, the community, the ecosystem – that refers to specific segments of the material world. These segments make the material world scientifically meaningful, ultimately, in terms of cause and effect. The ecological perspective is a way of knowing the world in a very material way. It may collide, though, with other meanings that are inscribed on landscapes, meanings associated with, for example, property rights and constitutional federalism. And naturalized time may collide with human-centered temporal narratives associated with history, progress, and development. Whereas in the wilderness context this collision may be framed in terms of the erasure of a primaeval or pristine state of nature, in connection with ecology and endangered species a common suite of images evokes the pulverization and disintegration of naturalized space and the truncation of naturalized time, particularly lines of genetic inheritance. The march of human progress seems to entail the end of time for other beings. Thus, Terborgh can ask, "[W]hat can be done to ensure that nature survives the twenty-first century?" (1999, 9).

The central issue in ecological politics, or the politics of biodiversity, concerns the process of artificial extinction. Here "the human" is brought into the center of the picture as more than a passive observer.

Putting it very broadly, ecological politics presents a contest between divergent figures of the human in relation to nature and different answers to the questions: "[W]hat is nature?" and "[W]hat does it mean to be human?" The ecological view advances an image of the human as knower and learner. The human is a being who is no less connected to and dependent upon the integrity of ecological materialities than any other species. We have acted in ways that have severely jeopardized the integrity of nature but we are capable of transforming ourselves. As we learn more about these interconnections and their importance to us we should impose upon our actions a measure of self-restraint commensurate with ecological constraints. As we shall see, a primary instrument of collective self-restraint in this picture is law. An opposing view renders the human less as knower and learner and more as dominator and transformer. Images of interconnections are secondary to images of boundaries and disconnection. This is also a discourse that takes "the human" to refer primarily to the individual and his intentions. Both figures have found their way into law. Before discussing the politics (and legal politics) of endangerment in more detail let's look at extinction.

Extinction is a material state of affairs. Most basically it entails the cessation of the transgenerational continuity of species and of the processes associated with evolution with respect to that species. It also entails the removal of a species from its community and habitat. Depending on the details, the absence of a species may have cascading effects throughout an ecosystem. If the species is what ecologists call "a keystone species," these cascading effects may result in the collapse of an ecosystem, the secondary endangerment of other species, or the proliferation of other species beyond the carrying capacity of its habitat. To say that a species is endangered is to assert that there is a real and immanent possibility that it will cease to exist. Most often, now, extinctions are artificial, that is, anthropogenic. There are many ways in which the actions of humans have caused the extinction or endangerment of other kinds of beings on earth. Many environmental historians argue that the extinction of many large mammals in North America, such as saber-toothed tigers and mastodons, was caused by the arrival of humans here during the last ice age. At present many plants and animals are jeopardized by humanly caused environmental degradation, the introduction of exotic species, and, especially, habitat destruction occasioned by economic activities, that is, by "development." While some animals such as grizzly bears, wolves, and bison were brought to the point of endangerment by deliberate acts of animus, most contemporary

extinctions and near extinctions result from the elimination of the basic conditions of viability through the destruction of habitat.

Recently extinct species such as the passenger pigeon and the ivory-billed woodpecker, then, can be seen as negative artifacts. But the category "endangered species" can also be seen as a cultural artifact. It is a social construction. To say this is by no means to imply that the condition of endangerment is not real. Rather, it invites one to imagine a culture very much like this one where the fact of massive artificial extinction was barely worthy of notice or naming. One might take, as an example, American culture in, say, 1935. The invention, circulation, and popularization of the category stems from both the noticing of the fact and the evaluation of this fact as cause for alarm. Looked at as an artifact it expresses a conjunction of "the natural" with "the human." "Species" indicates a natural kind, defined by a boundary across which reproduction cannot usually occur. It also indicates a particular biologically based way of being. It implicates naturalized framings of time, space, and scale. "Endangered," though, points to human actions, human causes, human framings of time, space, and scale. As an artifact the category is an object of intense political dispute and normative contestation. Given the general fact of contemporary mass extinctions and the specific instances of endangerment, a central political question can be phrased quite bluntly as, "so what?"

THE POLITICS OF ENDANGERMENT

An ecological perspective on nature is thoroughly scientific. It is with more than the usual amount of difficulty, though, that it can be understood as value-neutral. Ecology, especially in connection with artificial extinction, is very much a science with a social mission: biological conservation and the promotion of social policies conducive to the maintenance of biodiversity. Ecological knowledge seeks to demonstrate how what Paul Ehrlich (1986) calls "the machinery of nature" is put together so that humans might avoid its further breakdown or might fix some of what is already broken. If its central image with respect to nature is interconnections, its central image with respect to humans is limits. Contemporary mass extinctions are not viewed as simply facts but as evidence of a catastrophe. A question that animates ecological discourse might be phrased as "Who do we think we are?" For some, other species – and sometimes "nature" as such – are said to have rights, at least the right to exist (Nash 1989). Humans, therefore, have no right to drive

them into nonexistence. Some ecologists, such as Terborgh, are pessimistic and feel that it may already be too late to avoid the full force of a catastrophic breakdown. Others, like Wilson (1984), hold out hope that humans can learn to live in ecological balance. But to do so we must radically revise our way of living, our institutions, and our way of regarding nature. And importantly, failing to live within the limits that nature imposes not only imperils other species or "nature," it imperils the continued viability of human existence. Law, of course, is regarded as a primary instrument of social change and a scientific view of nature can inform law as to where the line between acceptable and unacceptable behaviors is to be drawn. As I shall discuss on pages 202–205, a primary vehicle for this in the US is the Endangered Species Act of 1973 (16 USC §§ 1531–1544).

The ecological framing is, in some respects, the official ideology of American law with regard to artificial extinctions. Few denounce ecology per se. And few advocate the deliberate eradication of life forms (except for some invertebrate "pests" and pathogens). Nonetheless, there is a more entrenched contrary view of nature. It is safe to say that the inherited perspective of humans as separate from and rightfully holding dominion over "external" nature, including wild animals, remains dominant. The Endangered Species Act, after all, only applies to those relatively few species which are already recognized as being on the brink of extinction by the best scientific evidence available. Most animals are fair game and of little concern to law.

The dominant, some call it "biophobic" (Ulrich 1993), view also tends to see animals in isolation from ecosystems. A bear is just a bear and not a top predator; a moth is just a moth and not the pollinator of flowers; a caterpillar is just a caterpillar and not a low-level herbivore. This view radically atomizes "nature," sees it as a collection of units, as in a museum display with no necessary interconnections. Integrity as such has neither inherent nor instrumental value. The various parts of nature may be valuable as resources, of negative value if they are seen to compete with or limit human aspirations, or of no concern one way or another. In all cases what a piece of nature is seen to be is determined by what that piece means for humans.

While an ecological view cannot easily be dismissed at a wholesale level, it can be contained, qualified, and domesticated so as not to impose an onerous burden on people who have a material interest in transforming habitats. One technique is to acknowledge ecological values and argue that they should be "balanced" by other competing values.

Balance, of course, is a very useful metaphor. It is used by proponents of ecological restraint. To the extent that acting in accordance with ecological principles is said to entail halting progress or stopping development, this view advances a more pragmatic or realistic approach to biological conservation. Surely we do not have to "save" every threatened species of bug or bird or rodent if the cost will be measured in jobs, tax expenditures, or a measurable diminution of the average standard of living. "Do we have to save them all," asks one commentator, "when the vast majority of 'them' are insects and other creatures Americans regularly step on without so much as a second thought?" (Suggs 1993, 68). Or as Charles Mann and Mark Plummer put it in *Noah's Choice: The Future of Endangered Species* (1995), "[W]e must acknowledge that species are endangered sometimes for good reasons indeed. To say otherwise is to condemn all human endeavor as trivial, an environmental reformulation of original sin" (216). A related technique is to diminish the value of ecological integrity. The benefits of biological conservation are seen to be exaggerated, the prospects of "leaving nature alone" are unrealistic and unrealizable, and the benefits of doing so are speculative at best. Like wilderness values, the values imputed to biodiversity are mostly of symbolic concern for urban elites.

Because ecological values are rooted in scientific conceptions of nature, another tactic is to manufacture uncertainty. Given the asserted astronomical costs of preventing extinctions, opponents argue, we must proceed with caution and only limit human action (or human freedom) when we are absolutely sure of the connection between economic activity and extinction. So, opponents may accept a scientific framing in general terms but dismiss specific studies as incomplete, sloppy, or politically motivated. Other tactics include taking the focus off of the species–habitat–extinction nexus – that is, off of the material world of nature – and putting it on the policies and laws designed to protect endangered animals. One argument is that the Endangered Species Act promotes a "public good" but that the costs are disproportionately borne by small property owners.

Ike Suggs, an opponent of the law, says that "The ESA is simply a manifestation of the public's interest in wildlife, and the public's aversion to paying for the satisfaction of that interest" (1993, 11). The act, he says, represents a "revolutionary" departure from settled legal principles and can only be understood as evidence of the "tyranny of the majority" (14). If the government wants to protect a species badly enough, it should be willing to buy the land that the species lives on. If

it does not want to pay a fair price, then that is a rational policy choice. But in "regulating" property to such an extent as to destroy its developmental value the government can be construed as having "taken" the land without the constitutionally required just compensation. Whether or not a species is worth "saving" – and opponents always talk in terms of "saving" a species and not in terms of ceasing to destroy it – the Endangered Species Act is an unconstitutional means to that end.

The core of the antiecological argument is that, if there is a conflict between the two, then nearly any human interest has primacy over the continued existence of an endangered species. And the figure of "the human" here is the individual human identified with ownership of real property. To the extent that the Endangered Species Act might restrict what some landowners can do with their property, the act is frequently described as "antihuman." This, in fact, is a key theme of anti-ESA rhetoric. Suggs claims, for example, that, "Over time . . . the human element has become peripheral in our nation's campaign to save each and every species, 'whatever the cost'" (71), and that "the ESA pits endangered species against property owners thereby sacrificing humans to non-humans" (17). Another opponent, writing in *The American Enterprise*, claims that "No consideration of human welfare is permitted . . . no matter how inconsequential the species or how costly the protection" (Mannix 1992, 58). Or, as one congressional critic asserted, "It's time for the life of a human being to have as much value as the life of a rat, shrimp, bug or bird" (Congressman Ken Calvert, quoted in Bogert 1994, 87).

One particularly interesting expression of this line of argument describes the ESA as having effected an inversion of humans and nonhuman animals, with humans having been ousted from the realm of the law.

> [T]he act has become an entitlement program for endangered species. It grants to the members of officially designated species an array of absolute and inalienable rights that would be the envy of advocates for the homeless, the disabled, or any other group needing help that consists of mere humans . . . If an endangered woodpecker builds it home where you intend to build yours, you may not reason with the bird or offer to buy it out . . . You may not sue the woodpecker or hold anyone else accountable. Endangered species can only be plaintiffs. The defendant's chair is reserved for humans . . . [D]esignation of an endangered species resembles nothing so much as a real estate foreclosure or transfer by adverse possession. At the end of the process, someone will find that the land

> he thought he owned now effectively belongs to something wilder. Under the law, endangered species may live wherever they please, free from any anthropogenic harassment or harm, and may exclude any use of the land that conflicts with their own. This amounts to what we call property rights. Endangered species are effectively given a senior lien or easement on any and all real property they might require or wish to use. Humans' property rights are subordinate to those of non-human occupants that meet the criteria of the act. (Mannix 1992, 59)

The Endangered Species Act, then, is dangerous. It is "too powerful to be upheld" and "[a]n increasing number of United States citizens are being harmed" by it (Suggs 1993, 5–6). Critics charge that, "If we do not amend this act to put some balance into the decision . . . to list one of these critters, this act has the potential of shutting down the economy of this country" (Congressman William Dannemyer, quoted in Suggs [1993, 2]). And it is not only the domestic economy that will collapse. "At the rate we are going in designating and saving species (and with the methods we are using) the world economy will be exhausted before we have made significant progress in saving endangered species" (Mannix 1993, 59). In this reading, "the economy" is *our* ecosystem. It is, therefore, either "them" or "us." With respect to this encounter between nature and legality we seem, then, to be witnessing a jousting of apocalypses.

A STROLL THROUGH THE ESA

The Endangered Species Act of 1973 has been called "one of the most far reaching and comprehensive pieces of legislation designed to save species from extinction" (Kilbourne 1991, 500). It has also been called "simply berserk" (congressional testimony quoted in Suggs 1993, 3). Like the Wilderness Act of 1964 it is a very complex piece of legislation. It has been amended a number of times since 1973 and there are continued calls to either weaken or strengthen it. Its stated purposes "are to provide a means whereby ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a system for the conservation of such species" (16 USC § 1531(b)). As Eric Freyfogle writes, "Of all federal statutes, the Endangered Species Act appears to embrace most fully the interrelated critiques [associated with] environmentalism" (1994, 305). It imposes obligations on the federal government, especially the Fish and Wildlife Service and the National Marine Fisheries Service which are charged with enforcing it.

It also, as the critics assert, imposes restrictions on all persons who might have dealings with an animal (or plant) officially recognized as endangered. To that extent, the act at least formally reconfigures relationships between humans and at least some wild animals and between the federal government and at least some humans. It makes some wild animals legally meaningful in new, if not "revolutionary," ways and makes some actions with respect to "external" nature legally significant in new ways. As Freyfogel notes, it appears to have incorporated an ecological view of the integrity of nature, hence its emphasis on conserving ecosystems and not simply species viewed in isolation. It also explicitly incorporates and endorses scientific representations of nature in many of its provisions. But, as another commentator has claimed, the asserted justifications for the ESA are overwhelmingly "human-centered" as opposed to "nature-centered" in that the benefits of preserving ecological integrity are to accrue to humans (Mann 1999).

The heart of the act creates a categorical scheme according to which almost all species of plants and animals in the United States, including invertebrates, are sorted. An "endangered species" is one that is "in danger of extinction." A "threatened species" is one that is likely to become endangered in the foreseeable future. There are also "candidate species," which may be the objects of scientific investigation to ascertain if they should be placed in one of those two other categories. More than 97 percent of the 100,000 known species in the United States, though, are not in any of these categories (Houck 1995). Just as there are *de facto* wilderness areas and *de jure* wilderness areas, so there are *de facto* and *de jure* endangered species. Not all endangered species are listed and, critics claim, not all listed species are truly endangered. Section 4 of the act describes the process according to which a species is to become "listed." This is to be done "solely on the basis of the best scientific and commercial [that is, trade-related] data" (16 USC § 1533(b) (2)). This is to say that an animal's legal status is to depend only on how scientists represent the material facts of the matter and not on whether it may be politically or economically inconvenient to have it listed. In addition to naming which species are deserving of protection the act also mandates that a listed species' "critical habitat" be designated. A 1978 amendment to the act defines critical habitat as "the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found the physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection" (16 USC § 1532(5)(a)(i)). Under the 1973

law, the determination of critical habitat was delegated to the expertise of the administering agencies but in a 1978 amendment Congress specifically said that this determination, in contrast to the listing process, was to be "on the basis of the best scientific data available . . . after taking into consideration the economic impact, and any other relevant impact" (§ 1532(b) (2)). This change has been interpreted as "a significant step back from the view that habitat and species are inextricably linked and that habitat protection is therefore an essential component of species protection" (Yagerman 1990, 832). As with the listing procedures, the determination of a species' critical habitat may or may not actually occur. So far only about 20 percent of listed species have had their habitats legally determined. Other provisions of the act mandate that agencies develop "recovery plans" for protected species. These, again, are technical scientific reports. Section 7 addresses federal obligations.

The most politically volatile part of the act is section 9, which deals explicitly with what actions may or may not occur in human relationships with endangered species. This section has the greatest potential impact on private property rights. It prohibits "any person" from "taking" a member of a listed species, and defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect or to attempt to engage in any such conduct" (§ 1538 (19)). Subsequently, the Department of the Interior, through the Fish and Wildlife Service, promulgated a regulation that further defined "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing behavioral patterns including breeding, feeding, and sheltering" (50 CFR 17.3, 1994). Section 10 describes a permit process whereby exemptions to section 9 may be obtained. Criminal and civil penalties for violating the act are contained in section 11. These include fines of up to 50,000 dollars and jail sentences of up to one year.

The Endangered Species Act is a set of rules. It directs social actors, proscribes actions, and describes the consequences for violating the rules. It is also a management tool by means of which the federal government attempts to realize policy objectives. But it is much more than that. It is a component of a textual mosaic consisting of words, phrases, and images. While the ESA itself is a bounded text with a given number of sections, subsections, clauses, and words, it exists, like the Wilderness Act of 1964, within a more complex and open-ended textual environment. It is connected with other congressional enactments such as the

Clean Water Act, the National Environmental Protection Act, and the Administrative Procedures Act; with international treaties such as the Convention on International Trade in Endangered Species; with the regulations that the Fish and Wildlife Service and the National Marine Fisheries Service make under authority of the act; with judicial interpretations of these; with the US Constitution and with common law doctrines of property law. As with any complex regime of legal regulation, the connections among the various components may not always be clear. So, if the ESA is a constellation of legal meanings, these meanings may not always be clear. And if we see the act as a diagram of power, the circuits through which power flows may not always be clear. Clarifying the connections between components of the legal, textual environment clarifies the relations of power between, say, the federal government and property owners and between humans and wild animals.

Animals such as grizzly bears, blue butterflies, sea turtles, brown pelicans, and fruit bats exist (or not) within webs of material connections, many of which have been profoundly transformed by human action. But a legal figure such as "an endangered species" exists within dense webs of signification. Unlike the material relations that constitute ecosystems, the textual relationships that make up the mosaic of legal signification may not be measurable or observable. They are, however, interpretable. They are amenable to divergent interpretations, different ways of drawing the lines, of making connections and disconnections. What happens "on the ground," whether, for example, an episode of habitat destruction may proceed or not, may be a function of whether that action is interpreted as a violation of section 9's prohibition on "taking" an endangered species. So, in a sense, a reading of the semantic ecology of law may determine the fate of physical ecosystems and of their nonhuman inhabitants. But, as we shall see, a reading of the words may depend upon a reading of the world. Tracing the connections among units of legal meaning and between the textual mosaic and the material world may depend on which among competing renderings of "nature" are given authoritative validation.

TRANSFORMATION STORIES

Richard Christy's attorneys attempted to turn the tables on taking. Christy owned 1,700 sheep and grazed them on land he had leased from the Blackfeet Indian Nation adjacent to Glacier National Park. Not

long after he had established his operation, grizzly bears, a threatened species, began harvesting the sheep at will. One evening he witnessed bears emerging from the forest. He shot at a bear, killing it. He was subsequently fined 3,000 dollars for violating the Endangered Species Act. He appealed. In his defense he asserted a "natural and fundamental right" to protect his property (the sheep). He also argued that he didn't so much "take" the bear as the federal government had "taken" his property without due process in violation of the Fifth Amendment. As the court described the claim, "Plaintiffs contend that by protecting the grizzly bears the Department [of the Interior] has transformed the bears into 'government agents' who have physically taken plaintiffs' property" (*Christy* v. *Hodel*, 857 F 2d 1324, 1988, 1334). In effect, the idea was to deputize the bears, to locate them within a specifically human domain of power, just as the sheep were located less in an ecosystem and more in the political economy of meat. In this transformation the predator–prey relationship of bears and sheep served as a proxy for the relationship between government and property – bears as sovereigns, sheep as property – so as to transform Christy's taking in violation of the statute into a governmental taking in violation of Christy's constitutional rights. The court of appeals rejected the quasi-deputization and affirmed the lower court's judgment against Christy.

The case of *Palila* v. *Hawaii* (639 F 2d 495, 1981) presents sheep (again, as proxy humans) in a somewhat different light. For decades the State of Hawaii had maintained a flock of feral sheep on the slopes of Mauna Kea for the purposes of providing North American hunters with something to shoot at in a land without large mammals. Unfortunately for the hunters, the area had been listed as the critical habitat for the palila – a small honeycreeper that was dangerously close to extinction. The survival of the palila is dependent on the integrity of the mamane-naio forest and the mamane trees provide food, shelter, and nest sites for the birds. Palilas live nowhere else. The introduced sheep, however, graze on mamane seedlings, preventing regeneration of the forest and diminishing the ecosystem the birds depend on. After a number of alternative management plans had failed to alleviate the problem, the Sierra Club sued (under the bird's name), alleging a "taking" in violation of the ESA and requesting the removal of the sheep. Their argument, which has obvious structural similarities to Christy's, was that the state, in maintaining the sheep that eat the seedlings that would (not) grow into mamane trees that would (not) provide food and shelter for the

palila, should be construed as having "taken" the birds. The sheep, in effect, were portrayed as "government agents." The judges found this claim to be more persuasive than Christy's. Both the district and circuit courts relied on a strongly ecosystemic understanding of animals and (as) nature and located human activities within these webs of material interconnections. It was with reference to these that the legal notion of "taking" should be assessed. But, if the prototype of "taking" is understood as being nearer to Christy's deliberate shooting of a listed animal, then it is not surprising that opponents of the ESA could see in the broadening of the category support for their view that the act "sacrifices humans to nonhumans" by prohibiting virtually any action that might have an adverse impact on a listed species no matter how indirect or unintended. The opponents' project then became one of resurrecting a more traditional view of human–nature interaction and, thereby, reinforcing the limits of legal coercion. Their chance came in the case of *Babbitt* v. *Sweet Home Chapter of Communities for a Greater Oregon*.

In *Sweet Home* (515 US 687, 1995) plaintiffs – an organization representing logging interests in the Northwest and Southeast – sought a declaratory judgment against the Secretary of the Interior. They challenged the applicability of the regulation defining "harm" as it pertained to the legal spaces (designated critical habitats) inhabited by the northern spotted owl and the red-cockaded woodpecker. The district court (806 F Supp. 279, 1992) rejected their arguments, as did, initially, a panel of the Ninth Circuit Court of Appeals (1 F 3d 1, 1993). Subsequently, however, the court of appeals granted a petition for rehearing and reversed its earlier ruling (17 F 3d 1463, 1994). This created a conflict within the ninth circuit and the Supreme Court granted certiorari to resolve it. The formal issue was one of administrative law. At issue was how power, encoded in a statute, is transmitted through a regulation in ways that modify the rights of property owners. Materially, the power described in legal texts comes to rest or is realized on segments of the material world made meaningful by the legally determined spaces of "critical habitats," and, ultimately, the bodies of animals. My analysis is focused on Justice Scalia's dissent. As it turns out, the Supreme Court also rejected the plaintiff's reading of law and nature.

For Justice Scalia, there were many things wrong with the regulation, with the way in which it channeled the flow of power and with the images of human–nature interactions that it incorporated. Scalia's principal task was to disconnect the regulation from the statute. Where the

regulation exceeded the authority of the agency and too severely limited the discretion of property owners, disconnecting it from the power of the statute would result in a restitution of property power. Among the features that made the regulation unreasonably excessive – and the majority's reading inaccurate – was an inversion of the material and the immaterial, of animality and humanity, of the natural and the distinctively human. Tactically, the desired disconnection between the regulation and the statute was to be accomplished by the redrawing of the lines and the rerighting of the positions. Had this been successful, animals would have been repositioned beyond the bounds of legal protection and property owners removed from exposure to legal coercion. In what follows I shall briefly discuss two smaller and one more significant and diagnostic of Scalia's rhetorical operations.

One feature that made the regulation unreasonable and invalid, on Scalia's reading, was that it required only "cause-in-fact" in order for a property owner to be found in violation. That is, if a person's actions were merely moments in a physical chain of causation that resulted in injuring a member of a protected species, that person would be liable to the penalties of the act. As he put it, a person's conduct "is made unlawful regardless of whether the result was intended or even foreseeable, and no matter how long the chain of causality between the modification and the injury" (715). This strict liability standard specifically discounted what is distinctive about humans: our mindedness and the immaterialities that make us unique. It removed from consideration our capacities to know, to foresee, to intend, to will, and to shape our conduct accordingly. Denying human distinctiveness removes the foundation for responsibility and, with it, justifications for punishment. It positions humans solely within circuits of physical causation. Scalia wanted to reinsert elements of the distinctively human and hold the act applicable only to instances of intentionality, deliberately, knowingly "harming" individual animals. In the majority's phrasing, the act only enjoins cases of the form "A hits B" (694).

Another of Scalia's criticisms was that in the regulation "the impairment of breeding" counts as "harming" and therefore as "taking" a member of a protected species. In Scalia's view, though, while modifications of habitat may, in fact, "impair breeding," and while this impairment might, in some sense, perhaps, harm *populations* of animals, it cannot "harm" individual members of protected species. It cannot, therefore, count as "taking" one. A particularly interesting part of this argument is contained in a footnote that is worth quoting at length.

> Justice O'Connor supposes that "impairment of breeding" intrinsically injures an animal because "[t]o make it impossible for an animal to reproduce is to impair its most essential physical function and to render that animal, and its genetic material, biologically obsolete." . . . This imaginative construction does achieve the desired result of extending "impairment of breeding" to individual animals: but only at the expense of also expanding "injury" to include elements beyond *physical harm* to individual animals. For surely the only harm to the individual from impairment of that "essential function" is not the failure of issue (which only harms the issue), but the *psychic harm* of perceiving that it will leave this world with no issue (assuming, of course, that the animal in question, perhaps an endangered species of slug, is capable of such painful sentiments). If it includes that psychic harm, then why not the psychic harm of not being able to frolic about[?]
>
> (734, emphasis in the original)

His point seems to be that preventing animals from reproducing cannot count as "harming" or "taking" precisely because nonhuman beings lack self-consciousness, or that the only way it could count is by ascribing consciousness, emotions, and intentions to "slugs," and thereby denying the basis of human distinctiveness. This, it seems, is the funny part.

Putting these two operations together, we can see that what was so wrong with the regulation, why it exceeded the authority of the agency, and why it should be disconnected from the power of the statute, is that it inverted the terms and positions of the material–immaterial, physical–mental, animal–human oppositions that we have traditionally used to make sense of reality. The regulation mandates giving primacy to (even the lowliest of) animals over human freedom, and to the domain of deterministic materiality over the self-determined actions of self-conscious subjects. Moreover, animals are accorded primacy on the basis of imputed "psychic" and "emotional" characteristics while humans are penalized on the basis of merely physical happenings unmotivated by intentions, unguided by knowledge or foresight, regardless of reason. In setting the inverted oppositions aright, Scalia's reading would have resituated the resubjectified humans (that is, property owners) within their traditional zones of freedom vis-à-vis the material world of nature, and resituated wild animals – as figures of nature – beyond legal protection except in the clearest case of "A (deliberately, maliciously) hits B."

These tactical assertions and repositionings are, though, less fundamental to his – or my – argument than his means of enacting the primacy of the immaterial through a performative privileging of legal form over

extralegal substance. Here a contrast with the majority opinion written by Justice Stevens is instructive. For the majority, the reasonableness of the regulation follows not only from their interpretation of the reasonableness of the agency's use of the word "harm," but, more importantly, from their view of "the broad purposes of the ESA" (698). The intentions that matter are not those of property owners undertaking habitat modifications but those of the Congress that passed the ESA. These are the intentions that determine the standards of fit between statute and regulation. Reference to "the broad purposes of the ESA" makes a more substantive gesture to the world of animals, their behaviors and metabolisms, their habitats and the larger ecosystem. It points to physical interconnections and to the processes of extinction and survival. It seemingly takes landscapes and bodies – stuff – more seriously. According to the majority, even if words like "harm," or "take" are ambiguous, these ambiguities are to be resolved by reference to the physicality of the world. This is done, explicitly, by deferring to the agency's regulatory expertise (708). That is to say, potential instabilities of legal meaning are best remedied by incorporating the knowledge about "nature" that is produced by natural scientists – ecologists or ornithologists – employed by the Fish and Wildlife Service. They, unlike either members of Congress or federal judges, know how the physical world is put together.

To put it differently (and to bring the contrast with Scalia's views into sharper relief), although the majority was focally concerned with questions of word meaning – this was, after all, what the case was about – these questions were answerable by reference to claims about what the physical world is like. "Harm" is not *simply* a word, it is a state of affairs. The majority, we might say, reasoned from world to word. They seem to have said: "[A]ccording to the best of our knowledge, this is what the world is like, and so, this is what the words 'harm,' 'take,' and 'injure' can reasonably mean."

Justice Scalia, however, seemed to reverse the directionality of word and world. It is in the enactment of this reversal that his prioritization of the immaterial over the material, mind over matter, and form over substance is most telling. The bulk of Scalia's argument is oriented toward confining the words "harm" and "take" to what he calls their "ordinary and traditional," "ordinary," "standard," "common and preferred" usages (717). Their meanings as interpreted by the agency and the majority are deviant and out of order. Among the tools that he relies upon to restrain these meanings are: Blackstone's *Commentaries on the Laws of*

England, published in 1766; a usage manual from 1949; and four dictionaries published in 1828, 1933, 1970, and 1981. From these authorities he constructed a diagram of a semantic ecology of violence or "harm." This is a map of lexical order and stability founded on the interconnections among concepts and categories. And it is this semantic ecology which takes precedence over the material ecological systems inhabited by the owls and woodpeckers.

Among the prominent features of this semantic ecology are the intentions of subjects and the individuation of objects. His survey of the authoritative texts demonstrated that "it is obvious that 'take' – a term of art deeply embedded in the statutory and common law concerning wildlife – describes a class of acts (not omissions) done directly and intentionally to particular animals (not populations of animals)" (718). Likewise, he found that "*harm* has in it a little of the idea of specifically focused hurt or injury, as if a personal injury has been anticipated and intentional" (718). The semantic ecology of violence requires the presence of a thinking, willing subject. Without it, no harm done. As suggested by the types and ages of his authoritative texts, another feature of his semantic ecology is historical continuity and stability. In contrast to this, the majority's reading was a radical departure. Scalia claims that their sense of "harm," in fact, "makes nonsense of the word [take]" and amounts to nothing less than "a ruthless dilation of the word" (719). There is after all, then, harm in this story. What was wrong with the regulation was that it willfully perpetrated a sort of lexical violence. The danger was to the traditional and conventional legal meanings and the property rights that depended upon the stability of these meanings for their very survival.

Significantly, what was missing in Scalia's story – what was actively rendered as absent – was virtually any nonironic reference to what is called "nature" or the material issues in question. It was the nonhuman stakes that were not there. There were no animals that were not cartoon characters. There was no mention at all of northern spotted owls or red-cockaded woodpeckers. There was not so much as a gesture toward ecosystems, habitats, metabolisms, or the physical processes of reproduction, survival, and extinction. There was, however, reference to "routine private activities" such as "farming . . . road building, construction and logging . . . that people conduct to make a daily living" (720). The lexical violence and destabilization of the semantic ecology are dangerous insofar as they facilitated the unreasonable and unlawful limiting of human freedom to transform the material world.

Scalia's essay demonstrated the performative repudiation of physicality in a number of senses. First, "nature" – or at least scientific representations of nature – was located beyond the frame of analysis, beyond the limits of law properly speaking. Second, Scalia's tactics of individuation and his use of the ironic voice can only have allowed the appearance of nonhuman beings as cartoonish versions of a deeply atomistic social theory. The old-growth forests of the Northwest and the piney woods of the Southeast were, at best, simply the repeating backgrounds for the antics of Yogi Bear or Bullwinkle Moose and not worthy of judicial notice. There was, in the text, a performative denial of the specificities of owl-world. The radical otherness of the wild is simply invisible. Most basically, Scalia's method of reading the law enacted the primacy of word over world, form over substance, the immaterialities of his semantic ecology over the materialities of ecosystems and bodies. Ambiguous meanings were stabilized and brought to order through reliance on other, usually quite older, texts. The meanings thus ordered by a proper reading of the semantic ecology, in turn, conferred order on the messy world of action, causation, and physical processes. The physicality of the world played no part in the stabilization of legal meaning. And this, one senses, is what law is for.

Beyond that, the desired result of these operations was to relocate wild animals and their worlds beyond the bounds of legal protection. But, of course, they were not and never had been beyond the law. They were already and irrevocably within the law as the incidental denizens of a naturalized property regime. Reaching back through the 1896 case of *Geer* v. *Connecticut* (161 US 519) to the *Digest of Justinian*, Justice Scalia reminded us that "All animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them" (717). That is to say, nonhuman animals, as figures and physical tokens of the idea of nature, were already and eternally located within operative circuits of physical force that are made legally meaningful through conceptions of property.

CHAPTER NINE

PUKA'S CHOICE: LAW AND ANIMAL EXPERIMENTATION

INTRODUCTION

What is it like to drill into the shaved head of an unanesthetized baboon who is strapped to a table? As a workaday task what are the challenges, the dangers, or rewards? Is it best done, do you suppose, in the early morning or, perhaps, late in the afternoon? What is it like to be the baboon? Is that an intelligible question? Who's to say?

Sociologist Arnold Arluke conducted an ethnographic study of different primate laboratories and found a variety of ways of situating oneself with respect to captive animals (Arluke and Sanders 1996). Some laboratories had developed a culture of abuse and terror where technicians – or "cowboys" as they called themselves – related to monkeys in a manner not unlike sadistic prison guards to inmates. In Arluke's view a principal task in these laboratories was maintaining the difference between "them" and "us" through continual displays of dominance. In other laboratories, however, he found a culture more like that of a nursery school in which the technicians formed emotional bonds with specific animals. They played together, ate meals together, and cared for each other. The relationships here were patterned on the nurturing relations of human adults and children. Technicians in these laboratories professed strong ambivalence about the whole enterprise of primatology.

Films distributed by People for the Ethical Treatment of Animals (PETA) such as *Unnecessary Fuss* depict episodes of gratuitous abuse of primates (Francione 1995). They also demonstrate that the "findings" produced by laboratories such as the University of Pennsylvania Head

Injury Laboratory are virtually useless for the intended purpose due to basic methodological incompetence. Defenders of animal experiments, in turn, describe the practice in general – if not in every single case – as necessary for progress. Botting and Morrison, defending the practice in *Scientific American*, explicitly frame it both retrospectively and prospectively in these terms:

> No outstanding progress in the treatment of disease occurred until biomedical science was placed on a sound, empirical basis through experiments on animals . . . We . . . anticipate major progress in the treatment of traumatic injury to the central nervous system . . . We find it difficult to envision how progress in this field – as so many others in biological and medical science – can be achieved in the future without animal experiments. (1997, 85)

It is not uncommon for defenders of vivisection to denounce proponents of animal rights or animal liberationists as little more than deranged terrorists. Clearly, the things that happen in laboratories are among the most significant and contested practices involving human interventions into nature. For opponents of vivisection, it is safe to say, a fundamental root of the problem is the illegitimate and self-serving naturalization of other, nonhuman beings. In this chapter we follow the path of nature from the literally "external" world of critical habitats and the wild to the literally internal world of buildings, rooms, cages, and tanks where captive animals live and die. But nature is now located inside the animal's body; for the baboon strapped to the table, it is inside her skull. This is what the scientist wants to get at.

HOW TO MAKE ANIMALS

Nonhuman animals, or "animal others," constitute a crucially significant part of the modern human world. Humans do countless things with live animals and with dead animals. Most Americans, of course, eat them. Chunks of their muscles and containers of their fluids are in stores, homes, restaurants, and schools. Animal "by-products" are used in everything from crayons to glue. We have fun with captive animals in zoos, circuses, and rodeos. Some people wear fur and feathers, many wear wool. Animals are widely used in education and billions of them are used for research purposes. Domesticated animals live with us as pets and companions. One way or another these nonwild beasts are rarely far from us. Orbiting in their tanks at the aquarium or sizzling on the

backyard grill they are as much a part of the human world as are cars and Barbie dolls or teddy bears.

Then too, quite apart from the countless material uses to which their bodies are put, animals are profoundly important bearers of symbolic and metaphoric meanings. The modern child's world of artifacts and images is largely "peopled" by animal representations. Animals are commonly found in corporate logos, public icons and in team, band, and place names. Our common metaphors, terms of praise and abuse are veritable menageries. We report that someone "acted like an animal" and there are few experiences worse than being "treated like an animal." But as Wolch and Emel assert, "[A]nimals have been so indispensable to the structure of human affairs and so tied up with our visions of progress and the good life that we have been unable to (even try to) fully see them" (1998, xi). (One might ask, however, what would it mean to "fully see them"? Is this even possible? Would it mean see them as they see themselves? see them as they really are? Would it mean to see them without seeing ourselves reflected in them? Would it mean seeing them without reducing them to mere means to our ends?)

Yet, as ubiquitous as animals may be in our lives and thoughts, they are, before all else, emblems of nature. What they share, what they *are*, is what they lack. As figures of negativity they are defined by absence or deficit: speech*less*, mind*less*, *a*moral, pure physicality. They are not us. Describing the prevailing view of animals, Arluke and Sanders write:

> From [the] anthropocentric perspective, the animal can think only in the most rudimentary ways, does not possess a self-concept, has no sense of time or space, cannot plan future actions apart from the boundaries imposed by the immediate situation, cannot differentiate between means and ends, and has no "emotions" in the sense that the animal cannot indicate these feelings to the self or to others. Trapped in the here and now, the nonhuman animal habitually or instinctively responds to stimuli presented in the immediate situation. (1996, 42)

They, unlike us, are creatures of embodied necessity. And as Kate Soper puts it, "Other animals are defined as beings who do not instigate conventions and for that reason are viewed as belonging entirely within the order of nature" (1995, 38). Animals are beyond – or beneath – the limit of the human and metaphors of limits, boundaries, and barriers pervade animal talk. Philosopher Mary Midgley discusses variations of what she calls "the species barrier," or the image according to which the various other species are understood not only as different from us (as cows

are from cockatiels or dolphins from chimps) but as "they" collectively are ontologically *separated* from us by an unbridgeable gap. This barrier imagery is important in that it facilitates a position of what Midgley calls "absolute dismissal" of the proposition that animals might be worthy of moral consideration and so may be used as means to virtually any human ends. The barrier, of course, is constructed out of images of mind and mindlessness. Simply put, "If animals are irrational, and value and dignity depend entirely on reason, animals cannot matter" (Midgley 1984, 11). Soper identifies what is at stake in the task of boundary maintenance. "[A] good part of our attitudes to animals," she writes, "is at the service of a policing exercise that preserves the 'human' from the 'natural' by identifying it with the mental and spiritualistic. That which is distinctively human is defined by exclusion of the carnal (more 'bestial') dimension, this being conceived as a 'lower' aspect or region" (1995, 91). And, if they are not us then we are not them.

The category "animal" has all the appearance of common sense. It seems to name a natural kind. It is a basic lexical item. But in what sense is it "natural"? One might imagine a language that carves animal beings into more or less discrete categories such as humans, lions, bushbabies, snakes, and so on, without the supraordinate category "animal" that excludes humans. And of course, in our own highly biologized consciousness we "know" that humans are primates, mammals, vertebrates. But we also know that when we speak abut animals, except in specialized contexts, we are talking about "them" and not "us." We also know that, again with specific exceptions, what it means to *be* an animal is to be a sort of animate being that is a legitimate candidate for being eaten, or captured or sold or cut. This is simply what it means to be an animal, this is part of the cultural work that "animals" does.

But just as the category "nature" is increasingly viewed as a social construction, so is the category "animal." And analysis of the conditions and consequences of animalization is a central part of that larger project. At present there is a massive effort to deconstruct the discourses of animality. In doing this scholars and activists are engaged in destabilizing the human/animal version of the human/nature dichotomy along with the images of human distinctiveness that support and are reinforced by the dichotomy. In different ways they are involved in the cultural-political project of refiguring what it means to be human. Part of this project entails denaturalizing other sentient beings. To the extent that they succeed, many seek to rewire the circuits of violence against animals.

There are a number of ways through which the cultural reworking of "animals" might proceed. One basic move is to argue against a radical discontinuity symbolized by the species barrier. This position argues for situating various others – most often "higher" mammals, those most like us – along a continuum vis-à-vis human animals. Drawing on recent findings in ethology or the science of animal behavior, other species are found not to be the embodiment of negativity that the dominant anthropocentric vision wants them to be. One move is to "rationalize" at least some animals. Many animals, the revisionists claim, do have language, consciousness, and rich emotional lives. That is, if we retain the conventional object/subject metaphysics, at least some animals would be better seen as "subjects" and subjecthood itself would seem to be a matter of degree. And, as Midgley says, "There follow [from studies of animal behavior] various changes in our view of man, because that view has been built upon a supposed contrast between man and animals which was formed by seeing animals not as they were, but as projections of our own fears and desires" (1984, 25). Another move is to emphasize our shared feature of sentience and especially our common capacity to feel pain and to suffer. To quote Midgley again: "The more clearly we see the difference between animals and stones or machines or plastic dolls, the less likely it seems we ought to treat them in the same way" (14). What the prevailing category "animal" does, then, is impose a boundary that facilitates the denial of significant similarities between all of us and the denial of the profound heterogeneities among them. Revisionists, though, say both that "they" are more like "us" and we like them. Increasing awareness of the similarities is thought to promote the recognition of our capacity to empathize which, in turn, entails a radical change in how humans (ought to) relate to nonhumans.

Animalization, as a discursive operation, naturalizes, objectifies, and reduces "them" as a collection of undifferentiated others precisely as it facilitates the subjectification of humans. But again, we are subjects because we are – at least potentially – rational. Our subjectivity is not founded on our embodiment, sensuality, or "brute" sentience. If it were, then other embodied beings might get to be subjects too. One view of the ideological work that "animal" – as a figure of nature – does is the expulsion of all that we find reprehensible about ourselves. In terms that are quite like the ways in which wilderness is conceptualized, Ham and Senior suggest that:

> The consciousness and language of the Animal may mean absolutely nothing and represent for us the core of meaninglessness and the lure of the void which inhabit [*sic*] all thought, communication, and social life. The . . . abyss which separates us from animals may be the void of meaninglessness. The animal may be continually signifying nothing – but so might we. The sacrifice of the animal may be a sacrifice of or to this meaninglessness. (1997, 4)

Such a view of animals renders their control or elimination, like that of wilderness, not only permissible but imperative. Their only meaning is meaning for us. As images of evil, brutality, stupidity, corporeality, and meaninglessness are projected onto pigs, bears, fish, and apes, the remainder – us – is purified. This cultural practice of ritual purification not only justifies domination and the infliction of violence, it also plays a role in the wider denigration of bodies and all that is associated with corporeality. The point for those who would refigure animality is that the very category is an ideologically charged artifact that requires continuous maintenance in order to be continually effective. Like "nature" more broadly, it is a tool for making humans human of a particular sort, subjects of a particular sort. It is a tool with which we justify the positioning of these subjects and objects, humans and animals, within relations of the most extreme forms of domination. The picture, according to the critics, is not simply detestable, not only a token of bad faith. It is also inaccurate. "We" are not who we think we are.

These culturalist attempts to reinvent "animals" are not without strong forms of resistance. Animality, after all, is a potent political issue. Animals are big business. On the backs of animals rest some of the foundations of the authority of modern science. What is at stake is what is to be done with them for us. What is at stake is the availability of the means to the fulfillment of ends as varied as a potential cure for cancer or AIDS, or the perfect pot roast. As an immediate measure, supporters of the prevailing naturalizing view of animals can work on repairing any breaches in the species barrier. Rhetorically their target is the misguided ideology of "anthropomorphism." Anthropomorphism refers to the illicit "humanization" of animals. As such it is seen to entail the denial of human distinctiveness, the very erasure of the line. And because the line is seen as a horizontal line that marks a hierarchical order, then erasing the line is seen to entail the degradation of humans. One proponent of the antianthropomorphic position sees the consequences this way:

> By anthropomorphizing [animals] we are encouraging the tendency to blur the distinction between humans and animals, which, in turn, may lead, and often has led, to the worst forms of biologism, racism or naturalism. The Nazi *Lebensphilosophie*, to cite an egregious example, explicitly assimilated human striving to the impulse of animal instincts . . . If marvelous animals . . . can casually murder, then humans, who are so much like animals, may be similarly expected to kill for reasons of genetic difference, by virtue of nationality or race – or simply for the pleasure of the crunch of the bones . . . Whenever the radical heterogeneity between humans and animals is erased, the door is open to brutally eugenic arguments advanced under the guise of biological necessity or the authenticity of nature. (Klein 1995, 23)

For this writer what seems (or ought to seem) most stable and immutable is the line itself as this effects and makes intelligible an economy of violence and morality. The positions might well be reversed but the opposition is eternal. If we are not them, then they are not us. Rendering them as (like) us leaves us vulnerable to becoming (like) them. Indeed, he goes on to urge that "It is necessary that we stop humanizing animals for fear that we start predicating animal attributes on humans" (23).

Others hold that anthropomorphism is a dangerous form of Romanticism or nature idolatry. The standard scientific view may be that "The truly objective biologist will refrain from projecting personal feelings onto the animal . . . A scientist should never presume that an animal has intentions or is aware of what it is doing, or even that it feels pain" (Angier 1995, 169). According to at least one authority, anthropomorphism is particularly rampant in that branch of science that the revisionists rely heavily on to refigure the animal: ethology (Kennedy 1992). But, argues Kennedy, "If the study of animal behaviour is to mature as a science, the process of liberation from the delusions of anthropomorphism must go on" (5). He writes, "More pressing [than demonstrating that animals do not think] is the danger of mistakes arising from assuming animals *are* conscious, *are* self-aware, *do* think, *do* have purposes, *do* use mental images, etc. without having ruled out alternative explanations of the animals' behaviour" (158). (On the other hand, Kennedy asserts that anthropomorphism itself is built into our own being. Therefore, "Since anthropomorphism appears to be in large measure 'human nature' our attempts to free ourselves from it are quite literally 'against human nature' and must often fail" (155).) By putting anthropomorphic views into circulation, encouraging the subjectification of animals and promoting the development of cross-species

empathy amongst ourselves we risk ending the march of progress and surrendering to the forces of nature.

In any case, ours is very much the age of animal politics. Animal liberation organizations and animal rights advocates as well as those who deride them as deranged terrorists are at work in constructing new "animals" and in maintaining the prevailing "old animals." The struggles are by no means simply rhetorical. They are vitally material. The practices of "liberating" laboratory animals, chickens, the denizens of zoos and circuses, attest to the changing situation of animals in contemporary American culture. Circulating through many of the debates and episodes of "direct action" are traces of legal meaning. As the motto of the Animal Liberation Front proclaims: "[I]f we are trespassing so were the soldiers who broke down the gates of Hitler's death camps" (animalliberationfront.com/Saints). (If the species barrier is repudiated as a device for making one's actions meaningful, history has no shortage of serviceable representations.) A crucial determinate of how these "emancipations" unfold is the fact that, generally speaking, law – or at least positive law – is clearly on the side of those who position animals beyond the gap. That is to say, dominant, reductionist renderings of "the animal" are internal to legal ideology and supported by legal forms.

THE LEGAL ANIMAL

One crucial cultural and political fact about many cats, dogs, dolphins, ferrets, goats, mice, monkeys, and pigeons in America is that they are owned. They are the bearers of legal meaning. They are legal objects, in principle no different from a parcel of land, a T-bone steak, a teddy bear, or a steel mill. Property rules and doctrines make animals meaningful in particular ways. To be an object of property is to occupy a position within a formal meaning system with respect to legal subjects and to the state. Property is principally *about* social relations describable in terms of rights and duties. The rights and duties of property – what it means to own – are allocated and enforced by the state. The very ideas of property, of *liberal* property, and of the ownership of animals more specifically are easily naturalized. They are all also easily denaturalized and portrayed as artifacts that were invented and that need to be continually reinvented. As one property theorist puts it, "Property rights are a cultural creation and a legal conclusion" (Baker 1986, 744). Property regimes govern what counts as "property" (slaves? embryos? ideas? nuclear warheads? animals?), and how what counts may and may not be used. And though

the practical uses of property are innumerable, legal theorists have created a taxonomy of kinds of uses or things to do with property. Property rights are commonly described as coming in "bundles." Each "right" is conceptualized as being a stick in a bundle. Property objects can, for example, be bought, sold, inherited, leased, and borrowed. One might exchange some of the sticks through a rental or lease agreement (such as the right to possession), but because one retains the rest of the sticks, one is still "the owner." Most property objects are at some point commodities. They are produced in order to be exchanged. Another stick in the bundle that is significant to the uses to which animals are put is the right to destroy. Indeed, for most animal objects this is the point.

In liberal property regimes, and perhaps in American legal thought more than others, property talk is rich in boundary metaphors. As property makes animals legally meaningful, a pervasive imagery of boundaries, borders, zones, spheres, and limits make property intelligible in very particular ways – and not in other ways. As Jennifer Nedelsky says in an important essay on this theme, "Law, Boundaries and the Bounded Self" (1990), liberal property notions are based on and project "a picture of human beings that envisions their freedom and security in terms of bounded spheres" (163). But there are at least three different boundaries that property projects onto social life. There is the boundary between "the owner" and other "private" actors or claimants. The limit here says "Keep Out" (unless I say otherwise). We encountered a version of this in the landslide cases. As Baker puts it, "Property is an aspect of relations between people. It consists of decision making authority. 'Authority' refers to the role of property as a claim that other people ought to accede to the will of the owner" (1986, 742–743). Then there is the boundary between the owner and the state or collective which draws its significance from readings of the public/private distinction. We encountered versions of this in connection with wilderness and endangered species. "Property," writes Nedelsky, "defines what the society, or its representative the state, cannot touch (in the ordinary course of things). It defines a sphere in which we can act largely unconstrained by collective demands and prohibitions" (1990, 165). Boundaries mark an inside and an outside. Outside of the bounded sphere are other subjects, inside is the realm of rights and "uses." Property, of course, is about power. "One of the things that the language of boundaries masks is power" (177). Or, as Baker puts it, "Property rules provide people with a means to exercise power over others. Sometimes this power over others will be of a degree appropriately called sovereignty" (1986, 751).

Property, then, is a formal system – a system of forms – that directs the flow of power in the social world. Many critical legal scholars over the years have drawn attention to the ways in which property both facilitates and masks the "sovereignty" that owners exercise over nonowning legal subjects. Critical animal legal scholars, if I can coin the phrase, bring us inside the bounded sphere into the realm of rights and uses. Animal legal theorist Gary Francione says: "[T]he defense of animal experimentation almost always rests on unarticulated assumptions about the immorality or, to a lesser degree, the impracticality of challenging certain widely held – and morally justified – assumptions about private property" (1995, 167).

The magic of "property" is similar to the magic of "animal" in that it effaces the vast heterogeneities among the objects gathered together under the name. But just as treating humans as property objects seems to most people to entail a reckless disregard for how far "property" can be stretched, so for many does the property status of animals. Cows, snakes, dolphins, and gorillas are simply not "the same" as steel mills, Three Dog Night records, cars, and hotels. Animals are alive. What is "owned" then, is a life, a form of being. To own an animal is to have virtually complete dominion over the life and experiences that the being is to have. A third boundary of the property system, then, is that given content by the subject/object dichotomy. But, unlike the other two, this one is characterized by virtually unlimited and unidirectional penetration. And, as we have seen, the subject/object dichotomy with respect to human–animal relations is, in turn, given content by the mind/body dichotomy. What is incorporated into legal conceptions of property (and through property inscribed onto the world) is the imagery by which the species barrier distributes mind and mindedness among sentient beings. We are minded, and mindful; they are not, they are only bodies that happen to squeak or grunt or bark.

The significance of these legal figurations of animals cannot be overestimated. As a component of the politics of nature, the politics of animals is a politics of rights. Those who reject the ontological absoluteness of the species barrier, therefore, advocate the abolition of legal objecthood for nonhuman sentient beings. As one prominent legal theorist of the status of animals says, "The rights advocate . . . seeks the incremental eradication of the *property* status of animals" (Francione 1996, 221–222). The allocation of a set of fundamental rights to animals entails a refiguration of what it means to be human and what it means to be a person. It entails not only the expansion of rights but also a revision

of the philosophical foundation of rights. It entails a shift from a rights theory based on rationalism (a feature of minds) to one based on sentience (a feature of bodies, or of bodies unsevered from consciousness). The project of "animal rights" involves a fairly significant revision of the conception of "nature" that is built into legal forms, even as it retains those forms in the image of rights as limits. For some feminist animal advocates this retention concedes too much to the extent that rights talk, even as applied to animals, reinforces boundary images and frustrates the emergence of an ethic of care and connection. As Donovan says, rights theory "requires an assumption of similarity between humans and animals, eliding differences. In reality, animals are only with considerable strain appropriable to Cartesian man" (1996, 14–15).

A being, a baboon, a dolphin, a pit bull, is doubly objectified, doubly reduced by prevailing discourses of power. First, it is reduced to "animality" and all that that means and doesn't mean. Second, it is reduced to property and all that that entails. It is positioned within forms of meaning, and so positioned within circuits of power vis-à-vis the legal subject and vis-à-vis the state as the guarantor of the rights of ownership. Its figurations as animal, as nature, as body, on the one hand, and as property on the other hand, are mutually reinforcing and neither can be severed from the other. Because it is "an animal" it can be treated like property; because it is property it can be treated like an animal. As Francione says: "Rights theory precludes the treatment of animals exclusively as means to human ends, which means that animals should not be regarded as the property of people. And because rights theory rejects the treatment of animals as property, rights theory rejects completely the institutionalized exploitation of animals, which is made possible only *because* animals have property status" (1996, 2).

It is true that, formally, animal objects are regarded somewhat differently from nonsentient property objects in that there exist numerous "anticruelty" statutes which prohibit inflicting "unnecessary suffering" on captive animals. Francione has convincingly shown, though, that these are legal forms with very little substance, as virtually any "use" of an animal's body can be justified as "necessary" and given priority over virtually any "interest" the animal might be seen as having. We shall be examining one example of this shortly. "If the acquisition of knowledge can count as a 'benefit' that entitles or morally justifies a researcher inflicting pain or death on an animal, and if scientists ultimately determine what 'benefit' means, then virtually any use of animals can be justified" (1995, 171). Moreover, the justification of anticruelty laws

is more to prevent humans from acting "inhumanely" – and thereby degrading themselves – than it is to prevent the suffering of animals. Midgley, discussing Kant's argument against gratuitous violence against animals says: "[T]he reason for not being cruel is that cruelty would debase our own nature. It is therefore our duty to ourselves to avoid this defilement. But *why* it should be a defilement we don't know" (1978, 46). As we shall see, what the prohibition against "unnecessary suffering" threatens has little to do with what animals may or may not experience and more to do with maintaining the integrity of the species barrier itself: we are not them, we are not beasts, our violence ought always to be reasoned and, hence, reasonable.

KNOWING THE ANIMALS

There are innumerable locations where animals are used and where animality is constructed. Especially significant – and particularly volatile – are research laboratories in which animals are the objects of experimentation. While animals are culturally significant figures of "nature" generally, because science itself operates with its own specialized conception of nature, then animals in these contexts represent special forms of nature. That said, however, it must be remembered that the domain of science is divided on the meaning of animality. As I mentioned, there are some projects that produce knowledge tending to reduce the sharpness of the human–animal divide. These include studies of primate consciousness, cetacean language, and elephant emotions, for example. But there are many more for which the maintenance of a sharp and unbridgeable gap is a prerequisite of practice. For these practices "knowing" the animal is less important than producing other sorts of knowledge such as that concerning the potential toxicity of shampoo or the effectiveness of a drug that might be used to control diabetes. For these practices, structured by these sorts of questions, the animal as nature is a body, an assemblage of materials, systems, and processes. To quote Francione again:

> René Descartes . . . believed that in order to understand nature it was necessary first to determine the parts that constituted the whole and then to determine how these parts related to the whole. Descartes viewed the world atomistically and in many ways was the chief proponent of what is referred to as reductionist scientific methodology . . . In order to understand things, we must first take them apart, and then reconnect them . . . It is easy to see how this reductionist approach supported the practice of

> vivisection. In order to understand "nature," Descartes believed it was necessary to resolve the object to be examined into its constituent parts. If the "object" happened to be a nonhuman, then the correct approach was to observe the structure and function of each of the parts inside the nonhuman. (1995, 175)

We might regard the relations of control and knowledge between objectified nature (say, the baboon in restraints on the table) and the subjectified investigator in a formal way. The baboon represents a body-as-nature as repository of knowledge. The technician represents mind in a way that links backward to the research project and to the training that he or she received. The laboratory is a site for the production of knowledge about "nature" or, more specifically, head anatomy and neurology. Between these beings there is a literal gap, a space. But in the process of preparing for the procedure the gap is closed in a material way. The technician, of course, is also embodied, but the body here is subservient to and directed by the mind; the actions follow from the intentions of the investigator. This body is also supplemented by tools and technologies, by drills and scalpels, syringes, and chemicals that, as I discussed in chapter 3, represent the material form of other, prior knowledges. The gap is closed when the skin, the dermal boundary, is broken by the point of the needle or the drill bit. Nature is penetrated. Mind, again, perhaps supplemented or mediated by sensory technologies – lenses or ultrasonic devices – enters the baboon's body, explores, observes, records. In the process, knowledge of a certain valuable kind is extracted. It will then be processed in socially conventional ways (in reports, articles, professional papers) and put into wider circulation to be used, perhaps, by others. Along the way the knowledge itself may take a commodified form as intellectual property, protected, like the use of the baboon, by the state.

Looked at another way, though, the naturalization of nonhuman beings facilitates the scientization of practice.

> [T]he image of animalness as conveyed by the animal sciences may well be a de-animalized biological construct rather than a mirror of animal reality. Social scientists view their own subject matter, humans, as animal physical bases + a vital addition. This view automatically turns animals into reduced humans, only comparable with us on a physical level. The argument seems to go on as follows: "If biologists are reductionists it is because animals, as reduced beings, prompt them to think in this way," while it may be that biologists study animals because this permits them to remain reductionists! (Noske 1997, 88)

Naturalization effects the sanitation of profoundly ideological operations and the valorization of whatever knowledge is produced as constituting progress per se. However it is looked at, however we understand the situation of the participants, the issue of animal experimentation is even more intensely politicized than wilderness or endangered species. For partisans on either side it is nothing less than a battle between good and evil. Animal advocates portray laboratory workers and scientists as being no better than Nazis and slavers; scientists denounce rights advocates as terrorists and lunatics.

In these contexts, then, the nonhumans may be triply objectified, triply reduced: as "animals," as "property," and as objects of scientific knowledge or fixed means to epistemic ends. Again, all are mutually reinforcing. But were the facts, images that enable their reduction to mere, brute animality to be inaccurate, then their legal reduction to property also becomes harder to justify. And if animals cannot be property, then the theory and practice of scientific naturalization would be much more difficult to achieve. Animal advocates challenge and seek to change the category "animal," the theory and practice of vivisection, and the legal framing of animals as property. Obviously, the notion of "rights" in this regard is crucial.

Perhaps in no other context is actually existing science so clearly itself on trial. Its practices and constitutive ideologies are attacked and vilified, subjected to a highly visible and effective campaign of propaganda. Actual laboratories are attacked and trashed, workers are threatened. These efforts have brought forth a forceful resistance and countercampaign. In this campaign, science relies heavily on law. The property status of animal objects imposes a strong barrier between them and others who might claim to speak for the animals. Layers of regulations serve to insulate owners from many challenges. In short, simply identifying the objects in question as property, as owned, is sufficient to channel the flow of power. The property form closes off all other narrative or contextual considerations.

RENDERING THE ANIMAL

The physical space of laboratories can be seen as occupying an intersection of two other kinds of spaces: the space of science and the space of law. Animals can be seen as boundary markers for each. Animal laboratories are locations within the space of science in obvious ways. They are zones of rather pronounced deference within which the pursuit and

production of knowledge is nearly unfettered. Laboratories are spaces of putatively free inquiry where what takes place within their walls is predominantly guided by the quest for knowledge as this is set out by the institutions and investigators. They are not, of course, absolutely unlimited by law. They are, after all, also workplaces. They are subject to building codes and so on. There are also proscriptions against, for example, the nonconsensual use of human subjects. Because science is largely self-regulating there are also important "internal" rules and protocols pertaining to research in general. Also, because of funding considerations, any research project will be governed by conditions set by the funding source. In a way, then, the laboratory is saturated with "law." Much of the "local legality" of a laboratory, though, reinforces the relative autonomy of science vis-à-vis state law.

It is also the case that use of animals in laboratories is not absolutely unlimited by state law. The federal Animal Welfare Act of 1970, for example, mandates that the Secretary of Agriculture promulgate standards for "the humane handling, care, treatment and transportation of animals by dealers, research facilities" and others (7 USC § 2143(6)a). Some animals, such as farm animals and others that I shall mention below, are not covered by the act. Moreover, with respect to research facilities, the act acknowledges the presence and value of the science/law boundary. It explicitly states that the rules and regulations are not to concern "the design, outlines, or guidelines of actual research or experimentation by a research facility as determined by such research facility" ((6)a). Nonetheless, the rules are to be aimed at ensuring that "pain and distress [of laboratory animals] are minimized." In addition to the rules and regulations promulgated by the Department of Agriculture there is also a host of state anticruelty statutes that may apply to animals in laboratories. The general thrust of these, as we saw, is to proscribe the infliction of "unnecessary suffering" on animals. This notion of a distinction between "necessary" and "unnecessary" suffering might appear as at least a theoretical limit to the sovereign space of science vis-à-vis animals, vis-à-vis law. It points to a limit to what humans can do to animals and what owners can do with living property objects before the state intervenes on behalf of the animals. It locates the boundary between the space of science and the space of law within the walls of the laboratory.

Note, though, that in such a formulation "suffering" is simply accepted as what happens in laboratories. "Suffering," like "harm," is a word. But it is also an experience that law acknowledges by naming it

as such, as it also does by referring to "pain and distress." In any case, efforts to find the boundary between the sovereign space of science and the space of law get directed toward finding the line where necessary, that is, acceptable, suffering becomes unnecessary. It is important to realize, though, that this does not entail an assessment of the quality or intensity of the suffering. In fact, egregious suffering may be much easier to construe as "necessary" than other lesser or gratuitous experiences. Rather, "necessary" points away from the body and its suffering and toward the motives and intentions of the subject investigator. "Unnecessary," then, is a judgment about the quality of desire, not the quality of pain. But if an instance of suffering is found to be "unnecessary," then the space of law and its accompanying sanctions may override and supplant the space of science in the laboratory. In such a case, the police may enter the laboratory and confiscate the animals.

Animality and the limits of necessity

One important case in the legal history of the politics of animals is *Taub* v. *State* (463 A 2d 819, 1983). One reason for its historical importance is that it brought the advocacy group People for the Ethical Treatment of Animals (PETA) to national prominence. Dr. Edward Taub was the chief scientific investigator in charge of animal research at the Institute for Behavioral Research (IBR), which operated a laboratory in Silver Spring, Maryland. His project involved learning how to retrain limbs damaged by stroke. To that end he used crab-eating macaques as animal models and simulated the effects of strokes (in humans) by "abolishing all sensation in the limbs [of the monkeys]" (819–820). The procedure is known as somatosensory deafferenation. In practice this meant operating on the monkeys and severing their nerves. In May 1981 Alex Pacheco, chairperson of PETA, sought and obtained employment in Taub's laboratory. While there he began to document the conditions under which the monkeys were kept. He also surreptitiously brought other primatologists into the laboratory to get their opinion of the conditions. One who testified against Taub said that he "had never seen a laboratory so poorly maintained for animal subjects or human researchers" (quoted in Fraser 1993, 72). This in spite of the fact that both the Department of Agriculture and the National Institutes of Health, Taub's funding agency, had recently inspected the facilities. Geza Teleki, a professor of primatology at George Washington University, testified that,

> Because of the direct risk of transmission of contagious, air-borne diseases between human beings and nonhuman primates, a primate laboratory is a potentially lethal installation. Besides contributing to an uncomfortable living situation for the animals, lack of proper ventilation and precaution against the spread of disease from the monkeys to human patients, staff and visitors . . . defies all reasonable health standards.
>
> (Fraser 1993, 72)

But, as Taub later said, "It wasn't trivial. It wasn't nasty. It wasn't mindless . . . Everything was done in order to find a necessary answer to a necessary question" (68). Pacheco brought the documentation to the attention of the local police, who then, armed with a court order, raided Taub's laboratory and seized the monkeys. What happened to the monkeys after this was itself the topic of a number of court cases. What I want to pursue is what happened to Taub.

The state attorney charged Taub with seventeen counts of violating provisions of the state anticruelty statute. It is important to remember that what triggered the entry of law into the space of science was not the experiments or how they were conducted but the physical conditions under which the monkeys were forced to live. At trial Taub was found guilty of failing to provide necessary veterinary care for six monkeys, and acquitted on the other charges. A second trial resulted in conviction on one count being sustained and the rest overturned. He appealed to the state court of appeals which dismissed all charges.

How and why the court acted as it did is instructive for understanding how law uses animals as boundary markers in the cartography of power. After setting out the facts of the case Judge Couch examined the law that the prosecutor sought to apply to the facts. A high proportion of the short text is given over to tracing a history of anticruelty laws in Maryland. The judge concluded that from this history, "It can readily be seen that the legislature has consistently been concerned with punishment of acts causing 'unnecessary' or 'unjustifiable' pain or suffering." There is, then, a limit. But, he continued, "clearly the legislature recognized that there are certain normal human activities to which the infliction of pain to an animal is purely incidental and unavoidable and, in such instance [the statute] does not apply" (*State* v. *Taub*, 821). As he gives no indication as to what counts as "normal human activities" or "such cases" we can only guess that he meant the context of scientific experimentation on animals per se. That is, he seems to suggest, that whatever happens in the laboratory is presumptively beyond the

reach of the law. Because nearly any activity could be "justifiable" by and "necessary" to the production of scientific knowledge then the state anticruelty statute is inapplicable to the space of science. The space of science retains its sovereignty.

But Judge Couch offered another reason for dismissing the charges. Quite opposed to the view that the laboratory is a space beyond the law, he also read it as a space that was supersaturated with legal meaning. He noted that the Federal Animal Welfare Act applied to what took place in the laboratory and that "The Act provides a comprehensive plan for the protection of animals used in research facilities." He noted that "the involved laboratory was subject to detailed regulations of the Secretary of Agriculture." He also noted that the laboratory was "subject to pertinent regulations" of the National Institutes of Health. This being so, the state law was superfluous. Again, it is unclear why he found this to be so. In any case he did "not believe the legislature intended [the statute] to apply to this type of research activity under a federal program" (821).

One way of looking at animals and the law is, as I mentioned, that they are beyond – or beneath – the concern of law. They have no rights, they receive virtually no protection. What might look like protection for them is really protection for our sensibilities. But, as I discussed above, animals are not beyond law. They are in law and law is in them, just as law is in the wilderness. They are *of* law, they are legal creatures, legal creations. Though beyond the boundaries of legal subjecthood, they are within the bounds of legal objecthood. And the applicability of the metaphysics of subject and object (humans/nature) is itself limitless.

Another way of looking at a case like *Taub* and the material reality that it is an indication of is to see the space of the laboratory as not simply science space – a space of other than the law – but as a space of antilaw within the law itself. More specifically, the animal laboratory might be seen as a space of prelaw, a space where the prelegal world of the state of nature is preserved. It is a space in which nearly all forms of unspeakable violence and total domination are presumptively permitted and legitimated (by the laws of nature itself?). The laboratory is a space where legitimate violence is given virtually free reign, constrained only by what the perpetrator can plausibly justify to himself. What is performed in laboratories, then, is not only experiments. What is also performed is an enactment of a model of the world without law where "might makes right," where one has, in Hobbes's phrase, "a right even to the body of another" (1651/1994, 80). It is a performance – a

legal performance for which beings are recruited specifically to be "treated like animals.'

But why might it be valuable for a legal order to preserve a space of amoral antilaw within its own precincts? It could perhaps be a model of life without law. The lives of laboratory animals can remind us not only that they are not us, but, perhaps more importantly, that we are not them. They call us to imagine, "There but for the grace of law go I." Perhaps even when legal sanctions against humans reach the extreme of sucking the life out of *our* bodies, the legal imagination can entertain that it had, in fact, upheld the dignity of humans vis-à-vis animals. The executed, after all, found him or her self strapped to a chair because of the choices he or she made and was free not to have made. The executed was given his or her day in court, had a chance to speak and to be heard by the law. The executed was not, after all, then, treated like an animal. The example of the animal can remind even the least of us how good we have it here beyond the state of nature. Law preserves its exemplary antithesis safely within the confines of science. Ironically, Taub later complained, that "Labs have become like concentration camps or prisons, where people constantly look over their shoulder to see who's watching" (Fraser 1993, 82).

Speaking for the animal

Taub was a criminal investigation. The laboratory was primarily functioning as a space of science. Its legal aspects were only "activated," so to speak, by extraordinary measures and, in any case, were easily "deactivated" by the court. But there are other legal spaces implicated by animal experiments. One is the procedural space of law itself as encountered by the courtroom. If the law – as manifest by the appearance of police, not in the form of property – can only with difficulty enter the laboratory, can animals enter the court? If the law is the domain of the word and if animals are beings without speech, who, if anyone, may speak for them to law? Who might enter the kingdom of reason and word on their behalf? These questions are answered with reference to the legal notion of "standing."

Standing names a set of rules, doctrines, and "tests" to determine who may and may not speak to the law and try to enlist the power of law. Standing is a boundary concept. It marks the gates of law. One of its purposes is to keep courts from being bogged down by too many suits. It is intended to guard against generalized complaints that are more properly addressed to legislatures. Courts in civil cases are only to deal with

determining liability and remedy for specific injuries. Animals, though, cannot speak to law, cannot name their specific injuries.

Many advocacy groups such as the Humane Society, PETA, the Animal Legal Defense Fund, Animal Lovers Volunteer Association, and the International Primate Protection League seek to speak for animals in the language of the law. But a difficulty in achieving standing to do so is that in many cases what is to be challenged is how a legally recognized owner is using his or her property, and there is a strong presumption that what owners do with their property is of no concern to third parties. Advocacy groups have no more right to interfere with the use of animal property than they have to dictate what I may do with my accordion. Property is property. One way around the property barrier is to challenge the regulatory structure governing animal use such as might be provided by the Administrative Procedures Act that we encountered in previous chapters. For example, a plaintiff might bring suit against the Department of Agriculture challenging the arbitrariness or nonenforcement of its regulations.

Like tort, standing can be broken down into constituent parts. Courts have fashioned a set of "tests" to determine whether or not a potential plaintiff meets the conditions. To have standing, a plaintiff must have suffered an injury. The injury must fall within what is called the plaintiff's "zone of interest." The plaintiff must have a real, personal stake in the nonenforcement of regulations and not simply a generalized grievance. The injury must have been "caused" by the defendant – that is, the Department of Agriculture – and it must be remediable by the court. If prospective plaintiffs satisfy these conditions, they may speak to the court. If they do not, they may not.

The case of *Animal Legal Defense Fund* v. *Espy* (23 F 3d 496, 1994) is interesting for a number of reasons. In 1966 Congress passed the Animal Welfare Act which, among other things, set minimum standards of care for animals used in laboratories that receive federal funding. The animals originally covered by the act were live dogs, cats, monkeys, guinea pigs, hamsters, and rabbits. In 1970 the act was amended to include dead animals and further defined "animals" as any "live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit or other such warm-blooded animal, as the Secretary [of Agriculture] may determine is being used, or is intended for use, for research, testing, experimentation" (7 USC § 2132(g)). The Department of Agriculture issued a regulation interpreting the statute to exclude birds, mice, and rats. That is, these *de facto* animals were not *de jure* animals under the act and so

their owners were exempt from providing the minimum standards of care to them. Plaintiffs, among them the Humane Society, the Animal Legal Defense Fund, and private plaintiffs, sued under the Administrative Procedures Act to require that the department include these animals as "animals." It should be noted that the vast majority of animals used in experiments are in the excluded category. In federal district court the plaintiffs alleged various injuries to themselves in order to extend protection to the excluded animals. The court granted summary judgment in their favor. The department appealed, arguing that the lower court should have dismissed the case because the plaintiffs lacked standing to challenge the regulation. The appellate court vacated the lower court's ruling and directed that court to dismiss. One plaintiff, Patricia Knowles, a psychobiologist who had worked with the excluded animals, was found to lack standing because her complaint amounted to no more than an "aesthetic injury" (500) which insufficiently implicated her zone of interest. Other organizational plaintiffs alleged that the definition of "animal" "hampers their attempts to gather and disseminate information on laboratory animals. If the definition were broadened, regulated laboratories would be legally obliged to provide information about their treatment to the Secretary, who, in turn, would include it in his annual report to Congress" (501). This, the court argued, amounted to nothing stronger than "informational injury," which, again, is too weak a foundation to support standing. The advocates who would speak for the animals, therefore, were excluded from the space of law.

Trading places

If organizations like the Humane Society cannot speak for the animals, can someone who has lived with laboratory animals claim to read their minds? If a rat is not an "animal" is a dolphin a "person"? A case that raises these questions is *State* v. *La Vasseur* (613 P 2d 1328, 1980). This case is particularly interesting when compared to *Christy* v. *Hodel*, the case of the deputized bear we examined in the previous chapter. For two years the defendant, Kenneth La Vasseur, had lived in the laboratory and had been the companion of Puka and Kea, two Atlantic bottlenose dolphins. He fed them and swam with them. Before being discharged from the laboratory, for reasons that the court does not mention, he and some friends loaded the dolphins into a van, drove fifty miles and released them into the Pacific Ocean. In court he testified that "his intention was to give the dolphins freedom of choice as to whether or not they returned to captivity." They swam away and he was charged with

theft of laboratory property. Part of his legal justification at trial was the "choice of evils" defense, which allows actions otherwise prohibited to be excused if the actor believed it to have been "necessary to avoid imminent harm or evil to himself or to another" (Hawaii Revised Statutes, § 703–302). His attorney argued that Kea and Puka each counted as "another" under the statute. Theft was a lesser evil than allowing the dolphins to continue living in the laboratory, which La Vasseur characterized as poor. Just as the court in *Christy* had rejected the deputization of the grizzly bear, the court in this case ruled that a dolphin is not "another" under the relevant statute, that "another" means "person" and "person" means "a natural person and when relevant a corporation or an unincorporated association" (1333). The dolphins were not persons to whom choice could be attributed, but "things," property objects, and objects of study. The dolphins were resituated by the court on the down side of the subject/object distinction. They are no more "agents" than was Christy's grizzly bear and no more free to choose to be free than a lawn mower, steel mill, or other property object. La Vasseur's conviction for theft was affirmed. The humanization – or, at least personification – of the dolphins having failed, La Vasseur and Puka, in a sense, traded places as he was sentenced to six months in confinement. And if *La Vasseur* reaffirms the proposition that "they are not us," *Animal Legal Defense Fund* suggests that, at least for some purposes, they might not even be them.

CHAPTER TEN

FEAR OF FALLING: LAW AND BESTIALITY

INTRODUCTION

> I love you, little girl. I'm *in love with* you. You're so sweet, so funny, so – oh Cherry my darling! He hugged her neck, hard, her head over his shoulder, rubbing his cheek against her sleek coat . . . James awoke as the sun came peeking over the eastern horizon. He was lying in the soft straw outside the stable, shorts again covering his loins. Cherry was asleep on the ground beside him, the top of her head resting on his left arm. James was happy. (Mathews 1994, 193)

James is the fictionalized name adopted by Mark Mathews, author of the autobiographical book *The Horseman: Obsessions of a Zoophile*. Mark Mathews is the pseudonym adopted by George Wilbur, an "out" zoophile, founder of Zoophile Outreach Organization and featured subject of both a BBC documentary, *Hidden Loves*, and an episode of the Jerry Springer show. Cherry, if it isn't obvious, is a horse that James/Mark/George owns. The passage quoted comes at the end of a book in which the narrator recounts his path from self-loathing to self-acceptance. Guided by a sympathetic psychologist, the author comes to realize that he and other members of the zoophile community practice a "nonthreatening alternate behavior." The aim of the book is to point the way toward greater social acceptance. The author analogizes the struggle of zoophiles to the historical struggles of African-Americans and gays and lesbians. "*I* am not normal," he writes.

> But we are human beings, sharing most of the characteristics of humanity. As such, rather than forcing us into chemical treatment or imprisoning us, or casting us out, perhaps it is time for society to take a closer look at its attitudes toward us. As long as we don't harm or hurt any people or our partners, as long as we are still productive, functional members of society, why, then, the opprobrium? Why not let us be? Is society harmed by diversity or enriched? Please think about it. (208)

His is a version of the story that love conquers all, intertwined with the story of social progress as the widening circle of toleration and equality. This is clearly a potent combination.

There are many different ways of making sense of zoophilia or bestiality or buggery. Historically in the West the most common way of making it legally meaningful has been with reference to "the abominable and detestable crime against nature." Human sexual relationships with animals – the acquisition of carnal knowledge of them – has traditionally been deemed "unnatural" and has been punishable largely on that basis. But James/Mark/George suggests that it is not about sex so much as it is about love: who can love and be loved by whom, how love can and cannot be expressed, how love can be denied by law and violence delivered in support of that denial. Not incidentally, though this point is not emphasized in *The Horseman*, another way to frame the issue may be to ask what an owner can and cannot do with his property.

In the previous chapter we saw that scientific experiments on animals often result in extreme suffering and death. These results are commonly justified by the fundamental belief that they are not us. Even higher primates whose resemblance to us supports their role as "animal models" are located just the other side of the line that announces the distinctiveness of humans vis-à-vis animals as figures of nature. They are very much *like* us but they are not us. Their deficits tell us so. In this chapter we explore another dimension of human–animal interaction but one that seems to emphasize the corollary notion that *we are not them*. Here we continue to examine some of the complex boundary work that goes into constructing and revising humanness vis-à-vis "the animal," but here we do so in connection to the realm of the emotions and sexuality. We shall also treat law's shifting relationship to these tasks. The first sections consider how conceptions of emotions are used to mark the boundary between humans and animals (again, as a figure of nature). But emotions occupy a very ambiguous location in these borderlands, sometimes marking out what is distinctively human while at other times tending to signify the domain of nature *within* the human vis-à-vis

"higher" faculties such as reason. Looking more closely, we shall consider the role of the passions and, more particularly, sexual desire, lust, and arousal, in making the beast within intelligible. That is to say, we shall explore how animality helps us make sense of the sensual, hedonic aspects of human existence. The relationship between disgust and desire has been construed as a proxy for the combative relationship between civilization and the (always threatening) state of nature that, according to the emergence stories discussed in chapter 4, is ongoing and never-ending. This is a struggle that may be metaphorically corporealized as one between our minds and hearts or between our guts and genitals.

The second section takes up the question of bestiality in light of these conceptions of emotions and sex and surveys a range of contemporary positions within this, admittedly fringe, arena of the politics of nature. The third major section examines the historical involvement of formal legal discourse in making sense of bestiality and its use of bestiality as a resource for making sense of itself. My focus is on the historical paradox rooted in the conventional stricture that that which is "against the order of nature" is also that which is "not fit to be named." The unnameable, unspeakable nature of this offense followed from a conception of the relationship between language and the disgusting, such that particularized descriptions of unnatural practices are understood as contaminating the speech act or texts themselves. By naming the unnameable, legal actors ran the risk of actually participating in the furtherance of the defilement and degradation engendered by the underlying act. As one judge declared:

> This was a prosecution of "the abominable and detestable crime against nature." The statute gives no other definition of the crime, obviously out of regard to the better sentiments of decent humanity, and to leave the record undefiled by details. The court has read the evidence of the record, and for the same reasons which influenced the framers of the statute, refuses to defile the reports by a recital of the sordid, immoral, depraved, and detestable statements therein contained.
>
> (*Sanders* v. *State*, 25 NE 2d 995, 1940)

Or, as another more tersely put it, "The charge is too horrible to contemplate and too revolting to discuss" (*Harvey* v. *State*, 115 SW 1193, 1909). On the basis of such sentiments legislators, prosecutors, and judges refrained from specifying the overt practices which constituted a punishable offense and sought to contain the disgusting within the confines of silence.

This policy of containment, though, had a number of effects. First, by uncoupling potential legal violence from the word, legal actors ran the counter risk of decoupling violence from reason, accountability, and legitimacy. That is, this strategy risked transforming law into brute (and mute) force. Second, it thereby created opportunities for defense attorneys to challenge convictions by advancing arguments concerning the vagueness of statutes and indictments and arguments that the acts committed were not embraced by the letter of the law. Because much of the rhetorical force was carried by general references to nature, the arguments by attorneys and judges became arguments about the limits of "the natural" and "the unnatural" and of law itself. Because the unnatural was (said to be) unmentionable and the line between the natural and unnatural indefinite, then the differences among a variety of acts could variously be emphasized or deemphasized. In some cases the fact that one of the participants was an animal seemed to make all the difference. In other cases, though, it didn't seem to matter at all as legislators and appellate judges expanded the category "unnatural" (and contracted the category "natural") by punishing both gay and straight oral sex as being no different from bestiality or "traditional" sodomy.

EMOTIONAL BORDERLANDS

The Horseman loves Cherry, but does Cherry love the Horseman? Undoubtedly the most common answer to this would be "no." Among the most commonly cited – but increasingly challenged – features indicative of human uniqueness is our capacity to experience emotions. An emotional life is one of the principal deficits of nonhuman forms of being. *We* love, hate, grieve, feel shame, disgust, and remorse. *Our* inner lives and social relations are given form and meaning by the affective commitments and dispositions that make us who we are. In contrast, though nonhuman animals may commonly seek pleasure and avoid pain, it is commonly held that they are incapable of emotions. (Recall Justice Scalia's joke about the "painful sentiments" of a slug in *Sweet Home*.) Jeffery Masson (1997) writes, "Instinctive love that crosses the species barrier is a remarkable phenomenon. We humans experience it all the time: We love dogs, cats, horses and many other animals. Yet while many scientists readily admit they love the animals they study, few will concede that the animals they study return that love" (xv). What may appear to be emotional responses in animals can be rather easily dismissed as anthropomorphic projections. In *A Tear is an*

Intellectual Thing: The Meaning of Emotions (2000), Jerome Neu asks, "What are the limits on the emotional life of animals lacking poetic imagination? Can they have emotions not grounded in the simple perception of reality? Do they have the intellectual capacity to be moved by imagined events?" Asserting the primacy of the mental, he answers "no." "The psychological meaning of emotional responses depends on the thoughts that we can plausibly see behind them. So far as those thoughts are limited, so also is the range of emotional experience and emotional expression" (13). One deficit, then, provides sufficient grounds for another: no thoughts, no feelings.

But this version of what Midgley (1984) calls absolute dismissal – and so the firmness of the boundary that it marks – has been complicated in both directions. On the one hand, one finds arguments that emotional lives are not restricted to human beings. Some claim that at least some animals are capable of experiencing and expressing at least some emotions. As Peter Steeves writes: "Fear is one of the few emotions which scientists are unafraid to attribute to animals without concern for anthropomorphizing" (1999, 138). And Neu acknowledges, "We have little trouble ascribing fear and anger to apes, dogs and certain other animals on the basis of their behavior, because we have little trouble granting them the degree of awareness needed to account for what certainly seems to be fearful or angry behavior in ordinary circumstances . . . But," he adds, "fear and anger are relatively primitive emotions" (2000, 13). So here the line between emotional and nonemotional forms of being may not correspond precisely to that which distinguishes humans and animals. The difference is marked by the slipperier zone that separates the "relatively primitive" from the more advanced emotions. But again, others challenge this demarcation. In *Dogs Never Lie About Love: Reflections on the Emotional World of Dogs* (1997), Masson claims that dogs commonly feel not only anger and fear but love, loyalty, gratitude, dignity, humiliation, and compassion. And if dogs can feel these then why not cats, horses, and pigs? Why not blowfish, lobsters, and Scalia's slug, or even creatures further out along the Great Chain of Being? How confident are we in dismissing the possibility even if we cannot discern the emotions or find these creatures lovable?

On the other (human) side of the line, emotions are commonly construed as being baser than reason by reliance on animal and nature discourses. In fact, the emotions as a figure of nature have for a long time been used to relegate women, children, and various ethnic and racial others to the status of the not-quite-fully-human vis-à-vis Anglo and

Teutonic adult males. And, of course, the allegedly essential emotional natures of these others have historically been a primary ideological justification for excluding them from political power and holding them to different legal standards. Particularly useful for purposes of relative dehumanization are those emotions gathered under the name of the passions. And of all of the passions, those associated with sexuality and the erotic have commonly been construed as among the basest.

Robert Solomon discusses what he calls "the myth of the passions" or culturally prominent ways of understanding passionate aspects of human being. "The passions," he writes, "have been generally agreed to be primitive and 'natural,' disruptive and irrational, lacking in judgment and purpose of reason, without scruples, and sometimes shockingly short of taste" (1993, xvi). They are "those shortsighted and self-indulgent less-than-wholly-human lapses in our objectivity and our knowledge of Reality" (xii–xiv). According to this common understanding, "The passions . . . belong to an 'inferior' faculty that must be mastered. These invading forces must be contained, as emissaries of the devil or malicious tricks of bored or vengeful demons" (11). In his *Philosophy and the Passions* (2000), Michel Meyer relates these views directly to key themes of nature discourse. "To be affected by nature becomes a process whereby one is subjected to nature . . . The same goes for being affected by, or having, passion. This becomes the inscription of nature in the human being" (100). And having identified the passions with nature, he then dwells at some length on the vagueness of the boundary and on its vulnerability when passions are aroused.

> The ambiguity [of the human/nature distinction] emerges from not really knowing whether human nature is above all natural or human, if we should be situated within the general order of nature, or if that which is human should be considered by itself because it is human . . . [P]assion is the point of convergence between nature and human nature, of nature in the human being. Through passion, we lose sight of our specificity as human beings and abandon ourselves to our instincts, as though we were nothing other than nature . . . [P]assion places us above nature because it prolongs our own sense of it, so it is not pure nature even though at the same time it is . . . The result of all of this is that passion is natural and it is not, it is human and it is not. It is the paradoxical concept of coherence which should permit people to be both part of nature and human . . . Passion makes us by unmaking us, it links us to nature and our animal nature, which we transcend as it does so because passion is itself a human, and only human reaction. (102)

The passions, according to common readings, then, represent the corporeal, animal wildness within each of us. Indeed, Meyer identifies the passions as "the state of nature within the self" (100). As such it is locked in an eternal struggle with reason and the internalized voice of humanity. Meyer asks, "Is having mastery over passions equivalent to changing an opinion, or to domesticating one's body?" (56). This eternal internal battle between the passions and reason is among the principal fronts in the war between mind and body, the distinctively human and the generally animalistic forces of nature. Crucially, the passions are visceral: we get hot, hot and bothered, we sweat, our knees go weak, we get knots in our stomachs, we stammer, we get an erection or begin to ooze. And sometimes we lose it – we lose control. Solomon puts the point nicely.

> The passions render us passive . . . Various passions "strike" us, "overwhelm" us, "consume" us, "paralyze" us; we "fall" into them, "give way" to them, and we attempt to "hold them down," "keep the lid on," maintain control, and suppress them . . . The entire history of human thought (Eastern as well as Western) has tended to view the passions as forces in some sense "outside" us, beyond our control, eruptions from an unconscious Freudian "id" or Cartesian "animal spirits" sapping the strength of Reason. (1993, 68)

Focusing on the Freudian version of this story he says, "[T]he battle [between id and superego] defines the life of the human spirit: 'us' against 'it,' reason and civilization against the monstrous demands and aberrations of the passions. Controlling these wild beasts is the purpose of human society, religion and reason" (xvi).

And so, the passions, more so than emotions more generally, complicate – indeed, threaten to annihilate – any simple reading of the boundary between humans and animals. And of all the passions none are as problematic (philosophically as well as existentially) as those involving desire, lust, arousal, and sex. Here, in our dreams and longings – or drives and urges – we may encounter nature in its inescapable essence.

CONTAINING DESIRE

Sexual desire can be understood in countless ways, many of them drawing on images of nature. Like other "basic" emotions, desire can be easily naturalized as universal. It can also be scientized and biologized with reference to androgens ("masculinizing hormones") and estrogen ("feminizing hormones") and thence technologized through the administration, for example, of synthetic antiandrogens such as cyproterone

and other manufactured hormones (Regan and Berscheid 1999). Of course, sexual desire has been profoundly psychologized and the sciences of psychology and psychiatry themselves founded on the scientization of desire. On the other hand, desire necessarily has a deep cultural and political history and, according to many, the historical politics of desire is inseparable from the history of modernity as such. And, as in other areas, the historicization and politicization of sexual desire seems necessarily to entail its denaturalization. As Foucault has written, "In the space of a few centuries a certain inclination has led us to direct the question of what we are, to sex. Not so much to sex as representing nature, but to sex as history, as signification, as discourse" (1978, 78). But, of course, as the *History of Sexuality* documents, this discourse has been very much a discourse of nature. Desire, its expression, repression, and representation, has been inextricably tied to the project of creating modern subjectivities. Nonetheless, outside of some academic discourses the social and political history of desire has more commonly been displaced and "nature" remains a critical tool in effecting this displacement.

If modernity is most clearly identified by the emergence of a certain sort of self, few notions are as intimately bound to that self as are its desires. It is an "I" that desires and it is desire that the "I" often coalesces around and through which it reveals itself to the world. Desire, as complex and idiosyncratic as it doubtless is, points toward a future at the same time that it exposes an incompleteness of the present. Desire, as a passion, can burn, it can consume. Kept within limits it may center and orient one's being. But it can also, in both romantic and antiromantic views, pose the danger of annihilating and negating one's being. As an incendiary incompleteness it can expand, radiate, and destroy. Desire has the capacity to overpower reason, overwhelm the voice of humanity. Roger Scruton, in his conservative treatise, *Sexual Desire: A Moral Philosophy of the Erotic* (1986), recognizes how desire has the "capacity to 'overcome' the subject, so that he is 'mastered' by [it]" (19). And this is *the* problem, *the* danger. Desire is like the landslides examined in chapter 6. It can erupt and destroy everything in its path, wiping out all of our accomplishments in the blink of an eye. To quote Michel Meyer again, "Desire is the essence of our passions . . . [and] It is well known that the passions enslave" (2000, 165).

Desire, then, can be naturalized in any number of senses. It is itself a prominent figure of nature. It becomes particularly dangerous when it ripens (blossoms? erupts?) into arousal. Martha Roth describes the dangers well. "We seem to believe that arousing lust is asking for trouble

because other passions are always aroused as well. Our passions – the feelings that sweep over us and, in sweeping, change us – are like a nest of coiled serpents; when one awakens, they all stir" (1998, 5). On the other hand, Scruton draws the line very differently, denying animals not only the ability to desire but even to be (properly speaking) aroused.

> [O]nly a rational being can experience desire, and those sentiments that are so often slighted, as being indicative of our "animal" nature, are sentiments that no mere animal has ever felt . . . Animals are never sexually aroused; they do not feel sexual desire, nor do they have sexual fulfilment. Almost all that matters in sexual experience lies outside their capacities, not because they reach for it and fail to obtain it, but because they cannot reach for it. (1986, 35–36)

Not incidentally, desire, lust, arousal, strongly associated as they are with nature, are also understood by romantics as signifying that which is most unrelentingly oppressed, repressed, distorted by civilization. Speaking of romanticism, Robert Solomon says, "Against this repressive conception of rational control of the passions, there has always been a 'counter-culture' to point out the 'unnaturalness' of damming up nature's torrents" (1993, 11). As we saw in chapter 4, the renunciation of the passions – along with the control of fire – was understood by Freud as having initiated the order of civilization and of law itself. Conventional understandings of sexual desire, then, implicate many of the central themes of this book. It is easily and frequently understood in terms of a force of nature, animality, and corporeality. Sex may be imaginative but it is also inseparable from embodiment: touch, sensuality, pleasure, and pain. Moreover, sexualities are hard to consider without reference to limits, knowledge, and control – some of the core themes of nature discourse. And the limits, and control of desire, have been of central concern to the story of modern law.

Historically, another significant way of making sense of sexuality has been through the division of those modes of desire and expression deemed "natural" and those deemed not only "unnatural" but "against the order of nature." This division has had a close but imprecise relation to that between the permitted and the forbidden. Again, there is a long history of both the naturalization and denaturalization of sexuality. I only want to register the work that "nature" has historically performed in the ongoing politics of desire (as a politics of nature), and to note that while invocations of nature in the domain of sexuality seem to connote a positive assessment of that which is deemed natural – that is, what is

natural is to be celebrated, endorsed, or reinforced – appearances are deceiving.

So what's so natural about (some forms of) sex? According to prominent historian of sex John Boswell, "Saint Thomas Aquinas argued that nature designed semen and ejaculation to create children and thereby propagate the species. To expend semen for any purpose other than reproduction was 'contrary to nature,' and therefore sinful" (1980, 149). Or, as glossed by Jonas Liliequist, "Nature referred to the hierarchical order of God's creation, where every living thing had its determined and appropriate position. Crossing the boundaries of creation or using a member not intended for procreative purposes, was a direct injury to God" (1992, 57). The unnatural – or the perverse – was, as stated by classical sexologist Richard von Krafft-Ebing, "Any expression of the sexual impulse which fails to correspond to the purposes of nature, i.e. procreation" (41). So the limit of the natural in the domain of sex is approached as one departs from genital-to-genital (and face-to-face) heterosexual contact engaged in for the purposes of propagation. All else is beyond nature and, perhaps, *against* nature. As Foucault has shown, in the nineteenth century sexuality emerged as an important object of scientific inquiry and the project of sexology began itself to spawn a multitude of deviances and oddities on a par with contemporary anthropology. It invented, among other figures, the homosexual, the hysterical woman, and the sexual child. It sought to achieve "a natural order of disorder" (1978, 44). In the twentieth century many specimens of exotica were cataloged under the general heading of "paraphilias," which constituted a veritable menagerie of wayward desires and troubled pleasures. Among these are the acrotomophiles ("amputee partner"), coprophiles ("smell or taste of feces or seeing someone defecate"), formicophiles ("small creatures, ants, insects or snails crawling on genitals"), urophiles ("being urinated upon or swallowing urine"), and, of course, our friends the zoophiles and zooerasts – the latter distinguished from the former by lower level of intensity and lower frequency of contact (Money 1986). As tokens of scientific knowledge the paraphiles become not only classifiable but explicable and, in some theories, treatable, manageable, curable. But the practices (and identities) are not only unnatural or rare. They are also disgusting. And if one of the tasks of law was to reinforce nature by punishing the unnatural, it was also the case that formal sanctions were a kind of backup when a more fundamental law failed to keep desires and pleasures within bounds. This was the law of disgust.

THE LAW OF DISGUST

A discussion of emotions and sexuality, and especially perverse sexualities such as zoophilia, would be incomplete without mentioning the controlling role of disgust. It would be difficult to understand the cultural work of the unnatural and the most common justifications for punishing those who engage in unnatural practices without taking into account the repeated declarations that these acts are repulsive. As it happens, disgust may also be a highly significant boundary marker itself. To the extent that emotions are understood as either marking or complicating the human/animal (nature) distinction, the emotion of disgust is oriented toward reinforcing the boundary. In a very illuminating study, *The Anatomy of Disgust* (1997), William Miller is explicit about the police functions of disgust.

> Humans are most likely the only species that experiences disgust, and we seem to be the only one that is capable of loathing its own species. We also seem to be driven to aspire to purity and perfection. And fueling no small part of those aspirations is disgust with what we are or with what we are likely to slide back into . . . [U]ltimately the basis for all disgust is *us* – that we live and die and that the process is a messy one emitting substances and odors that make us doubt ourselves and fear our neighbors. (xiv)

Indeed, for Miller, "To feel disgust is human and humanizing" (11). Moreover, disgust is best seen as a cultural achievement and can serve as a measure of our progressive distanciation from nature. Perhaps paradoxically, disgust, like the passions, is visceral. When we are disgusted we may gag, we may become nauseated, sickened. Disgust, says Miller, "makes us pay with unpleasant sensation for the superiority it asserts" (32).

But what is disgust? Or rather, what elicits disgust and why does it do so? What do we get for our pains? Superiority to whom or what? Psychologist Paul Rozin and his colleagues have studied the disgusting in some detail. In their entry on disgust in *The Handbook of Emotions* (2000) they tell us:

> Anything that reminds us that we are animals elicits disgust . . . [D]isgust serves to "humanize" our animal bodies. Humans must eat, excrete, and have sex, just like animals. Each culture prescribes the proper way to perform these actions – by, for example, placing most animals off limits

> as potential foods, and all animals and most people off limits as potential sexual partners. People who ignore these proscriptions are reviled as disgusting and animal-like. (642)

Or, as Martha Nussbaum has put it, disgust "wards off both animality in general and the mortality that is so prominent in our loathing of animality" (1999, 24). So, disgust operates around the human/animal borderlands, patrolling, enforcing, and reinforcing human uniqueness and superiority, keeping the line clear and keeping us within bounds. It is this cultural achievement that causes sensations of nausea and gagging that repel us and compel us to feel our humanity in our guts. Nausea is an embodied expression of what Miller calls "a psychic need to avoid reminders of our animal origins" (1997, 6).

But disgust is not only a boundary marker, it is also a barrier, a limit that in repelling us counteracts any possible attraction that the disgusting might have for us. To the extent that desire represents animality and nature more generally, then the struggle between disgust and desire may be a proxy for the larger struggle between the human, the civilized, against the animal or the savage. If we are pulled toward our own animality, or back to "our animal origins," or, in the case of zoophiles, to actual nonhuman animals as sexual partners, the law of disgust is to exert a greater force to counteract this attraction. To quote William Miller again, disgust

> acts like a barrier to satisfying unconscious desire. This is the disgust . . . that Freud called a reaction formation, in which the role of disgust joins with shame and morality to work as a dam (the image is Freud's) to hold back sexual instinct . . . Disgust is there to prevent the activation of unconscious desire, or, more precisely, disgust is part of the very process that makes such desires unconscious. (109)

But again, rather than clarifying the boundary, the operation of the disgust–desire contest may complicate it. "The disgust that operates as an initial barrier must operate that way because of a necessary admission that what lies behind the disgust is not foul at all but fair" (111). Furthermore, disgust provides not only a barrier but a floor, it polices not only what is within and beyond set limits, but separates the high from the low. Again, from Miller:

> Disgust evaluates (negatively) what it touches, proclaims the meanness and inferiority of its object. And by so doing it presents a nervous claim of right to be free of the dangers imposed by the proximity of the inferior.

> It is thus an assertion of a claim to superiority that at the same time recognizes the vulnerability of that superiority to the defiling powers of the low. (9)

Disgust, then, turns out to be one of the most culturally significant resources for making sense of nature – and of ourselves in relation to nature.

Disgust is not only humanizing but civilizing. As such it can be deployed to inscribe boundaries, barriers, and floors within human societies. That is, it can be useful for dehumanizing, animalizing, and naturalizing, and thereby dominating others. For those of us consigned to the nether worlds of the disgusting this creates difficulties. Nussbaum argues that, "Because disgust embodies a shrinking from contamination that is associated with the human desire to be nonanimal, it is more than likely to be hooked up with various forms of shady social practice, in which the discomfort people feel over the fact of having an animal body is projected outwards onto vulnerable people and groups" (1999, 22). "We need a group of humans," she asserts, "to bound ourselves against, who will come to exemplify the boundary line between the truly human and the basely animal. If those quasi-animals stand between us and our own animality, then we are one step further away from being animal and mortal ourselves" (29). As the social consequences of this run counter to our professed commitment to tolerance and inequality we should, she argues, dismantle or untell the disgust–civilization story. We should, in fact, turn it on its head:

> [T]he really civilized nation must make a strenuous effort to counter the power of disgust, as a barrier to the full equality and mutual respect for all citizens. This will require a re-creation of our entire relationship to the bodily. Disgust at the body and its products has collaborated with the maintenance of injurious social hierarchies. The health of democracy therefore depends on criticizing and undoing that social formation. (32)

The politics of disgust that Nussbaum endorses returns us, then, to the politics of nature, to the Horseman's plea for social acceptance. And, not incidentally, it implicates a need for legal reform. Disgust, she says, "is never a good reason to make a practice (for example sodomy) illegal . . . this disgust-reaction should itself be distrusted, as a device we employ to deny our own capacities for evil" (22).

One last point on the politics of disgust concerns the close association between the disgusting and the immoral and between the immoral and

the illegal. Many disgusting practices – eating maggots, for example – are typically regarded as neither immoral nor illegal. But many sexual practices that are conventionally deemed disgusting are considered unnatural and immoral and have been criminalized on that basis. The most socially significant of these are sodomy and oral sex. Perhaps if the sense that is made of nonprocreative sex relies on the complex of conventional antagonisms, it is a relatively easy matter to regard instances of these practices as having more than individual significance. There may appear to be more at stake than this or that individual's moral failings or aesthetic sensibilities. Occasions of sex without the possibility of reproduction may be interpreted as posing dangers of the highest magnitude. When desire overcomes disgust, when passion overpowers reason and overwhelms the voice of humanity, it may be taken as a sign that animality is overtaking humanity where it matters most. It may signify the ultimate triumph of nature where human claims of distinctiveness and superiority are most vulnerable to doubt. These episodes of depravity and degeneration may represent the real and palpable peril of regression. As such they may be interpreted as the most profound repudiation of humanness: the repudiation of the founding renunciation, the Great Refusal (as Herbert Marcuse [1966] put it) as the Great Reversal. These acts reveal the always provisional, tentative, and fragile nature of the emergence stories and so the vulnerability of civilization itself.

The anxieties may be heightened because of the further association between the disgusting and ideas of contagion and contamination. If what elicits our disgust is not destroyed – or at least contained or somehow sanitized – there is the danger that it may spread. There is the danger that the consuming, incendiary nature of desire within individuals may find a greater social expression. Disorder begets disorder. Enforcing prohibitions, reinforcing the law of disgust among those for whom it has proven insufficient, is nothing less than taking appropriate measures to prevent the breakdown of human society and the destruction of civilization. All of this, in fact, is encoded in the very word "sodomy." As one Kentucky Supreme Court said, "[T]he word 'sodomy' is derived from the city of Sodom, where the crime against nature had its origins and was universally prevalent until that city was destroyed by the wrath of God" (*Commonwealth* v. *Poindexter*, 118 SW 943, 1909). As we shall see, the contamination could spread not only by relaxation of the prohibition or even by demonstrations or initiations of impressionable youth. From William Miller again: "Disgust does not move us to condemn for pure pleasure because it always makes us bear some of the costs of

condemnation. Disgust never allows us to escape clean. It underpins the sense of despair that impurity and evil are contagious, endure, and take everything down with them" (1997, 205). It could also spread, so to speak, by word of mouth. Talking about it – whatever form "it" may have taken – might in itself be disgusting. Talking or writing about it – or at least doing these in the wrong way – might very well hasten and further the contamination, the risk, the breakdown. Hence the associations between the disgusting and the obscene, the unmentionable, the silenced, and the censored. Or, this, at least, is a common way of understanding you know what. These complex relationships and associations among sex, silence, contagion and pollution, danger and nature, reason and violence have had important implications for how social actors have responded to alleged episodes of the abominable and detestable crime against nature.

Before we examine more closely the specific politics of bestiality and law's response to its occurrence, it might be worth while to return to the animal experiment laboratories that we discussed in the previous chapter, recalling that the justifications for the infliction of pain there all came to rest on the assertion that they are not us. An important event in the historical politics of animal rights was the 1982 theft and circulation of videotapes from the University of Pennsylvania Head Injury laboratories by People for the Ethical Treatment of Animals (PETA). The videos were made by researchers as part of their internal documentation of a project that involved subjecting baboons to severe trauma. They were subsequently edited and narrated by animal rights activists. The videos show repeated incidents in which unanesthetized baboons – arms and legs bound, heads encased in devices engineered to deliver an immense amount of force – were made to experience what some observers recognized as suffering. According to the narrator, the videos also document numerous violations of both state law and standard scientific protocols, the latter allegedly rendering whatever data might be obtained virtually useless for the stated purposes of the research project. The videos also document technicians ridiculing the animals and hurting them in ways that had nothing to do with the production of knowledge. Over the years PETA has circulated the images and, one must admit, their propaganda and educational value is considerable. The images are very disturbing. But imagine if, instead of injuring and destroying the animals, the technicians were captured on tape kissing the baboons on the lips – or masturbating them, or performing oral sex on them. Or imagine if the videos documented a technician himself becoming aroused

and engaging in anal sex with a primate. Many would say that such representations – or the contemplation of such actions – were not merely disturbing but disgusting, revolting, nauseating. Seeing such images, we might say, pollutes our consciousness. Indeed, for some readers my asking you to imagine such scenes is too much of an affront to human decency; that even to imagine imagining is too repulsive and degrading. Such is the power of disgust.

ON BESTIALITY

The binaries that organize the emotional domains of disgust and desire, in setting up boundaries, barriers, and floors, suggests an either/or structure that itself reinforces the limits of nature. But we know well that there are degrees and gradations of disgust and that some desires and practices are more forbidden than others. Some candidates for the disgusting are judgment calls, some are idiosyncratic. Some things approach the line but don't cross. And the line itself has shifted significantly over time – in part in response to the shifting politics of disgust and desire. At any given time, though, there may be something approaching consensus that some things simply are disgusting. Some activities, it seems, are uncontroversially and obviously beyond the pale. In the cultural hierarchy of disgusting practices in the modern West, few practices rank lower than human sexual contact with nonhuman animals. As Midas Dekkers puts it, "[A]t all times and in all places [bestiality] has been punished. People simply do not approve of others having sex with animals. That is what makes them human beings" (1994, 130). Or, as a theologian recently put it, "The 'yuck' factor is immense and many people feel disturbed by the mere thought of it" (Linzey 2000, 29). But even here, if one deigns to look more closely, one might discern finer distinctions. If one can imagine the intelligibility of a monogamous, long-standing (heterosexual?) relationship between a man and a horse – as the Horseman invites us to – one might acknowledge a qualitative distinction between that and the exploitative, pornographic, commercial representation of a woman having "sex" with an eel or anteater. One might also distinguish these from the fatal sexual mutilation of a chicken in a motel room. One might even be genuinely indignant at the suggestion that there are no significant differences here. Such is the politics of bestiality.

Though not nearly as visible as the politics of nature with regard to wilderness, endangered species, or animal experiments, there is a

contemporary politics of bestiality. On the one hand, as we saw in our opening discussion of the Horseman, it is possible to attempt to assimilate at least some bestial practices to the liberal story of progressively expanding tolerance for an "alternate lifestyle," to form a sort of identity politics, to organize and mobilize around issues of equal protection. And no less an authority than Martha Nussbaum would seem to lend credence to the project. Opposed to this movement are organizations such as the Humane Society and Animal Sexual Abuse Information and Resources (ASAIR) for whom bestiality represents a particularly troubling form of abuse and exploitation. According to ASAIR, for example, "Bestiality is an abuse practiced by a growing cult-like group of deviants and impressionable teens, as well as curious experimenters" (www.asairs.com). "The zoophile's worldview," claims ASAIR, "is similar to the rapist's and child abuser's. They all view the physical gratification they have with their victims as consensual, and they believe it benefits their partners as well as themselves." And, they contend, "Serial killers often start by abusing and killing animals." Among the practical objectives of these organizations is the recriminalization of bestiality in those states in which it had been inadvertently decriminalized in the 1970s along with sodomy. In an article published in *Theoretical Criminology* (1997) Piers Bierne writes:

> Indeed, since the mid nineteenth century many "unnatural offences," including bestiality, have effectively been decriminalized. Nowadays, a defendant will probably be charged with a misdemeanor like public indecency, a breach of the peace or cruelty to animals. Indeed, the social control of bestiality has formally passed from religion to criminal law to a psychiatric discourse at whose center lies the diseased individuals . . . However, at once subverting this psychiatrization and also echoing certain aspects of the spirit of decriminalization, there has gradually emerged a pseudo-liberal tolerance of bestiality. This tendency implies that because bestiality is an interesting and vital part of almost every known culture it should not only be tolerated but even, within certain limits, celebrated. (325)

An important point of contention between the antagonists concerns the question of consent. Dealing with this issue requires opponents to render animals and the human–animal interface in terms of the crucial aspect of language. As Carol Adams, a proponent of the convergence of feminist theory and animal advocacy, says, "Silence is a major problem. Unlike most forms of sexual contact, in which a partner can report the

experience, only one of the participants can talk; and because of the stigma surrounding bestiality, that party usually remains silent" (1995, 30). And ASAIR claims, "Practicers of Bestiality and Zoophiles Abuse Helpless Victims Who Can't Say No" (www.asairs.com).

In response a zoophile who goes by the name of EquAdept claims in a webpage entitled "The Essence of Zoophilia," "Despite what those 'consensuality bashers' may believe, the fact is that reading animal body language is not difficult for true zoophiles since they are intimately familiar with said animals on a level not appreciated or fathomed by nonzoos" (www.home.worldonline.dk/horses). And, indeed, EquAdept counts him or herself among the ranks of animal rights activists. "Bestiality only becomes a 'bad' thing when animals are physically forced/coerced/trained into sex against their will, at which it then becomes abuse or rape and I disapprove of that with every fibre of my being." So, perhaps, this is a factional issue between animal lovers. Likewise, a zoophile identified as Anthony reports that, "If an animal consents to sex . . . he runs up to you, knocks you down, and fucks you. If an animal does not consent to sex it will kick you or bite you or run away. I see absolutely no ambiguity there. I think consent with animals is a much less hazy notion than it is with humans" (quoted in Andriette 1999). Or as another, Equinox, says, "When I look at a horse, I don't see a dumb animal. I don't see just an animal. I see a living thing that has a personality, likes and dislikes, that has the ability to communicate which goes beyond words" (quoted in Andriette 1999). And, as presumably neutral observer Peter Steeves stresses, "Consent . . . must not be reduced to the linguistic matter of talking; there must be other paths toward consent" (1999, 153). Some of the central political questions here are: Who speaks for the animals? Can the animal make her feelings known? Who loves animals? What is love anyway?

As I suggested above, another point of contention is whether there are meaningful, and morally significant, differences among people who have sex with animals. EquAdept believes that the distinction is crucial. And the difference is rooted in love.

> The key to distinguishing between true zoophilia and true bestiality is emotional content, perhaps thought of best as romantic or spiritual involvement. There is a difference between making love with an animal as an act of love and simply fucking them as an act of lust . . . It is not the act, but the presence or absence of love in that act (the willingness to please the other partner over themselves) as an example and a level of

> commitment to the care, the feelings and the desires of that animal that distinguishes one from the other. Those who are bestialists are simply driven by pleasure, experimentation and adventure of sexual intercourse with an animal.

But Adams rejoins: "Just as pedophiles differentiate between those who abuse children and those who love children – placing themselves, of course, in the latter group – zoophiles distinguish between animal sexual abusers (bestialists) and those who love animals (zoophiles). In each of these cases the distinctions are only self-justifications" (1995, 30).

So here, in this perhaps marginal front in the nature wars, we see the familiar lines being drawn. But ultimately, perhaps, we are dealing here with a more fundamental question regarding nature and its irreducible unknowability. Steven Laycock explores this issue in an essay called "Animals as Animals: A Plea for Conceptual Clarity."

> I cannot know whether the "terror" and "suffering" exhibited by a wounded deer are authentic expressions of an inaccessible subjectivity or my own projection. I can imagine what it might be like – *for me* – to be pursued by hunters intent on taking my life. I can imagine what it would be like – *for me* – to be mortally wounded and to be slipping, in agony, toward the brink of death. And I can imagine what it would be like – *for me* – to experience mortal terror and to cling desperately to life. The deer, it would seem, mirrors my own projected fears, my own agony. But is the pain I "see" a reflection or an expression? I do not, and cannot, know. And I must live with the question. (1999, 275)

He continues:

> We project our own image upon the manifold objects of our world, and are deceived by this projection much like the parakeet that "sees" another bird in its mirror. We *discover* that the animal is sentient, that it desires to live, feels pain and anguish. Or alternatively, we *discover* that what we call an animate being is merely a complex interaction of organic chemicals, a soulless algorithm devoid of genuine sentience; we discover that there is nothing it is like to be a deer or a dog or a bat. Both "discoveries," the humane and the brutal (or brutalizing), involve ventriloquism. It is we who make it appear that the voice we offer on behalf of the animal is the animal's own, that what we say is what the animal *would* say if only it had a human voice. (277)

"We can, and we do," he contends, "interrogate a mute reality which offers us only silence in response" (275). Questions like " 'What is it like [to be a bat, a dog, a horse, a baboon]?' open up an authentic dimension

of philosophical investigation – in this case, that of the unknowable" (271).

Historically and at the present time arguments about the unnaturalness of interspecies sexual relations have been mobilized to direct official state violence toward human (and in the past, nonhuman) participants. But, as Dekkers says:

> Laws against bestiality are not necessary. Even without a court in the background it is bad enough to be found committing bestiality. This is why it is taboo. A man who is caught with a calf is a dirty old man, a woman with a dog a slut, a foreigner with a goat a laughing stock. No one who has gained notoriety as a chicken violator will get very far in life. (1994, 128)

But what is it, after all, that has called forth such a response? Is the story about disgust, refusal, and the collapse of civilization sufficient to explain it? Peter Morriss explains the prohibition in terms of the damage bestiality is imagined to inflict on the categories through which we make ourselves meaningful. "My suggestion is that there is abhorrence, not because [bestiality] *degrades* animals, but because it *upgrades* them – it treats them as something *better* than they are . . . It denies a hierarchy in which animals are always lower than humans. So it blurs, or denies, the boundaries, particularly the boundary between the human and the animal" (1997, 271). "The gist of it," he says, "is that animals engage in mindless lust; we are supposed to practice something on an altogether higher plane. But we can not pretend we are doing something very different from what animals do when we are doing it *with* an animal: the whole edifice then collapses" (272).

There is, of course, a long, long cultural history of boundary reinforcement from which we might infer an equally long history of transgression, anxiety, and vulnerability. There are the familiar biblical injunctions from Leviticus. Likewise, in his *Man and the Natural World* (1983), an examination of ideas in sixteenth-century England, Keith Thomas wrote that "Bestiality . . . was the worst of sexual crimes because, as one Stuart moralist put it 'it turns man into a very beast, makes a man a member of a brute creature' " (39). Writing of conceptions of bestiality in seventeenth-century Sweden, Jonas Liliequist remarks: "The mixing of categories and the comparison of the bugger with a brute animal connoted a deeper cultural meaning, reflecting both popular attitudes and learned doctrines. First of all, if reason distinguished man from animals in God's order of creation, then bestiality was an

act against reason" (1992, 67). Some contemporary observers agree. In Scruton's understanding, "The bestial act, which abrogates the responsibility of the object, abrogates also the responsibility of the subject – and that is its point. It is an attempt by the subject to flee from the burden of interpersonality, to be merely an animal, in this encounter which could otherwise not be accomplished without intolerable disgust" (1986, 27). He continues:

> The truly bestial desire remains locked in the sense of the *merely* animal nature of its object. For the truly bestial person, jealousy would indeed be impossible, as would shame before the object of desire. All the "trouble" of desire is vanquished in his mind, with the abolition of the conditions which create it. Here lie both the appeal of bestiality and the real source of the common revulsion which it inspires. The bestial person sees himself as he sees the object of his desire: a "mere" animal, acting in a realm where no moral idea troubles the senses, a realm from which the crippling awareness of the other's perspective has been removed. This realm, where responsibility is no longer recorded in the intentional structure of experience, is safer than the human world. (292)

Interestingly, zoophiles may agree with the gist of this, even if they draw very different conclusions. The point may be that animals are better than people. Zoophiles, claims EquAdept, "enjoy the satisfaction they will never be lied to, betrayed, have their emotions toyed with to hurt them or have silly games played upon them. Their animal companions will always be faithful to the end" (www.home.worldonline.dk/horses). But among the many paradoxes and reversals here consider: if engaging in bestiality represents a repudiation of the distinctively human, it may also, in a way, be a sort of backhanded endorsement of the ideal of humanness. As Dekkers put it:

> Human beings fall for other human beings. And if they occasionally fall for an animal, they are attracted by the animal's human features. What attracts the dog lover is not the doggishness of the dog – the fact that it drools and pants and stinks and moults – but its human qualities – faithfulness, gratitude, patience in waiting for its master . . . The fact is that in some respects some animals are even more human than human beings themselves. No human being has such an entreating expression as a basset hound, no human being is as loyal as his dog. (1994, 31)

That is, horses and dogs may be "animal models" in ways not unlike primates in animal laboratories. They are like us, but they are not us. Of course, culturally prominent readings of animality are not incidental

to efforts to make sense of bestiality: the impossibility of reproduction, the asserted claims concerning the impossibility of reciprocation and the impossibility of speech all play into renderings of the human vis-à-vis the animal. Bestiality as corporeal performance of the Great Refusal may represent an expression of Romanticism not unlike Thomas Birch's celebration of the pure wild that was and is before and beyond the civilizing distortions of language and law (see chapter 7). Animal bodies are vehicles for getting back to nature – however momentarily – that a trek in the woods can never approach. As one zoophile has put it,

> You never forget that you're dealing with a member of a different species when you're having a sexual encounter with an animal . . . For myself, it is to a degree becoming that species. It's a way of being with animals that is difficult to attain otherwise. It's sort of like a vacation into another way of being . . . My own vision of interspecies sexuality is about contacting the animal spirit within ourselves. (Quoted in Andriette 1999)

And neither is disgust incidental. If disgust is the cultural barrier that keeps us locked inside the machine; if its visceralness is a manifestation of the literal incorporation of civilization, then the fact that bestiality is, by virtual consensus, disgusting may be a large part of its (not the animals') attraction. Perhaps sex with animals is not an end in itself but a means to another, more fundamental end. One is not penetrating (or being penetrated by) the animal so much as one is escaping the prison house of language, civilization, law, and rules. But, of course, it is language, civilization, and law – including the law of disgust – that points one in the direction: "This Way Out."

ON LAW

If you were to insert an erect penis into a horse's vagina, or take a dog's erect penis into your mouth you would not only be having sex with an animal. You would also, in many jurisdictions, be breaking the law. There are rules prohibiting these kinds of things and spelling out the sorts of punishments attached to breaking the rules. If you are caught you may be bodily taken up by the various institutions of criminal justice. You can be arrested, indicted, tried, sentenced, and punished. Imagine what this might be like.

The desire, always present to some degree, builds to an intolerable, uncontrollable level. You sneak into your neighbor's barn – as you have before. You open your coat and approach the forbidden territory. (Never mind that you are also trespassing and making unauthorized use of

someone else's property.) You overturn a tub, the better to fit. Suddenly, you hear a voice. The light goes on and you see a human face – seeing you. The expression on the face turns from incomprehension to comprehension. You're caught.

These things happen. In 2000 Roger Powell was caught with a pig by a ten-year-old in the woods near a residential subdivision. In 1999 James Ray was caught with a sheep in a California high school. In 2000 Robert Broderson was caught with a sheep at Hawkeye Community College in Waterloo, Iowa. Students found him naked in the hayloft. Beside the sheep was a blue nightie. Michael Bessigamo of Valparaiso, Indiana, was not caught in the act but because he had a history of prior violations the police went to him when a motel room he had rented was found splattered with blood and feathers. These things happen (see press reports compiled on www. asairs.com).

The authorities are called, you're arrested and given a hearing. You're indicted. You speak with a lawyer. You're tried, convicted, sentenced, and punished. When you're caught, you're caught up in a web of legal meanings and a web of power. Legal meanings of various kinds crystallize around the act, the animal, the bodies. Prosecutors, public defenders, and judges struggle to make legal sense of what you've done – what you *are*. Clearly, inserting an erect penis into a sheep's vagina is a very different cultural performance from inserting a finger into a sheep's nostril and its legal significance is also different. But what, after all, is that difference? What does it mean to do that? Or rather, what meanings are generated and destroyed by the act? How does the law make sense of it and itself?

As it turns out, law's encounter with bestiality has changed in fundamental ways in the last few decades. Where until recently the topic was treated as if it had no history – the prohibition being read back through common law and biblical law into nature itself – now, as Bierne (1997) claims, it is less likely to be regarded as the abominable and detestable crime against nature and more likely to be framed in terms of animal abuse, public lewdness, a crime against property, or a form of mental illness. First I want to take a historical detour and look at some early and mid-twentieth-century cases as interesting encounters between law and the nature idea.

There are two noteworthy features of what we might call "traditional" American law on bestiality. The first, as I have mentioned, is that it was regarded as the abominable and detestable crime against nature. Historically this is the legal form that was used to make the practice

legally meaningful. We might initially ask what this meant. In what sense was "nature" wronged? It might appear that such laws are nature-endorsing but, as we have already seen, this is very misleading. The trouble was not that nature was violated but perhaps that it was celebrated and embraced and that the domain of humanness was renounced. The zoophile crosses – and in so doing, erases – the boundary. He climbs over the barrier of disgust that marks off the civilized from the wild. He crawls under the species barrier. He penetrates, and in so doing, breaches and dismantles the barrier. The zoophile, through his body, by means of the animal's body, attempts to get back to nature: to escape the hell of other people, to escape the confines of civilization, to escape the prison house of language, and to communicate in grunts and kicks. In so doing he commits a breach of the social contract. He repudiates and threatens to reverse the emergence story. He enacts the regressive primacy of passion over reason, desire over disgust. He demonstrates the vulnerability of civilization, the contingency of all of the pretty lines that make human life meaningful. So, as we saw, there is an urgent danger. Perhaps part of the point is that in inserting an erect penis into a nonhuman, one not only breaks the law, that is, violates a particular statute, but one breaks the Law of Laws through the multiple and mutually reinforcing renunciations, repudiations, reversals, and refusals that the act signifies. This is what makes it, unlike rape and murder, "abominable and detestable."

In this context it is law's job to negate the negation, reverse the reversal, reinscribe the erased boundaries, and reinforce the breached barriers. If the zoophile is attempting to escape it is the law's task to call him back, to drag him back, to reclothe him, enshroud him in language and categories and a grammar of subjects and objects, to reinscribe him within webs of meaning and discourse, to reassert the irrevocability of the founding contract. Historically this has been done by reviling the bestial and by inflicting pains on his (or her) body. In doing these things the law might be seen as reenacting the emergence story by directing its violence in the name of reason. The accused is, after all, not taken out and shot like a beast. He is given a hearing: he is formally indicted under existing statutes. He is tried and defended. Evidence is offered and evaluated for sufficiency. If he is convicted he will be sentenced according to the letter of the law.

But here we encounter the second notable feature of traditional bestiality law: its peculiar relationship to silence. Speaking of buggery, of which bestiality is a species, legal scholar Les Moran has written:

> Anyone attempting to explore the meanings that are produced and deployed by way of the legal textual practices of buggery has to solve a riddle. The riddle relates to a requirement that has had considerable durability in the Common Law. In order to speak of buggery within that legal tradition, the speaker had to proceed according to a command to remain silent . . . The legal formula by which buggery was to appear in the law (through the indictment) demanded that the wrongful act be named by way of a silence. (1996, 33)

Speaking of sex more generally – and of the repressive hypothesis which was the focus of his critique – Foucault wrote:

> As if in order to gain mastery over it in reality, it had first been necessary to subjugate it at the level of language, control its free circulation in speech, expunge it from the things that were said, and extinguish the words that rendered it too visibly present. And even these prohibitions, it seems, were afraid to name it. (1978, 17)

In the specific context of zoophilia this is an interesting state of affairs. One of the principal features of animals, of course, is their incapacity for speech. "Those guilty of the sin that cannot be named, that makes them less than human, are rendered mute as animals before God" (Jordan 1997, 106). On the other hand, one of the distinctive features of modern law is its intimate association with words, and most especially with the idea that legal violence is distinguished from other forms of violence by its subordination to words as tokens of reason. Yet here there is an extremely problematic relationship to words, speech, and reason. It is almost as if, in order to call the bestial back, law was forced to abandon its own claims to authority. As the bestial sought to escape the prison house of language, the law, in retrieving him, was compelled to go beyond its own foundations. Needless to say, this strategy is not without risks. As Moran argues, "Compliance with the injunction that buggery is 'not to be named' threatens to make that naming impossible and thereby threatens to undermine the operation of law" (1996, 33). Before I assess those risks let's return to the theme of disgust in order to ascertain why some might feel it worth the risk.

Not only is disgust elicited by direct sensory exposure to disgusting things but also by exposure to representations of disgusting things. Describing the disgusting can itself disgust. The disgusting can be reproduced by speech (and texts and images) and therefore reproduced *in* speech such that language itself can be understood as contaminated by

what it represents. Words themselves can elicit the same sort of visceral responses as that to which they refer. Disgusting words may recreate the images of disgusting acts in the consciousnesses of speakers and hearers. (Or, perhaps the greater fear is that they won't.) In any case, the belief in representational contamination might justify a strategy of containing the disgusting within a veil of silence. To do otherwise – to describe the disgusting – would be to participate in the furtherance of the disgusting act itself; to spread the contagion, degrading oneself and one's interlocutors in the process. Moreover, to describe it in law, to deposit traces of the disgusting in legal texts, runs the risk of defiling law itself. Many mid-century judges were quite explicit about the avoidance of explicitness. All the judges can do is to point in the general direction: yonder, beyond the boundary, beyond words. (If the disgusting has to be indicated, though, another strategy is to sanitize it by relying on Latinate or Hellenic words in preference to the monosyllabic grunt-like utterances of Anglo-Saxon.)

But again, as Moran suggests, not saying runs the potentially equal or greater risk of relinquishing claims of being a *legal* utterance at all. To the extent that law – to be law – is associated with rules as propositions and clearly communicated commands, to the extent that legal violence is distinguished from non- or extralegal violence precisely because it is so constrained and channeled by words and the force of reason, then the punishments that followed from the refusal to say may be of dubious legality. One way that the problem has been raised in bestiality appeals has hinged on the problem of vagueness. As one legal scholar has put it:

> No society can ever be minimally free if people do not know on what grounds they can be sent to jail. It would be no less tyrannical for the police to arrest the citizenry for violating secret laws than for them to arrest people wholly arbitrarily, without any law at all. Fundamental fairness requires that the law spell out which acts constitute criminal behavior; a vaguely worded law is as bad as no law at all. (Lieberman 1999, 526)

And as, Supreme Court justice Thurgood Marshall noted, "[A] vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application" (*Grayned* v. *Rockford*, 408 US 104, 1972).

Thus in some bestiality (and other forms of "unnatural" sex) cases in the twentieth century, judges seemed to be faced with a dilemma:

either disregard the command to be silent, name and describe the actions, run the risks of participating in the reproduction and open-ended circulation of the disgusting and of defiling law itself; or abide by the command and run the risk of relinquishing claims to be "law" at all and participate in the infliction of violence by brute force, unconstrained by language and reason. In many cases the choice seemed to be clear – obey the command and remain silent. But for other judges, as we shall see, the choice was less clear or the risks too great.

One consequence of this dilemma was that it provided defense attorneys some room to maneuver. Vagueness could be exploited in such a way as to extract an accused zoophile from the web of punishment. And occasionally convictions were overturned. Because the difference between guilt and innocence is marked by readings of the limits of nature and because the command for silence rendered the location of those limits imprecise, to say the least, some cases involving bestiality can be characterized as contests about where to draw the line. How far is too far? When does the merely distasteful turn into the criminal? At what point in a chain of events does the merely strange begin to threaten the very foundations of civilization? Historically, the "unnatural" has been coextensive with the perverse and, as we saw, the perverse has been identified as any sexual practice not undertaken for the purposes of reproduction – or, indeed, any practice other than genital-to-genital (and face-to-face) heterosexual contact. So sex with animals has often been simply a precinct of this larger domain of the unnatural. And because of the command for silence and the elasticity of words such as "unnatural," "perverse," and even "sodomy" it is often impossible to know what specifically is punishable. Strange to say that to some extent animals did not seem to matter at all. The unnatural was the unnatural, the disgusting was disgusting. Differences that others may have seen between consensual oral sex between heterosexuals or homosexuals and nonconsensual sex with a chicken were commonly effaced. All are equally forbidden. In other cases, though, the animal seemed to make all the difference in the world.

Consider the case of Raymond Murray (*Murray* v. *State*, 143 NE 2d 290, 1957). He pleaded guilty to committing "the abominable and detestable crime against nature with a beast" and was sentenced to not less than two nor more than fifteen years at the Indiana State Prison. His plea was submitted without benefit of counsel and later, with the help of a public defender, he moved to reopen his case. In the words of the Indiana Supreme Court,

> Appellant asserts that the commission of the act with which he was charged was not a crime within the meaning of sec. 10-4221, *supra*, because a chicken is not a "beast" within the meaning of such statute. We concur with appellant that: It is a fundamental rule in the construction of statutes that penal statutes must be construed strictly, or, as is otherwise stated, strictly construed against the state. The rule of strict construction means that such statutes will not be enlarged by implication or intendment beyond the fair meaning of the language used, and will not be held to include offenses and persons other than those which are clearly described and provided for although the court may think the legislature should have made them more comprehensive. However, this court has recognized that the legislature intended to include within sodomy all acts which are included in the definition of "crime against nature."
>
> (291, internal quotes deleted)

Then, the court quoted another long passage from a 1923 case involving cunnilingus:

> "We thus have the words of the statute and their fair meaning. The only thing left for the court to do is to sensibly apply them as their proposed use in the statute would indicate. This done, they do not only cover the thought asserted by appellant, but they have a wider meaning, the corruption of morals, the disgrace of human nature by an unnatural sexual gratification, of which reason and decency forbids a more detailed description." . . . With this rule in mind we proceed to consider whether the act committed by appellant falls within the purview of the statute. Appellant contends that the term "beast" as used in sec. 10-4221, *supra*, does not include "fowl," and relies upon a definition in 10 C.J.S., 219 as follows: a beast is "Any four-footed animal, as distinguished from birds, reptiles, fishes and insects." (292)

But, the court countered, "Webster's International Dictionary, 2d Ed., defines beast as 1. Any living creature; any animal; 2. Any four-footed animal, as distinguished from birds, reptiles, fishes and insects; 3. An animal; – distinguished from man . . . In our opinion a chicken is a beast within the meaning of that term as used in sec. 10-4221, *supra*" (292–293). Too bad for Raymond Murray.

The following case illustrates the question of whether animals matter. In the late 1940s Virginia Tarrant was indicted in Franklin County, Ohio, on the charge that she "unlawfully had carnal copulation against nature with a certain beast, to wit, a dog" (*State* v. *Tarrant*, 80 NE 2d 509, 1948). More specifically, she "took into her mouth the male organ of a dog and engaged in the act of sodomy over some period of time"

(509). Ms. Tarrant's attorney identified a problem with the indictment. He argued that "the term 'carnal copulation,' is restricted in its meaning so that it means only the joining of the sex organ of a human being with the sex organ of a beast. If this is a true interpretation of the statute," the court acknowledged, "then the defendant cannot be guilty." In essence the claim seems to be either that one cannot acquire carnal knowledge by mouth or that "carnal copulation" has "two meanings, one meaning where it concerns human beings and another meaning where it concerns a human being and his or her conduct with a beast." The combined features of orality and the presence of a beast should place the defendant beyond the meaning and reach of the legal protection.

> We do not believe that the Legislature ever intended such a construction. The term "carnally," is defined . . . as "in a manner to gratify animal appetites or lusts." In the same volume and page, the phrase "carnal knowledge" is defined as "sexual bodily connection," "sexual intercourse." . . . The term as it refers to human beings is not given a different meaning than the one that is given in referring to a beast . . . If the act would be carnal copulation for human beings to perform, we fail to see how it could be logically argued that it is not carnal copulation when performed by a human being and a beast. (201)

How far is too far?

In *State* v. *Frank* (15 SW 330, 1890) the defendant was charged and found guilty of the unsuccessful attempt to commit the crime of sodomy with a dog. His attorney argued that the mere attempt, without more, was not a crime. The Missouri Supreme Court, though, claimed that there could "be no doubt . . . that the attempt to commit the offense of sodomy is a crime in itself, and punishable as such" (330). Likewise the defendant in *Green* v. *State* (27 SE 567, 1943) was convicted of the attempt to commit bestiality and the Georgia Court of Appeals affirmed his conviction on the grounds that, had he not been frightened off, there was no doubt that he would have succeeded. Further along the chain of events the defendant in *Hudspeth* v. *State* (108 SW 1085, 1937) argued that his conviction on charges of having carnal intercourse with a cow should be reversed because penetration, which was required to sustain a conviction, had not been proven. The court rejected this argument, claiming that "inferences to be deduced from the circumstances leave no reasonable doubt upon the subject." Among the pieces of circumstantial evidence was that the defendant was found in a neighbor's barn with his

"pants unbuttoned, and there was wet cow dung all over his clothes and the hairs around his private parts" (1085). On the other hand, Harold Nichol's conviction for sodomizing a neighbor's calf was overturned because, even though "the rear end [of the calf] was all bloody," and the defendant was apprehended hiding in the barn, and "his pants were off and his B.V.D.'s were bloody," the court was not persuaded that "the circumstances exclude every other reasonable hypothesis except the guilt of appellant" (*Hudspeth* v. *State*, 225 SW 2d 841, 1950). More to the point, "The state should have had the animal examined to prove penetration." Likewise, the court in *Almendaris* v. *State* (73 SW 1055, 1903) held that "The juxtaposition of appellant to the jennet is proven, but the act of penetration is only established by circumstantial evidence." The defendant's conviction was therefore reversed.

Not what but where

But, after all, do animals matter? Yes and no. As our discussion of disgust, desire, and the passions emphasized, the point of the prohibition is to maintain the gap between humans and animals; it is to deny and restrain our animality, to discourage our indulging in animal appetites. But what seems to matter here is more the *idea* of the animal within than the fact that one of the participants is not human. Bestiality is only one way in which the crime against nature can be committed: an animal is not required, even though the presence of an animal may highlight the animality of the act. And, in fact, most cases addressing the crime against nature do not involve animals at all. What seems to matter most is where a man puts his penis. Most challenges to convictions focus more specifically on what sort of orifice the penis is inserted into and not the species that has the orifice. Most cases interpreting statutes that forbid crimes against nature necessitate interpreting "nature" in order to determine whether a particular act constituted a legal violation. That is, the deployment or withholding of legal violence depends on a reading of nature. In a series of challenges we can see how nature is rendered in order to make sense of law itself and the limits of legal violence.

Undoubtedly, the most significant cases are those in which a defendant had been convicted of having committed the crime against nature by engaging in oral sex. In the early twentieth century these cases had a strongly formal cast to them. For example, in the Texas case of *Prindle* v. *State* (21 SW 360, 1893) the court said that, "to constitute this offense, the act must be in that part where sodomy is usually committed. The act in a child's mouth does not constitute the offense. However

vile and detestable the act proved may be, and is, it can constitute no offense, because not contemplated by the statute, and is not embraced by the crime of sodomy" (361). A Kentucky court held that, while "The acts charged against the appellees are so disgusting that we refrain from copying the indictment in the opinion . . . We must confess that we are unable to see why the act . . . is not as much a crime against nature as if it is done in the manner that sodomy is usually committed" (*Commonwealth* v. *Poindexter*, 118 SW 943, 1909). But the fact was that it was not. In another Texas case (*Munoz* v. *State*, 281 SW 857, 1926) the judge announced that "The undisputed evidence shows that the appellant performed the disgusting, abominable and nauseating act of using his mouth upon the person of one Meyers." But such practices did "not come within the definition of 'sodomy' as known by the common law and adopted by legislative enactment in our state." As a result, the conviction was overturned. A large part of the problem, for these judges, followed from silence on the part of legislators. As the Nebraska Supreme Court wrote, "Our statute fails to define the manner in which the infamous crime against nature may be committed . . . It is to be regretted that acts so infamous and disgusting have not been declared to be a felony by the legislature of this state, and we trust that the Lawmakers will speedily remedy this defect" (*Kennan* v. *State*, 125 NW 594, 1910). Therefore courts were forced to rely on the common law meaning in which "the crime against nature" = "sodomy" = inserting a penis into an anus. And as many courts stated, this was a very regrettable state of affairs.

In the cases in which judges resisted the expansion of the unnatural there is something more – and more important – at stake, something nearer the heart of law. Reading nature wrongly could result in judicial usurpation of legislative functions. Having grounded a reversal on the received view of the common law definition of crime against nature, the Utah Supreme Court said:

> While we, from the standpoint of decency and morals, fully concur in all that these and other courts have said regarding the loathsome and revolting character and enormity of the act charged, yet we, in the absence of legislative enactment making such acts criminal and punishable, denounce and punish them as crimes. To do so would in effect be judicial legislation. (*State* v. *Johnson*, 137 P 632, 1913, 634)

Quoting from an Ohio slander case, the court continued:

> In view of the injurious consequences of such a shocking charge, we confess to be strongly tempted to make one further innovation; but looking back to that period of doubt and uncertainty to which we have referred, and remembering that it is more important to have a rule, well understood and easily defined, of practical application, and sufficiently comprehensive to meet the ordinary needs of justice, than to have one varying with the changing views of the judges or variable standards of moral conduct in different communities, or at different periods we are unwilling to make any further innovation, but prefer to remit the matter to the only proper tribunal – the lawmaking power of the state. (635)

This rather formalist approach to judging nature, without more specific guidance from the legislature, must rely on common law meanings of the words. The common law crime against nature was then a sort of natural "unnatural," continuing unbroken from time before mind. Legislators can expand the domain of the unnatural but they have to be more specific about what counts. They have to be clear about where the line is being drawn. In doing so perhaps they can be understood as creating a sort of artificial or conventional "unnatural." Indeed, the judges in many of the cases hoped that legislators would do so and in many states the legislators did expand what counts as "crime against nature" by specifying that penetration of the mouth is a form of "sodomy" (Eskridge 1999).

On the other hand, many courts did not shrink from upholding convictions by expansively interpreting the bounds of the unnatural. "We thus have the words of the statute and their meaning," wrote the Indiana Supreme Court in *Young* v. *State*, 141 NE 309 (1923).

> The only thing left for the court to do is to sensibly apply them as their purposed use in the statute would indicate. This done . . . they have a wider meaning, the corruption of morals, the disgrace of human nature by unnatural sexual gratification, of which reason and decency forbids a more detailed description. They seem to be sufficiently broad and extensive to include the abominable and detestable act, cunnilingus, proved in this case. (311)

In the second decade of the twentieth century there was something of a formalist/(proto)-realist split in state case law on the questions of the unnaturalness of oral sex and of law's relationship to sexual bodies. Some judges, as we saw, apprehended a lack of fit between the legal forms and the offensive acts. They seemed to be saying: "Here is the form: the crime against nature. Much as we would like to punish the defendant,

our commitment to formalism and the virtue of restraint constrains us from doing so. Violence is to be constrained by words and until those with the authority to change the legal forms do so we are powerless to intervene." Other judges, however, adopted a more commonsense approach to interpreting the unnatural and the limits of law. Here is how the Supreme Court of Oregon (*State* v. *Start*, 132 P 512, 1913) made sense of nature:

> In the order of nature the nourishment of the human body is accomplished by the operation of the alimentary canal, beginning with the mouth and ending with the *rectum*. In this process food enters the first opening, the mouth, and the residuum and waste are discharged through the nether opening of the rectum. The natural functions of the organs for the reproduction of the species are entirely different from those of the nutritive system. It is self-evident that the use of either opening of the alimentary canal for the purposes of sexual copulation is against the natural design of the human body. In other words, it is an offense against nature. There can be no difference in reason whether such an unnatural coition takes place in the mouth or in the fundament – at one end of the alimentary canal or the other. The moral filthiness and inequity against which the statute is aimed is the same in both cases. (512)

Consider the history of the unnatural in the State of Montana. The defendant in *State* v. *Guerin* (152 P 747, 1915) was charged with having committed "the infamous crime against nature" by "taking into his mouth by force the private member of another male person." Relying on numerous authorities the trial judge dismissed the prosecution and the state appealed. The Supreme Court of Montana reversed. "In denouncing the crime," the court said,

> the legislature concluded that it was so well understood by every intelligent person that the mere mention of the name would be sufficient. Every intelligent adult person understands fully what the ordinary course of nature demands or permits for the purposes of procreation, and that any departure from this course is against nature. It therefore seems trifling with our intelligence to say that copulation accomplished by use of the *anus* is against nature, whereas the same act accomplished by the use of the mouth is not. This view contravenes common sense. (748)

But in 1959 formalism returned with a vengeance in the extraordinary case of *State* v. *Dietz* (343 P 2d 539) in which a dissenting judge brought home the risks of distorting legal forms. John Dietz was charged with committing "the infamous crime against nature": he was acquitted

but found guilty of "an *attempt* to commit the infamous crime against nature." The judgment against him, though, stated that he *had* been convicted of "the infamous crime against nature." His appeal raised a number of arguments, one of which was that oral sex is not covered by the statute in Montana. The majority, relying on *Guerin*, upheld his conviction. What makes the case remarkable is the forceful dissenting opinion by Justice Adair. While most oral sex appellate opinions are measurable in paragraphs this dissent is nearly twenty pages long. It is nothing less than a detailed legal history of the crime against nature in common law and in the State of Montana. As was usual in such cases, the defense argued that the statute was "indefinite, vague and uncertain." Justice Adair, however, wanted to demonstrate that the law *was* quite definite and that the act committed wasn't prohibited by the statute.

> The definite article "*the*" in the quoted five word phrase [the infamous crime against nature] particularizes the noun; that is, it specifies and particularizes a particular thing separate and distinct from others of the same class or group so that in employing the definite article "*the*" in the phrase "*the* infamous crime against nature" the Montana Legislature has specified and designated *the* particular crime there made punishable, separate and distinct from numerous other crimes which, solely because of the character of the punishment provided therefore, are termed and classified generally as infamous crimes . . . The statute does not say "one of the crimes against nature," or "a crime against nature," or "any crime against nature, but "*the* infamous crime against nature." . . . At common law, sodomy . . . was committed only *per anum*; penetration *per os* did not constitute the crime. (545, emphasis in the original)

For Adair it was an inescapable fact that the state legislature had never expanded the common law meaning of the crime against nature. That expansion was attempted by the state supreme court in *Guerin* but this attempt was itself illegitimate. Upholding Dietz's conviction on the basis of *Guerin* represented a fundamental breach of legal authority and judicial responsibility. Adair declared that "ours is a government of *law* and not men. Our Legislature has enacted in *the law* of this state the definition of 'law' and declared how *the law* is expressed . . . Law is a solemn expression of the will of the supreme power of the state" (552). And the will of the state is made known by the constitution and by statutes. Perhaps inadvertently using an ironic turn of phrase, he wrote, "By 'the law of the realm' our judges are denied the authority or power to legislate, or

to amend or change the provisions of the statutes or Constitution and, in construing same they are denied the authority to *insert what has been omitted, or to omit what has been inserted*" (559, emphasis in the original, internal citations deleted). The crux of the difficulty was that, "Unless the five word phrase '*the* infamous crime against nature' when committed by man with mankind, refers to and means coitus per anum and not otherwise then . . . it would be impossible for a citizen upon reading the test of it to determine when he is subject to its penalties" (561).

By the 1970s the naturalization and unnaturalization of sex was undergoing an important transformation. Consider this dissent in an Indiana case apparently concerning consensual oral sex.

> The crucial words are "abominable and detestable crime against nature with mankind or beast." The words "abominable" and "detestable" are mere epithets and are not descriptive of behavior at all. The words "with mankind or beast" give us no information unless we know what behavior is being conducted "with mankind or beast." The issue then is whether a person of ordinary intelligence can know what conduct is prohibited by the phrase "crime against nature". I do not think so. Aside from the fact that to be punishable a crime must be against the sovereign state of Indiana not against something called "nature," the words do not tell anyone what behavior constitutes a crime. What is meant by "nature"? A deviation from a statistical norm or from some unannounced moral norm? The words "crime against nature" are also mere epithets. They could be used to punish whatever behavior the majority considered morally offensive or perverse without any advance notice of the kind of behavior prohibited. (*Dixon* v. *State*, 268 NE 2d 84, 1971)

Justice De Bruler's dissent in *Dixon* may be taken to represent an important moment in the legal history of "nature" insofar as it explicitly repudiates – indeed, finds meaningless – the nature stories that had underwritten the punishment of unapproved sexual practices. But perhaps "nature" simply began to be seen as unnecessary. In 1986 the Supreme Court upheld the enforcement of antisodomy laws based on invocations of tradition (*Bowers* v. *Hardwick*, 478 US 186). Of course the tradition in question is one that sees nonprocreative sexuality and homosexuality as unnatural. On the other hand, in recent bestiality cases defendants may have nature turned against them in other ways. Now zoophiles are not evil, nor are they renouncing the civilizing project. Now they are mentally ill, disordered. They are the victims of nature gone awry. Thirty-three-year-old Sterling Rachwal of rural Wisconsin was found not guilty of sexually abusing horses because of mental illness. He was ordered to

be "held for 19 years in the Winnebago Mental Health Institute. That sentence won't begin until he finishes an 18 year term for similar crimes in Waupaca County" (*Milwaukee Journal Sentinel*, 31 July 1997). The prosecutor in this case commented, "I think the community is protected by this type of agreement. Until [Rachwal] can be treated successfully and is no longer a danger to the property of others, and horses, he will remain committed there." His attorney agreed. "It's everyone's hope and desire that Sterling get the treatment and help he needs so he can begin to heal." Sterling's mother agreed as well. And as the prosecutor in Waupaca County put it, "[W]hatever causes the defendant to act in this fashion is a problem of long standing that won't be cured in a couple of years. It's going to take a long time" (*Milwaukee Journal Sentinel*, 14 May 1997).

CHAPTER ELEVEN

THE BIRTHS OF NATURE AND TRADITION: LAW AND REPRODUCTIVE TECHNOLOGIES

INTRODUCTION

Imagine five people seated around a table in a small conference room, two married couples and a lawyer representing an infertility center. They are discussing the details of a contract. The contract, like all contracts, is about the future and the various concrete actions the parties will take in order to bring about the desired future. It is also about contingencies should that future unfold in a way other than as planned. Like all contracts, this one involves an exchange of promises. It represents a meeting of the minds as captured in words and signatures. As with most contractual agreements this one involves people who are strangers to one another. What makes the document a contract and not just a wish list is the presumption that, should the promises be unfulfilled, a judge may be called upon to compel fulfillment or some other form of restitution. The contract that the people are discussing concerns nature. It concerns human bodies and the control of bodies. It is what is called a surrogacy contract. It is an agreement that one of the women will have an embryo (derived from the gametes of the other couple) implanted in her uterus; will, if possible, carry the pregnancy to term and will give the baby or babies to the "intending couple" for them to raise as their own in exchange for 10,000 dollars. Sperm, egg, uterus, child, money. The surrogate also agrees to undergo amniocentesis. If that procedure reveals the presence of a genetic disorder she also agrees to have an abortion, at the discretion of the sperm donor/father. Agreement is reached,

documents are signed, and the people leave the attorney's office – the space of law – and go their separate ways.

Some time later, the "intending" woman begins a regimen of hormonal injections to stimulate the production of eggs and to synchronize her menstrual cycle with the other woman's. Some weeks later, she is in another room, at another table. Now she is in a biomedical space, a room in a clinic. She lies on her back on an examination table. A nurse inserts a device into her vagina and "harvests" eggs. Her husband has masturbated into a cup and a technician takes his sperm and her eggs and carefully combines them with other substances. Within days the mixture has resulted in the formation of a number of eight-celled embryos which are then frozen. Later, pursuant to the agreement, the other woman arrives at the clinic. Now she lies on a table. Three of the embryos have been thawed and put into another syringe-like device. A technician inserts it into her vagina and deposits the embryos. After the procedure the two couples have lunch together. Soon they learn that the procedure was successful. The surrogate is carrying twins. Forty weeks later, after a difficult pregnancy and hard labor, the woman delivers two healthy girl babies. Under the circumstances, "deliver" is an ambiguous word. Like most babies the newborns traveled down the birth canal. They entered the world of light through the same passageway they had traversed in the other direction through a syringe. In that sense, they were delivered. But the contract demands more. It demands their delivery to the intending couple and a formal relinquishing of parental rights. For most women who agree to gestate fetuses for others this is the easier of the deliveries. For some, though, it is impossible.

Every birth constitutes a continuity with the past and the initiation of the new, the unique. Every birth provides an occasion for experiencing the highest hopes and the deepest fears. The birth of the cultural practice of contract pregnancy was no exception. Its genealogy is commonly read back into the Old Testament. Surrogacy by way of artificial insemination has long been a staple practice of animal breeding. Similar practices involving anonymous sperm donors have been common with humans for decades. Its legal transubstantiation in the form of contract pregnancy, in which the woman who gestates is also genetically related to the child, has been practiced since the 1970s, and in the late 1980s "full surrogacy" involving embryo transfers became possible and marketable. The notorious Baby M case of the mid-1980s might represent a birthday of sorts, at least in terms of popular consciousness. But, to indulge the rich metaphorical possibilities a little longer, perhaps it is

more accurate to say that contract pregnancy is still in its gestational phase. The state of American law on the topic is still manifesting symptoms like morning sickness and swollen ankles. Some observers see the very idea of contract pregnancy as an abnormality and call on law to reject it, to abort. Others see the prohibition of the practice as itself a miscarriage of justice. For now it is enough to say that the practice is criminalized in some states, while it is permitted and regulated in others. In some jurisdictions the contracts are enforceable while in others they are not and many states have neither statutory nor case law one way or the other.

The story of reproductive technologies, and especially contract pregnancy, is a story about severances, disconnections, fragmentations, recombinations, and transformations. As we shall see, the parts can be assembled in many disparate ways. It is no wonder, then, that, when assembled one way, we get a story about inspirational acts of altruism, the goodness of love, the gift of life, and the beneficent and liberatory power of science, and, when assembled another way, we get a story about the depths of human depravity, slavery, the oppressive logic of patriarchy, the commodification of women and children, and the abdication of the moral authority of law in the face of technocommerce. Contract pregnancy is about, among other things, the disconnection of sex and reproduction, but in the opposite way from bestiality (that concerned sex without reproduction, this is reproduction without sex). Contract pregnancy is also about severing conception from gestation, and childbearing from child-rearing. In most situations at least one biological parent will be separated from the child's life. As I shall discuss in some detail, interpreting the contract may also involve different readings of the separation of minds and bodies, self and other. In judicial interpretations there may also be some articulation of concerns about the insufficient separation of market forces and the profit motive from family life. As many commentators have noted, contract pregnancy also seems to entail the fragmentation of the concepts "mother" and "natural mother." As much as other contexts examined in this book it raises the specter of the breakdown of identity and the disintegration of meaning. The situation also implicates a complex ecology of control: control of mind vis-à-vis body, of women vis-à-vis their bodies, of men vis-à-vis women, of the word (contract) vis-à-vis corporeal experience, of past over future, of parents over children, of science over nature, and of law over science. In the absence of trouble, in the absence of a breakdown of legal meaning, the lines of control may cohere. The future envisioned

in the preconception contract discussions may unfold pretty much as imagined. Self-control, social control, technological control all line up. But when that doesn't happen, judges may be called upon to rearrange the lines of control to make them all point in the same direction. To do this they must select and recombine elements of the stories they are told, including stories about nature, and law's own nature so as to restore meaningfulness and to justify the working of the force of law in the world.

In the following pages I shall first discuss the different ways in which nature talk is used to make sense of the situation of contract pregnancy. Then I shall examine contending images of the body-as-nature that inform the politics of reproduction. In a final section I shall look at how judges interpret contract law, and their own role as the enforcers of contracts, in regard to troubles with contract pregnancy. These troubles raise questions about the intelligibility of legal forms. While some judges fear that enforcing surrogacy agreements might overwhelm the legal form, others fear that failure to enforce might undermine the authority of form. I suggest that judges may rely on available conceptions of the body in their dealings with these problems of form.

NATURE'S MOTHER

Various images of nature swirl and collide within commonplace understandings of procreation, pregnancy, motherhood, and family. Sometimes nature is valorized, often it is not. In an article on "The New Revolution in Making Babies" *Time* magazine referred to "that most basic of instincts, programmed into the brain and body by millions of years of evolution: the urge to have children" (1 December 1997, 41). This, one imagines, is distinct from the urge to have sex. In any case, as anthropologist Marilyn Strathern (1992) writes, "the process of procreation as such is [conventionally] seen as belonging not to the domain of society but to the domain of nature" (17). But the participants in the process are unequally naturalized. "[T]he mother–child relationship, more fully contained by the boundaries of home and hearth, and defined biologically," says Janet Dolgin, "has been recognized as a 'natural' unit . . . since the nineteenth century; claims to maternity have invoked nature; claims to paternity have invoked culture. This continues to be the case" (1993, 646). This is because, until quite recently, the contributor of sperm could be anonymous in ways that she who is pregnant and gives birth to a child could not be. "Nature," says Dolgin,

"identifies mothers. In contrast, fatherhood is constructed as a (conventional) object of knowledge" (644, internal quotes deleted).

Naturalized maternity, in turn, underwrites a naturalized conception of family and kinship. Until now, says Strathern,

> Kin relations, like genetic make-up were something one could not do anything about. More powerfully, when these relations were thought of as belonging to the domain of "nature", nature also came to stand for everything that was immutable, and that was intrinsic to persons or things, and as those essential qualities without which they would not be what they were. (1992, 34)

And family, understood as a natural domain, is also understood as an area of social life that is (and should remain) separate from and existing prior to the public social realm of markets and, specifically, commercial, contractual relations. Dolgin understands opposition to contract pregnancy as "an attempt to keep the family separate from and unaffected by the world of money and work, unaffected, that is, by the market, including its often unremitting view of people as unconnected autonomous individuals" (1993, 640). The family is "the one arena of modern life in which *relationship*, not individualism, has been central" (645). Family, that is, may be conceptualized as a sort of nature preserve. As such, it is in some sense prelegal. It may be the job of law to protect the fragile autonomy of family from the pulverizing effect of market forces.

But if this ideology suggests a valorized world of nature, how might "the new revolution in making babies" be understood? Most obviously, there is a distinction between "natural," that is, coital, methods of procreation and the various "artificial" means such as artificial insemination, in vitro fertilization and embryo transplants. But even this line might not be so clear. As one commentator asks,

> [C]onsider the placing of seminal fluid near a woman's cervix by a doctor. Why should this practice be known as "artificial insemination"? The only thing artificial about it . . . is that the man who provides the ejaculate does not inseminate the woman by having intercourse with her. But a natural process of conception still occurs, if it occurs, within the woman's body. (Stanworth 1987, 26)

Perhaps the author would draw the line between this practice and in vitro fertilization. But, as we shall see, this line is not necessarily any clearer. The fertilization itself and the consequent formation of zygotes, their development into embryos and fetuses, and the complex processes attending gestation and birth are still quite easily construed as "natural."

There are yet other "natures" at work. Because procreation and motherhood are so firmly embedded within the frame of the natural, voluntary childlessness, for women, is also seen as unnatural. Michelle Stanworth, for example, argues that "the technological possibility of fertility control coexists with a powerful ideology of motherhood – the belief that motherhood is the natural, desired and ultimate goal of all 'normal' women, and that women who deny their 'maternal instincts' are selfish, peculiar or disturbed." On the other hand, involuntary childlessness is frequently understood as a disorder, a natural barrier to desire, as nature saying "no" and frustrating the will. A pamphlet put out by one infertility center, for example, is called "When Nature Fails" (cited in Franklin 1997, 104). One infertile woman (whose mother-in-law agreed to be inseminated by her son, the daughter-in-law's husband) has written that because she could not conceive, "At 27, I felt I wasn't a complete woman" (Williams 1998, 89). Or, as the husband of an infertile woman put it, "My wife's ovarian reserves were depleted, her infertility was irreversible, she was biologically incapable of procreation and permanently exiled from the purest form of motherhood, though not from motherhood itself" (Shacochis 1996, 61). When one (or two) confront(s) this unnatural nature, or what the husband called a "physiological brick wall" (55) and "the psychic catastrophe of infertility" (62), there is, it seems, a natural and unavoidable reaction. Naomi Pfeffer says, "Besides their involuntary childlessness there is one characteristic which the infertile are said to share, their desperation" (1987, 83). Desperation is perhaps the dominant theme in narratives of infertility in the popular press. Condemned by nature to lead an unnatural life, many women attest to a willingness to "try anything." One infertile woman, writing in *Vogue*, says, "I tried Prozac, a litter of cats and two baby goats. Normally having animals to love would heal my grief, but this time nothing happened" (Bransford 1995, 135).

Until recently, there were few options other than adoption and resigning oneself to one's fate. And adoption may be devalued precisely because it lacks a core natural, that is genetic, element. "In rearing one's genetically related offspring," writes Overall, "very real experiences are involved in discerning and appreciating the similarities between oneself and one's children . . . there is a sense of continuity and history created by the genetic tie" (1987, 154). Now, though, there is what is called "assisted reproduction." This may facilitate trading "the stigma of infertility" for the lesser stigma of artificial reproduction. But even here, the naturalness of maternity is still recoverable. As we saw,

the artificialness of artificial insemination can be rhetorically diminished and the naturalness of conception and gestation can be enhanced such that commercial-technological interventions are construed not as *conquering* nature but as *assisting* it. Nature may have "failed" but not irremediably. Reproductive technologies – and the companies that market them – do not master nature, they restore it. An advocate for the infertile suggests that "Treatment which enables the infertile to bear children is the restoration of a normal aspect of our biology . . . it is the restoration of functioning within the normal range" (Berg 1995, 97). And as Strathern says, "as long as some element of the entire process of childbirth can be claimed as 'natural,' technological interventions appear enabling" (1992, 56). Science and commerce, in this framing, are not antinature, but pro-nature, pro-motherhood, and pro-family. Similarly pro-nature, then, is the legal form that enables the coming together of sperm and egg, or embryo and uterus, desire and ability, intention and nature, market and family: contract. It is the adherence to the naturalizing force of this pronatalist ideology that is of concern to many feminists. As Berg says, "[I]nfertile women who seek assisted reproduction are almost always perceived [by feminists] as mindless automatons who have succumbed to the pronatalist agenda and are therefore excluded. Their collective voice, perspective and their varied experiences have somehow been easy to ignore and dismiss" (1995, 94).

And there are yet other natures at work here. One is the nature concerning transgenerational genetic continuity that is used to distinguish genetic parents from other care givers, such as parents who adopt. Another concerns the naturalized relationship between a child and the woman who carried the child in her womb. As surrogacy cases involving embryo transfers demonstrate, it is now possible that two women may both have irrefutable claims to be the "natural" biological mother of a child. In these situations, the effect of reproductive technologies may be to shatter the concept "mother," and to shatter the concept "nature" that traditionally provides the foundation for "mother," and family. It may seem that under these conditions "nature" breaks down. It points in different directions and is made useless for making sense. It turns out that this is not the case insofar as the various "natures" at work can be prioritized. For example, the genetic mother can be read as *more* "natural" than the gestational mother – or the other way around. In any case, it often falls to judges to pick up the pieces and to make "nature" make sense.

"Nature," then, in all of its complexity and potential incoherence, swirls around common understandings of these issues. There is, though, a still more fundamental figure of nature that connects with our previous studies of sexuality, bestiality, animal experiments, and endangered species. This is the naturalization of "the body" and of the distinction between body and mind. Unlike some of these previous contexts, the human/nature distinction here may be drawn *between* persons such that some are more easily naturalized or humanized than others. Or, as is the case with the passions and sexuality, the line may be drawn *within* a human being, such that the nature problem is seen in terms of a struggle between a self and its (her) body.

THE BODY IN QUESTION

Reproduction, reproductive technologies, and the contracts that make them legally meaningful all concern bodies, different bodies, knowledge of bodies, and the control of bodies. As one nonbiological "intentional" mother said of her "surrogate," "Her continued smoking with diabetes can lead to obstetric complications . . . I'm livid . . . She lives on junk food. I want to control the air she breathes and the food she eats" (Bransford 1995, 137). But what, after all, *is* a body? How have different bodies been historically understood in the culture that now practices in vitro fertilizations and embryo transfers? Framing this as a historical question is necessary because "the body," like other figures of nature, is undergoing a rather contentious reconfiguration. Materially, nothing demonstrates this more clearly than reproductive technologies themselves. In a number of ways we live among – or within – historically novel bodies. But also, and not surprisingly, the very idea of "the body" is the focus of a number of cross-cutting debates. There is a virtual gang of new bodies being articulated in order to challenge the supremacy of the old bodies associated with patriarchy, modernity, and liberalism. These new theoretical bodies (which are available for making sense of one's own embodiment) were born, in part, in response to the new material bodies that are the offspring of science and commerce. The new bodies and the old come together in legal narratives of reproductive revolution. In this section I shall briefly discuss some of these bodies: the dominant or inherited body, the insurgent culturalist body, feminist bodies, and legal bodies. I shall then return to the context of contract pregnancy and sketch out elements of contemporary body politics as a form of nature politics.

The inherited body

An important strand of contemporary cultural criticism has as its object of scrutiny what we might call "the dominant body," or the conception of human bodies that has been bequeathed to us by centuries of social thought. The key organizing structure of this thought is the mind/body distinction understood as an instance of the human/nature distinction. This body may also be called "the Cartesian body," but its genealogy can be traced into the deepest roots of Western thought. In fact, the distinction upon which it is based (along with its naturalizing effects) is so commonsensical, so taken-for-granted, so obviously grounded in experience, that it can itself be quite easily naturalized and only with effort come to be seen as an invention, a social construction. Human bodies, like cow bodies, monkey bodies, and spider mite bodies, are physical entities, and physicality is understood by way of nature talk. Physicality is what we have in common with animals, plants, rocks, and water. Human bodies are biological organisms. What makes human bodies different is that they contain and are the instruments of human selves. The biological body is the chunk of nature that human subjects inhabit. It is the stuff that carries us through our biographical lives. Through respiration, food intake, and waste disposal; through its functions as habitat for microfauna and flora; through its relationship with pathogens; and through its sensory capacities, the body interacts with the larger environment in which it is physically situated. Like other instances of nature, it is the object of a control relationship. Its primary control relation may be with its enclosed "self," but different bodies may be the object of control by other subjects. What is important to note is that the inherited body is fundamentally conceptualized as *other than* the self that it contains. Moreover, in most cases it is – or ought to be – subordinate to that self. Elizabeth Grosz, a prominent architect of one of the "new bodies" that would replace the inherited body, says of the latter:

> The body has thus remained colonized through the discursive practices of the natural sciences, particularly the discourses of biology and medicine. It has generally remained mired in assumptions regarding its naturalness, its fundamentally biological and precultural status, its immunity to cultural, social and historical factors, its brute status as given, unchangeable, inert and passive, manipulable under scientifically regulated conditions. (1994, x)

And, she continues, "This bifurcation of being is not simply a neutral division of an otherwise all-encompassing descriptive field. Dichotomous

thinking necessarily hierarchizes and ranks the two polarized terms so that one becomes the privileged term and the other its suppressed, subordinated, negative counterpart" (3). This rendering as nature, as other than, antagonistic to and, ideally, subordinate to "mind" is, according to many, what "the body" does in conventional Western thought. Grosz, again, says, "The body has been regarded as a source of interference in, and a danger to, the operation of reason" (5). Philosopher Drew Leder asserts that "a certain telos toward disembodiment is an abiding strain of Western intellectual history . . . The body has been relegated to a secondary or oppositional role, while an incorporeal reason is valorized" (1990, 3), and that "In the West there has been a tendency to identify the essential self with the incorporeal mind, the body relegated to an oppositional moment" (69). Similarly, medical anthropologist Lawrence Kirmayer claims that in "dominant representational theories . . . [t]he body and its passions are viewed as disruptions to the flow of logical thought, as momentary aberrations or troublesome forms of deviance to be rationalized, contained and controlled" (1992, 325).

Among the principal effects of this sort of body having attained the status of taken-for-grantedness is the facilitation of one way of understanding what it means to be a human subject while at the same time making other ways of understanding harder to achieve. Writing of the role that the dominant body plays in modern legal thought, Pheng Cheah and Elizabeth Grosz suggest that "We might see the mind itself as an effect of the social inscription of the body" (1996, 7). Alan Hyde puts the matter more directly. "The most basic choice that inheres in any use of the word *body*," he writes, "is the implicit separation from something else . . . like mind or soul or spirit . . . Choosing to describe the existence of people in space as a body is always an implicit choice for an ontological construction, neither natural nor inevitable, that *dematerializes* 'something else' as it *materializes* the body" (1997, 9). This is one of the principal tasks that "the body," as a figure of nature, is called upon to perform.

There is much to be said about this and contemporary debates about "the body" are much more complex and nuanced than I can even suggest here. I shall limit my comments to a few. First, the subordination of body to mind is not simply a theoretical maneuver. Rather, this subordination is performed and achieved in countless everyday situations. Perhaps, as Freud and others have argued, it is performed continually by most of us most of the time. Second, because some human beings are more easily identified with "body" than are others, these bodies are

more likely to be subordinated to or dominated by these others as well. Third, the inherited body thus described is absolutely fundamental to the intelligibility of law and legal practice. This is a point I shall return to below. I want to stress, though, that the inherited body effects (and is effected by) a double naturalization. First, the body itself is rendered as a figure of nature. As brute physicality it is the site of negativity, the source of necessity. Second, the distinction itself is not conventionally understood as having been made or drawn. It is not a matter of convention. It simply *is*. Awareness of this double naturalization is important because just as arguments about the social construction of nature more generally are frequently greeted with incredulity, claims about the social construction of bodies may be mistaken for denials of the physicality of bodies. But constructivists – in their deconstructive moments – do not deny physicality. They are not "idealists" as this term is often employed. Rather, they deny both forms of naturalization. They see actual, material bodies – presumably even their own – as cultural artifacts of a special sort and they see the mind/body distinction through which bodies are naturalized as a cultural artifact of a different sort.

The cultural body

Contemporary culturalist views of the dominant body, the modern body, the inherited body, draw on a wide range of oppositional theories. Differing lines of feminist analysis in combination with Foucauldian poststructuralism, phenomenology, critical race theory, and queer theory have produced a range of new bodies to contend with. What many of these approaches share is a commitment to the denaturalization of the body and, concomitantly, an emphasis on the body as cultural, historical, and political artifact. One aim of these projects is to explore the work that "the body" has conventionally performed in making humans intelligible to themselves. Another, insofar as that work is regarded as facilitating inequality and the material experience of deprivation, is to disable the inherited body from being useful for that work. The new body is founded on critical examinations of how the old body has actually been fabricated and reproduced in practice. One culturally significant site for reproduction of the conventional body is the domain of biomedicine; another is the domain of law. Thomas Csordas, in his Introduction to *Embodiment and Experience: The Existential Ground of Culture and Self* (1994), puts the matter bluntly: "The new body that has begun to be identified can no longer be considered as a brute fact of nature" (1).

There are different ways to denaturalize the body. One approach draws attention to the cultural and historical variation of bodies and the experience of embodiment. Culture, in this view, is inscribed on or spoken through bodies. This does not refer only to overt markings such as make-up, tattoos, scarification, or circumcision. It also refers to gestures, expressions, ways of moving, standing, being ill, and other culturally variable modes of being a body in action. It raises questions about how social actors learn – and, sometimes, resist learning – how to *be* the sort of body that the culture demands them to be. In our culture it concerns how one comes to perform gender, race, age, sexual orientation, and other corporeally based social inscriptions; how well or poorly one learns to perform masculinity, whiteness, working-classness, or straightness in one's very bearing and gestures. As Iris Young writes, it may concern how those who are gendered female learn to "throw like a girl" (1990), sit like a girl, walk like a girl, or run like a girl. On this view, a body, any body, is no more natural than a cornfield or a toy poodle. Only the means of inscription or modes of performance are different.

How bodies are seen and experienced is strongly shaped, then, by discourses of the body. One important aspect of this shaping is, in fact, through the generation of images of "*the* body" as an abstract, generic figure conceptually distinct from the multitude of actual lived bodies. Another, as we have seen, is through the imagery of the body as nature, and more specifically as an object of scientific knowledge production. Another is through understandings of the body as property. Discourses of gender, race, sexuality, age, class, and disability strongly condition how bodies are seen and experienced. Consider the range of meanings projected onto your body. Consider the bodies of women in general, women of childbearing age, infertile women of childbearing age. Consider how the meanings of these bodies differ from others; how the meanings differentiate sorts of bodies; and how understandings of "nature" are at work in making these bodies culturally meaningful. But if bodies mean, culturalists argue, these meanings are not unequivocal. Csordas argues that "the body should be understood not as a constant amidst flux but as an epitome of that flux" (1994, 2), and that "The paradoxical truth, in fact, appears to be that if there is an essential characteristic of embodiment, it is indeterminacy" (5). Likewise, anthropologist Margaret Lock finds that, "since closer attention has been paid to bodily representation, the body has become more elusive, fluid, and uncontrollable" (1993, 134). The meanings of bodies and the practical, experiential significance of embodiment are ambiguous, unstable, and

fiercely contested. And if, as Cheah and Grosz assert, "Our bodies are the medium through which power functions" (1996, 12), then it matters which meanings are given primacy. The central question animating contemporary body politics – understood as a form of nature politics – is who gets to control those meanings, and therefore, who gets to control the bodies. These questions are particularly germane to the politics of reproductive technologies.

As I have already discussed, one of the most culturally significant elements of meaning that are inscribed on bodies is the mind/body distinction itself. Scientistic materialist visions may erase the difference one way by physicalizing mind. But some culturalist body theorists erase it another way by elucidating how "the body" might be understood as an agent in its own right or how embodiment contributes to subjectivity. This sort of argument takes "knowledge" to refer to more than rationalist, propositional ways of knowing. In a discussion of Merleau-Ponty's phenomenology, Grosz writes that, for him, "the body 'knows' what its muscular and skeletal actions and posture are in any movement or action quite independent of any knowledge of physiology or how the body functions . . . it is not by means of access to a Cartesian abstract or geometrical space that one knows where to scratch in order to satisfy an itch on one's back" (1994, 91). Leder, drawing on Heidegger, treats this notion in a discussion of the "incorporation" of a skill. "A skill", he tells us, "is finally and fully learned when something that was once extrinsic, grasped only through rules and examples, now comes to pervade my own corporeality" (1990, 31). Of more direct relevance to our wider topic, Robin May Schott, in a piece called "Resurrecting Embodiment" (1993), talks about how a pregnant body knows itself or how a lactating body can be said to "know."

> When a nursing mother's milk "lets down" when her baby cries, even when she is out of hearing range, her body is developing a new sense of knowing another human being. This knowledge is not "rational," according to the model of knowledge inherited from the ascetic tradition of Western philosophy . . . It is knowledge that displays the sensuous and emotional [that is, embodied] roots of cognition. (179–180)

Again, these arguments do not entail the denial of "mind" per se so much as a denial of mind as disembodied and of bodies as simply the sensory conduits of information to the mind. They do assert, though, that what we know as embodied beings is no less significant in the constitution of self than what we know propositionally. But, if all bodies can be

said to know through, for example, the acquisition of skills or the incorporation of cultural knowledge, different sorts of bodies have differential access to different sorts of knowledge. And only some have access to the experiential knowledge of pregnancy. As Iris Young writes in "Pregnant Embodiment: Subjectivity and Alienation" (1990), "Pregnancy challenges the integration of my body experience by rendering fluid the boundary between what is within, myself, and what is outside, separate. I experience my insides as the space of another, yet my own body" (163). Men, children, and infertile women have to take her word for this.

These, then, are some of the new bodies that have arisen to challenge the inherited body. They specifically aim to denaturalize "the body," and to denaturalize the mind/body distinction that facilitates the naturalization of the dominant body. There is, as we shall see, disagreement as to whether they succeed or whether, instead, they actually promote the renaturalization of women's bodies. In any case, these ideas provide different ways of interpreting the cultural practices relating to reproductive technologies. If it does make sense to see "the body" as a social construction, and if the social construction of the body is an instance of the social construction of nature, it is constructed at dispersed sites throughout the culture: in the home, at school, in the market, on the street, through the media, through religion, on the job. It is constructed through scientific, medical, and biotechnological discourses. It is also constructed and contested through the discursive and institutional practices of law.

The legal body

Alan Hyde has undertaken an examination of "the legal body" from a culturalist perspective. His finding that "as employed in contemporary American law, *body* means an inconsistent and incoherent assortment of representations and visualizations, deployed to solve political problems internal to legal discourse" (1997, 4) precisely mirrors what I have been arguing about "nature" more generally in legal discourse. There are, Hyde argues, a multitude of different context-dependent bodies at work in legal discourse. In their detailed construction, the criminal body differs from the sexual body and the laboring body differs from the dead body. The body as a source of determinacy, like other figures of nature, is itself indeterminate. Nonetheless, while there are many "natures" in legal discourse, there is one dominant reading. Likewise, there is one dominant "body" in legal discourse that deserves the name of *the* legal body. Not surprisingly, this is a local version of the dominant body in the culture of which law is a part. It is the body that gets its meaning

through deployment of the mind/body, subject/object, human/nature distinctions. It is the body that we encountered in connection with animal experiments and bestiality and that we shall encounter in subsequent chapters. The proliferation of different bodies that we encounter owes its existence to the plasticity, ambiguity, and instability of the underlying distinctions. Cheah and Grosz claim that "most of our contemporary theories of the legal system are based on a mind/body dualism, where obedience to the law ultimately stems from the evidentness or self-presence of legal norms to the legal subject's power of reason" (1996, 3). Similarly, Peter Halewood writes in "Law's Bodies: Disembodiment and the Structure of Liberal Property Rights" (1996) that "liberal rights theory separates itself from the body, basing its universalism on the equality with which it attaches to all legal subjects as abstract wills or personalities, rather than as particularly instantiated or situated bodies. Indeed, formal equality is made possible by this separation of will from any particular form of embodiment" (1337). And Hyde himself asserts that "The legal subject has a sort of free will, a mental autonomy. It commands the body and the body obeys . . . The legal subject is distinct from the body, not identical to it" (1997, 259).

The legal subject, then, is disembodied and the legal body is constructed as a physical container and instrument of that subject. It is separate from and subordinate to that self. Exceptions, as we shall see, are made. Some subjects and some bodies depart too radically from the normal legal framing or from the legal framing of "normal." Feminist legal theorists have long noted that the apparently disembodied subject is not quite so disembodied after all. Rather, the myth of disembodiment is accomplished by treating some bodies as "marked" or exceptional and others as "unmarked" and normal. The body that the myth of disembodiment hides is, they argue, a white, male, adult, heterosexual, fully abled body. It is a version of this *legally neutral body* that is the standard against which all bodies are either made to conform or are found wanting in relation to. A culturalist critique of the legal body would examine law as a site of construction wherein legal subjects are actively disembodied so as to locate the origin of behavior in the domain of immateriality, of "choice" or intentionality.

It may be that persons who are better able to conform to the sort of body that law needs might benefit from the imposition of disembodiment and that those who cannot or will not conform may bear more of a burden. As we shall see, this relates directly to arguments about contract pregnancy. Before looking at these arguments, though, it is worth

remembering here that the "new bodies" of culturalist theories are not the only new bodies around. There are also the new material bodies produced by the workings of the sciences of medicine, genetics, and pharmacology in tandem with commerce. Theoretical insights may help us make sense of these new twenty-first-century bodies. Meanwhile, legal discourse may have nothing to rely on except the inherited eighteenth-century body fabricated by Descartes and others. It may have little recourse other than to fall back on nature.

Body politics and the return of the natural

What, then, are we to make of – or with – these new bodies? In particular, what are we to make of the new bodies being produced by the marriage of reproductive technologies and commerce? What are feminists to make of them? What are the women who *are* the bodies in question to make of them? Not surprisingly, there are different answers to these questions. Like the "infertile body," the "surrogate body" is open to a number of sharply contrasting interpretations. Not surprisingly, the various readings draw on different understandings of "nature" in their efforts to make sense of this body.

First, with regard to reproductive technologies more generally, many women and many feminists have regarded the development of contraceptive technologies and the relative increase in access to safe abortion technologies as having enabled women to take greater control over their bodies, and so, of their lives. These technologies are commonly seen as emancipatory. Not incidentally, access to them is conceptualized in terms of reproductive rights. Wider access has been facilitated by the courts in landmark cases such as *Griswold* (381 US 479, 1965) and *Roe* (410 US 113, 1973). There remains, of course, an intense politics of contraception and abortion, and resistance to women having greater control over reproduction still often takes a legal form. Other reproductive technologies such as artificial insemination, in vitro fertilization, embryo transfer, and surrogacy are also commonly understood as promoting the cause of liberation in that they create the possibility to become biological parents for people who would not otherwise be able to. This includes infertile men and women, lesbians and gay men. That so many people have taken advantage of these enabling technologies might at least raise the presumption of their liberatory role. Looked at this way, the story of science as progress converges with other cultural projects such as feminism and gay liberation. As Michelle Stanworth says, "The thrust of feminist analysis has been to rescue pregnancy from

the status of 'the natural' – to establish pregnancy and childbirth not as a natural condition, the parameters of which are set in advance, but as an accomplishment which we can actively shape according to our own ends" (1987, 34). Reproductive technologies, in demonstrably denaturalizing procreation, have crucially furthered this objective. On the other hand, Stanworth also contends that "The view that reproductive technologies have given women control over motherhood – and thereby their own lives – simply will not do" (14). The question is much more complex than any simple reference to progress can account for. There is, in fact, intense opposition to the practice of contract pregnancy, in particular among feminists and others. However, we need to distinguish arguments about the cultural practice from arguments about judicial enforcement of the contracts.

Many of the arguments against the practice focus on its class dimensions. While some surrogacy arrangements involve a family member (a sister or mother) agreeing to carry a fetus for a woman (or more commonly, a wife and husband), many more involve dealings among strangers. In this situation the "intending" or "commissioning" couple is much wealthier than the surrogate or gestational mother. The gestational mother is portrayed as having her body taken over by the intending couple and, more particularly, by the husband-father whose sperm is injected into the surrogate's body. Bioethicist George Annas, for example, decries "the commercialization of human embryos, the degradation of pregnancy, and the further exacerbation of class distinctions and economic violence that the use of embryos genetically unrelated to the 'surrogate mothers' who bear them could bring" (1990, 44). In like manner, Gena Corea, a prominent feminist opponent, draws parallels between surrogacy in humans and the ordinary practices central to the breeding of animals. "Women may find that the connection men have made for centuries between women and animals still lives on in Patriarchal minds just as it lives on in men's laws and practices. Women and animals remain parts of nature to be controlled and subjugated" (1985, 313). Yet another potent dehumanizing analogy is to slavery. Anita Allen, for example, writes that "aspects of surrogacy contracts also make the surrogate mother, like the child she bears . . . a kind of slave . . . The characteristic feature of slaves is that they lack self-ownership. Slave owners sell, use, dominate" (1990, 141).

To these readings of the surrogate's body as radically naturalized, animalized, and dehumanized we might juxtapose countless first-person accounts from gestational mothers that emphasize the enhanced sense of

self-worth that comes with altruistically giving others "the gift of life." Ruth Macklin, in an essay entitled "Is There Anything Wrong with Surrogate Motherhood?: An Ethical Analysis" (1990), states the issue directly:

> The feminist charge that the practice of surrogacy exploits women is paternalistic. It questions women's ability to know their own interests and enter into a contractual arrangement knowingly and competently . . . Feminists who oppose surrogacy presume to speak for all women. But what they are really saying is that those who elect to enter surrogacy arrangements are incompetent to choose and stand in need of protection . . . The charge of "exploitation" contradicts the moral stance that women have the ability and the right to control their own bodies. If that right grants women reproductive freedoms of other sorts . . . why does it not similarly apply to the informed, voluntary choice to serve as a surrogate? (141–142)

There are, though, other issues in play. Many see contract pregnancy as entailing not only the practice of "renting a womb," but of selling babies. For many it is the commercialization of childbearing and the commodification of human bodies that raises concerns about dehumanization. Individuating serves to disguise the social dimensions of the practice. Some radical feminists, in contrast to liberal feminists, see in surrogacy an attempt by men to displace women from any role in reproduction. They see surrogacy and embryo transfer technology as giant steps nearer to ectogenesis or the development of artificial, mechanical wombs, or the gestation of human fetuses in pigs. Under these more apocalyptic scenarios women may soon be reduced to the role of simply providing the raw materials in the form of "harvested" or mined eggs. Stanworth restates (but does not endorse) the argument this way: "[I]t is suggested that men's alienation from reproduction . . . has underpinned throughout the ages a relentless male desire to master nature, to construct social institutions and cultural patterns that will not only subdue the waywardness of women but also give men an illusion of procreative continuity and power" (1987, 16). Opponents of the practice of commercial childbearing call for its prohibition and criminalization. And indeed, many states and other nations have banned the practice if it includes an exchange of money.

Arguments about the practice are one thing, arguments about whether the contracts should be enforced by judges are something else. Here contrasting visions of "the body" as "nature" may be more sharply drawn. As we saw, there are different sorts of surrogacy arrangements. In

what is sometimes called partial surrogacy, the gestating mother is also the genetic parent; in so-called full surrogacy, the gestating mother is pregnant as the result of embryo transplant. In yet other situations the "intending parents" may seek out an egg donor, a sperm donor (either of whom may be anonymous), and a gestator. These different situations may raise different legal issues. There are also different ways in which the contract can break down. In one recent case, for example, the intentional couple (neither of whom were genetically related to the fetus) divorced while the surrogate was pregnant and the male attempted to escape parental obligations (*Buzzanca* v. *Buzzanca*, 72 Cal. Rptr. 2d 280, 1998). Other cases, such as the famous Baby M case, arise when the surrogate changes her mind and refuses to surrender the child to the intending couple. This is where things fall apart. This is when the intending parents, or the biological father, turn to law. The case comes to a judge as a claim of breach of contract and a request that the judge enforce the contract by compelling "specific performance." That is, the judge orders the woman who gave birth to the child to live up to the terms of the contract by surrendering the child and relinquishing her parental rights.

Many feminists insist that in such situations the judge is obligated to enforce the contract. To do otherwise, they argue, is to dehumanize women. To refuse to enforce surrogacy contracts is to treat women as less than fully human – or, at least, less fully human than men. This understanding follows from accepting the vision of bodies and minds that is integral to contract law. "In contract law, intent manifests itself by a promise and subsequent reliance provides the basis for enforceable agreements. Typically, the mental element is the pivotal element in determining legal outcomes" (Stumpf 1986, 195). Lori Andrews, in "Surrogate Motherhood: The Challenge for Feminists" (1990), quotes the following Senate testimony by psychologist Joan Einwohner:

> [W]omen are fully capable of entering into agreements in this area and of fulfilling the obligations of a contract. Women's hormonal changes have been utilized too frequently over the centuries to enable male dominated society to make decisions for them . . . Victorian ideas are being given renewed life in the conviction of some people that women are so overwhelmed by their feelings at the time of birth that they must be protected from themselves. (173)

Support for enforcement is predicated on aligning women as firmly with "mind" as men are in order to resist the naturalization and biological

reduction of women that the denial of enforcement is seen to entail. What is at stake, these commentators claim, is a resurgence of ideologies that align women with body with nature as against men who are made meaningful with reference to the minded, disembodied human. By resisting the claims of individual women the interests of women as a group are advanced. Schultz raises the issue of dehumanization directly: "To ignore the significance of deliberation, purpose and expectation – the capacity to envision and shape the future through intentional choice – is to disregard one of the most distinctive traits that make us human" (1990, 377–378).

These liberal feminists base their arguments on acceptance of the dominant legal body and its commitment to a disembodied subject. They assert the primacy of mind over body and frame the body as the property of its disembodied self. They hold that this model is as applicable to women as to men. Their opponents understand them as repudiating the specificity of women's bodies and denying the experiential reality of pregnancy. They can also be understood as assuming that the legal body as incorporated into "normal" contract ideology is accurate and should be validated in the face of challenges. A contract is a contract. Nothing in the material or existential world is so exceptional that judges should abdicate their responsibility to enforce the contract, even if this entails directing the force of the state against the defendant.

Feminists who oppose enforcement commonly base their opposition on a vision of the body – of women's bodies or pregnant bodies – that is at odds with the inherited, liberal body and its dissociation from subjectivity. This view, as we saw, emphasizes the contribution of embodiment to subjective experience. It is suggested that the subject who has undergone pregnancy and birth is, in a sense, not the same subject who signed the contract months earlier. Her inability to surrender the child does not simply indicate a change of mind so much as a change in self. Andrews cites Senate testimony of Elaine Rosenfeld that:

> The consent that the birth mother gives prior to conception is not the consent of . . . a woman who has gone through the chemical, biological, endrocrinological changes that have taken place during pregnancy and birth, and no matter how well prepared or well intentioned she is in her decision prior to conception, it is impossible for her to predict how she will feel after she gives birth. (1990, 172–173)

But this change of self is not simply physicochemical or hormonal. The change is the result of "bonding" or the formation of the most intimate

of relationships. Mary Shanley writes that "Mother and fetus are at one and the same time distinct and interrelated entities, and this fundamental fact of human embodiment means that to speak of the 'freedom' of the mother as residing in her intention as an 'autonomous' agent misunderstands both the relationship between woman and child and that of the woman to her ongoing self" (1993, 627). She continues: "The potential violation of a woman's self when she entered a pregnancy contract stems from the months she will spend in relationship with a developing human being. It is a relationship that may change her" (631). Alta Charo asks: "Will a pregnant woman's sense of fused biological well-being stand any chance against a legal property interest that others have in the fetus still within her body?" (1994, 88), and recommends that "law need not slavishly follow cramped visions of nature but can instead facilitate broader visions of justice" (26).

This is a real dilemma. It is one that turns on and conditions questions of control and knowledge, questions of power and meaning, questions of limits. What each of these feminist positions fears is that judicial determination of the enforceability of the contract will promote the naturalization and dehumanization of women. Judges, it seems, are offered a choice of naturalizations. The liberal position is predicated on a mind/body dualism that identifies the self with a disembodied mind (as made manifest in intentionality captured in words), and that relegates the body to the status of a material property object no different, in principle, from a field for growing corn or wheat. What is specific about women's bodies, pregnant bodies, gestation, and the psychological effects of pregnancy is denied, but what these bodies have in common with cow bodies or coal mines is foregrounded. But the argument from embodiment raises the specter of biological reductionism in a perhaps more obvious way. If this is a dilemma for feminist theory, judges who are called upon to enforce the contract face a different sort of problem. This is the problem of interpreting "the law" and applying it to "the facts." And this may raise problems concerning legal form. The two contending bodies of feminist thought may be resources for solving these problems. But judges cannot be neutral. They must endorse one body over the other and, one way or another, make women conform.

THE PRIMACY OF FORM

When these troubles come to law the question turns to form. Judges must resolve the dispute. They must decide who gets and who does not

get the child. But before they can apply the law to "the facts" – however these might be construed – they must first assess what the law is. This might include looking to statutes or other authoritative texts for guidance. But the central legal questions are: Is the contract a valid legal instrument? And should it be enforced? These questions cannot necessarily be answered by simply looking at the contract. The contract has to be situated within and interpreted against the background principles and doctrines that constitute contract law more generally. It has to be measured against an ideal version of the form itself, its presuppositions, purposes, and limits. Judicial engagements with surrogacy reveal anxieties about the integrity of contract law. To some extent, concern with the integrity of form may take priority over concern for the underlying troubles.

Again, the core ideology of contract law focuses on the contract as memorializing a meeting of minds. Contracts describe a voluntary exchange of promises about subsequent exchanges of goods or services – actions. In contract, past controls future and word controls deed. As a legal document a contract implicates the force of the state. If events do not unfold as planned, the force of the law may be called upon to reinforce the primacy of past over future and word over deed, by, for example, compelling "specific performance" – that is, compelling the defendant to fulfill her promise, to keep her word – or, by assessing restitutive damages. But as in all areas of law, there are exceptions. Among the more significant of these are those that find that there hadn't been a voluntary meeting of minds to begin with, as when one party signed a document under conditions of duress or fraud. Another exception to enforcement is when the terms of the contract are so out of line with accepted practice as to render the agreement – and its enforcement – unconscionable. Other formal elements include whether there was a bona fide "offer" and "acceptance," whether there was "consideration" (that is, whether anything of value had changed hands), and whether any party had already acted in "reliance" on the contract (that is, whether the future that the contract was designed to bring into being had already begun to unfold). Assessing the validity and enforceability of any contract involves a comparison with an ideal form that has all of the necessary ingredients and none of the prohibited ones. Generally, if there is no striking departure the contract will be enforced.

The arguments within feminist thought about surrogacy, as we have seen, have their legal counterparts. The liberal argument is that a contract is a contract. It sees neither duress nor unconscionability. It enjoins

judges to reinforce the power of past over future, word over deed, mind over matter. Looked at one way this posture suggests a certain rigidity of form: a contract is a contract, a promise is a promise. The form is not so flexible as to permit a proliferation of exceptions and excuses. If one decides to use the form in order to achieve one's desired ends, one cannot lightly shrug off obligations when they become inconvenient. But looked at another way it suggests the nearly infinite plasticity of form because nearly anything that people might wish or do might be the topic of contractual obligations. Private parties may utilize the form for whatever they may desire and obligate judges to back up these desires with legal violence. Most emphatically, it is not for the judge to decide which among competing desires she might endorse.

The counterargument is that the contract form has limits. It can only be stretched so far. Private parties can only expect to be able to call on the coercive powers of the state within these limits. Unconscionability is the name of one – rather vague – limit. "Public policy" is another. Likewise, the Constitution is understood as imposing limits on the enforceability of contracts, for example racially discriminatory contracts. There are other limits and, opponents of surrogacy argue, the facts of contract pregnancy put it beyond the limits of legal coercion.

Both positions can be seen to focus attention on the integrity of form. On the one hand, one might be inclined to enforce a contract because to do otherwise might undermine the form. A contract is a contract. Allowing people to evade their freely chosen contractual obligations through the promiscuous or ad hoc creation of exceptions threatens to erode or dilute the strength of contract law per se. This might foster social irresponsibility and economic collapse. On the other hand, one might be inclined to refuse to enforce a contract for fear of overwhelming the form and pushing it beyond its limits – and dragging judicial obligations along with it. Judges are guardians of the form. As it turns out, in order to protect the integrity of the form, judges may rely on the available representations of "the body." That is, as in other contexts, interpretations of nature may be used to stabilize legal meanings and to condition the circulation of the force of law. The famous case of *In the Matter of Baby "M", a Pseudonym for an Actual Person* (537 A 2d 1227, 1988) illustrates this.

Travels with Baby M

A New Jersey woman, Mary Beth Whitehead, agreed to be artificially inseminated with the sperm of William Stern (Chesler 1988). Their

contract called for Whitehead to gestate and give birth to a child, to surrender the child to Stern and his wife Elizabeth, and to terminate her parental rights so that Elizabeth could adopt the child in exchange for 10,000 dollars. The arrangement was brokered by the New York Infertility Center which received 7,000 dollars from the Sterns for services rendered. When the baby was born Whitehead announced that she had changed her mind and was unable to surrender the child, whom she had named Sarah, but whom the Sterns had named Melissa. In response, the Sterns obtained a court order compelling Whitehead to live up to the terms of the agreement. When the police came to her house with the court order she passed the baby out of a window to her husband and they, along with their two older children, fled to Florida. After the Sterns had the Whiteheads' bank accounts frozen, Mary Beth and her family returned to New Jersey. And after a period of fruitless negotiations the Sterns sued for custody of the child.

Much has been written about this case. Among the most insightful pieces is Janet Dolgin's "Just a Gene: Judicial Assumptions about Parenthood" (1993), in which she discusses the ways in which the judges who heard the case relied on naturalistic renderings of motherhood in ways that used "nature" as a ground for both valorizing and denigrating Whitehead's "contribution." With respect to the lower court's decision to compel compliance with the contract, Dolgin writes, "To the extent that [Whitehead's] claim to legal motherhood rested on the invocation of her 'natural' maternity, the court viewed that nature, in her case, had run amok . . . Her natural mothering instincts . . . developed uncontrolled" (681). The New Jersey Supreme Court reinstated Whitehead's parental rights. However, in Dolgin's view, "Both courts . . . characterized Whitehead as an example of nature gone awry" (684). My aim is not to duplicate Dolgin's interpretation. I should like to sketch how judges approach the basic question of contract, and second, how these decisions both rely on and reproduce each of the contending images of body-as-nature that I have discussed.

A contract is a contract

A trial on the issues was conducted by Judge Sorkow of the Superior Court of New Jersey (525 A 2d 1128, 1987). The bulk of the opinion was devoted to an analysis of the best interests of the child. The judge arrived at his determination by pretty much listing all of the ways in which the Sterns were good and the Whiteheads were bad. Among the

reasons presented as to why Mary Beth was bad were the facts that she had broken the contract and evaded Sorkow's earlier orders.

On the question of contract it was determined that there simply was no statutory law that covered the case. Acknowledging the possibility that he might be on the verge of entering a legal wilderness, the judge said: "[T]he only concepts of law that can attach to surrogacy arrangements are contract law principles and parens patriae concepts for the benefit of the child. These are the only polestars available for this court to chart its course on the issues of surrogacy" (1158). Then, looking to the form, he found all that was required for enforcement and none of the exceptional elements that would authorize a refusal to enforce. Mary Beth Whitehead "was competent at the time of entering into the contract and was aware of its terms . . . She understood what she had promised to do, understood what she had to do" (1144). But was it a valid contract? "The parties," said Sorkow, "expressed their respective offers and acceptances to each other and reduced their understanding to a writing. If the mutual promises were not sufficient to establish a valid consideration, then certainly there was consideration when there was conception. The male gave his sperm; the female gave her egg in their pre-planned effort to create a child – thus, a contract" (1158). Moreover, "once conception occurred the parties' rights were fixed, the terms of the contract are firm and performance will be anticipated with the joy that only a newborn can bring" (1158).

As for the presence of any of the prohibited ingredients, he found that "neither party had a superior bargaining position. Each had what the other wanted" (1158). There was no fraud. He likewise dismissed the defendant's argument from unconscionability. "This [was] a bargain Mrs. Whitehead sought and obtained" (1159). Her eyes were open. Whatever risks she took were freely chosen. The only thing untoward that occurred was that "when the time came to perform Mrs. Whitehead refused to perform her promise to give Mr. Stern his daughter . . . [S]he changed her mind, reneged on her promise and now seeks to avoid her obligation" (1130). "The surrogacy agreement," then, "is a valid and enforceable contract pursuant to the laws of New Jersey," and "Mrs. Whitehead . . . breached her contract in two ways: 1) by failing to surrender to Mr. Stern and 2) by failing to renounce her parental rights to that child" (1166). "This court, therefore, will specifically enforce the surrogacy-parenting agreement to compel the delivery of the child to the father and to terminate the mother's parental rights" (1170–1171).

Form rules. Form gives primacy of past over future, word over deed. As in other contexts, such as bestiality, form sets aright what had been inverted. More specifically, it reestablishes the sovereignty of mind over body. But it is, as we have seen, a contested vision of the body that underpins the integrity of form. Opponents of enforcement, as we saw, stress the embodied character of subjectivity, the unique relationship between mother and fetus who share a body, and the development over the course of gestation of a unique "bond" between the two. Throughout his opinion Judge Sorkow sought to undermine this view of a physically based relationship. Indeed, as Dolgin says, he sought to portray the maternal relationship as having gone out of control. Mrs. Whitehead is found to be "thoroughly enmeshed with Baby M." She is an "overinvolved mother." "Too much love," he wrote, "can smother a child's independence. Even an infant needs her own space" (1168).

Refusing to enforce this contract might conceivably frustrate the furtherance of justice, but how might refusing to enforce it threaten the foundation of contract law as such? Echoing the argument from embodiment, "[c]ounsel for the Whiteheads say that until Mrs. Whitehead felt the emotion of birth and sensed the child she could not give informed consent at the time she signed the contract." As we shall see, the state supreme court made much more of this argument. Judge Sorkow simply noted how it pointed the way down the slippery slope. "Would he have all contracts remain in limbo until the result of the intended agreement is available and the makers could then conclude whether the result is what was intended and the contract then made enforceable? How would one handle the marriage contract, the property settlement agreement or any other contract of common experience?" (1149).

A contract is a contract. Whether the contract is about a roofing job, a delivery of pork bellies, or the gestation of a fetus is immaterial. Form is form, substance is substance and form rules. Whitehead freely promised and just as freely changed her mind, broke her word. Bodies and corporeal transformations have nothing to do with it. If we let the body in here, he seems to have suggested, it could get loose and roam throughout the domain of contract, overthrowing promises and settled expectations. Bodies, and especially women's bodies, represent the wild disorder of nature. Better to keep the body at bay, better to rely on the disembodied subject. Better to limit our attention to the domain of "the writing," to the meeting of the minds. That way the integrity of form is secure.

On beyond contract

On appeal, the state supreme court upheld the lower court's custody decision but overturned the termination of Whitehead's parental rights (537 A 2d 1227, 1988). On questions of law, however, the supreme court was highly critical of Judge Sorkow's interpretations. It went so far as to give credence to Whitehead's claim that it was Judge Sorkow *himself*, by erroneously issuing an ex parte order granting custody to the Sterns, who caused Mary Beth Whitehead to "act in ways that were atypical of her ordinary behavior" (1139) and to flee the state. Part of the problem was that law carelessly invaded the natural, prelegal domain of motherhood and family.

Supreme court justice Wilentz corrected the trial court's reading of law on two main and related points. First, the troubles between the Whiteheads and the Sterns were covered by and resolvable with reference to settled statutory law, and second, surrogacy contracts such as theirs are invalid and unenforceable. He reached these conclusions by shifting the focus from the exchange of words to the material exchange of a body. "This [case is about] the sale of a child," he wrote, "or, at the very least the sale of a mother's right to her child" (1248). "The evils inherent in baby-bartering are loathsome . . . The child is sold without regard for whether the purchasers will be suitable parents" (1243). And while one of the "purchasers" was the child's father, the other purchaser was one who sought to adopt the child. The agreement, therefore, violated New Jersey statutes prohibiting the use of money in connection with adoption.

> Mr. Stern knew he was paying for the adoption of a child; Mrs. Whitehead knew she was accepting money so that the child might be adopted; the Infertility Center knew that it was being paid for assisting in the adoption of a child. The actions of all three worked to frustrate the goals of the statute. It strains credulity to claim that these arrangements . . . really amounted to something other than a private placement adoption for money. (1243)

As he saw it, "In the scheme contemplated by the surrogacy contract in this case, a middle man, propelled by profit, promotes the sale. Whatever idealism may have motivated any of the participants, the profit motive predominates, permeates and ultimately governs the transaction" (1249). This commodification of babies and commercialization of pregnancy put the arrangement beyond the bounds of contract. There were a number of policy reasons for putting commercial surrogacy beyond

contract. Among these was the view that "[t]he surrogacy contract guarantees permanent separation of the child from one of its natural parents," something that ought not to be done lightly. But at root, the issue was that "there are . . . values that society deems more important than granting to wealth whatever it can buy, be it labor, love, or life." Suggesting the barbarism of the agreement, he wrote that "there are, in a civilized society, some things that money cannot buy" (1249). Contract, then, has natural limits and surrogacy arrangements breach those limits.

This, it would seem, would be enough to dispose of the question of contract. But the supreme court also disagreed with the lower court's validation of the disembodied subject.

> Under the contract, the natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a preexisting contractual commitment, the threat of a lawsuit, and the inducement of a $10,000 payment, is less than totally voluntary. (1248)

"In surrogacy," Wilentz continued, "consent occurs so early that no amount of advice would satisfy the potential mother's need, yet the consent is irrevocable."

How, then, to explain Whitehead's behavior? Wilentz felt that she was "rather harshly judged" by the trial court. "She was guilty of breach of contract, and indeed, she did break a very important promise, but we think it is expecting something well beyond normal human capacities to suggest that this mother should have parted with her newly born infant without a struggle. Other than survival, what stronger force is there?" He continued:

> We know of no authority suggesting that the moral quality of her act in those circumstances should be judged by referring to a contract made before she became pregnant . . . The Sterns suffered, but so did she. And if we go beyond suffering to an evaluation of the human stakes involved in the struggle, how much weight should be given to her nine months of pregnancy, the labor of childbirth, the risk to her life, compared to the payment of money, the anticipation of a child and the donation of sperm? (1259)

The struggle for control of the bodies in question is inextricable from the struggle to control the forms through which bodies are made legally

intelligible, and control of the forms is inseparable from the controlling visions of embodiment and disembodiment that inform the recognition and evaluation of "suffering." Legal readings of sperm and egg and uterus and fetus and their relationships to each other and to the technosocial contexts of their coming together or coming apart shape the unfolding of events and experiences. But the legal body did not enter the story with Whitehead's refusal; it was present before the Sterns and Whiteheads had even heard of each other. Their (technologically mediated) coming together was the material realization of a legality that prefigured the fusion of egg and sperm, the transcription of DNA, the development of embryo, fetus, infant. Baby M was not simply interpreted by law, she was its effect.

CHAPTER TWELVE

DOCTRINAL MUTATIONS AT THE EDGE OF MEANING: LAW AND GENETIC SCREENING

INTRODUCTION

Both expert and popular discussions of genetics are commonly framed by the inherited dichotomy of nature and nurture. Nurture, in this context, signifies the social and, perhaps, the volitional, that is, the domain of the human. Nature, as in other contexts, signifies physicality and physically based necessity. It is also common for the "nurture" side of the formula *itself* to be naturalized as "the environment." On the other hand, aspirations for seizing control over the mechanics of genetics by way of genetic engineering or the development of gene therapies can also be construed as the ultimate subordination of nature to the realm of choice and freedom. The dream of controlling genetic processes can represent the ultimate domestication of nature and the triumph of knowledge over blind fate. In any case, genetic discourse draws on and reproduces – even as it mutates – inherited notions of the relationship between humans and nature.

Most obviously, "genes" or segments of chromosomes consisting of lengths of DNA, are physical substances. However else we may interpret them, *what* we interpret are biochemical, molecular, ultimately atomic, units of matter. The world of the gene is the physical world: biochemical processes operate among DNA, RNA, proteins, and enzymes at the intracellular and intercellular level of reality. But the *idea* of the gene is also, as we shall see, a profoundly powerful social and political resource. No less than animality and wilderness, it is a cultural artifact. More than a token of the, by no means simple, material "facts" of genetic processes,

"the gene" has become an exemplary tool for naturalization. As such it has called forth a range of contending denaturalizing framings.

GENETIC TIME AND THE NATURE OF THE FUTURE

What is distinctive about DNA molecules in comparison with other molecules that make up our bodies is that they are, of course, the units of transgenerational inheritance. In the workings of DNA we are able to imagine connections among humans – and between humans and other life forms – in temporal terms. The connections may be traced backward through generations at the same time as they point forward into variously imagined futures. DNA is a biological substance – *the* biological substance – through which time itself may be naturalized. As the surrogacy stories suggest, genes have become the physical foundation for naturalized readings of "the family" and of identity. The gene is both a sign of origin and a sign of fate. In the gene we may be shown the molecular token of emergence and prospective trajectories of both the individual and the transcendental (species) subject. The surrogacy stories are at least as much informed by genetic discourses as anything else. And the preference for surrogacy over traditional adoption, for example, is commonly justified by appeal to the natural preference for "one's own," where "one's own" signifies a subject's bodily materials. But "own" here also signifies a transgenerational identity of a diachronic lineage. The molecules that constitute genetic substance are rhetorically enlarged to assume the status of "one's own flesh and blood," such that genetic relations support an identity of a given subject with his or her genetic kin. It is as if when I say that my daughter has her mother's eyes, that I have my father's sunny disposition, that my granddaughter has my Huntington's disease, I am saying that we are of one substance. These common moves both diminish the individual subject (the I that I am is but a way station, a transitory expression of an enduring gene – a transgenerational series) and enlarge it (the I that I essentially am goes back into the depths of time, backward through evolution to the origins of life, and, if I can succeed in reproducing myself, the I that I am will continue indefinitely – for ever). This begins to suggest a view of the subject that departs radically from the image of the (disembodied) legal subject. Of course, the relationship between genes and flesh and blood also goes the other way, as when persons are reduced to the sum of their genetically based "traits." Through the figure of the gene we imagine

social linkages, and through these, fundamental aspects of identity. Surrogacy – and in vitro fertilization more generally, to the extent that it is marketed and purchased as the fulfillment of a previously frustrated desire – plays on the potency of the genetic dream. Genetic reproduction is not only the "making" of a new body (or a new person) out of elements of other bodies, it is the making of a new person out of specific heritable *traits* of other persons. These traits are the "expression" or effects of genetic processes. It is the possibility of the continuity of these traits across bodies and across generations that counts.

And there are other naturalized families. We are told, for example, that humans and chimpanzees have 98 percent of our genetic makeup in common (Marks 2002). The remaining 2 percent is what makes humans "humans" or, at least, *Homo sapiens*. Variation within this 2 percent is what makes each of the billions of us "unique." The DNA in the nucleus of your cells is read as a material link in a chain that goes back to the primordial stew. Hominids, on this evolutionary reading, are simply one twig on a unified "tree of life." Reflecting on this, we are told, demonstrates our kinship with all other life forms: other primates, other mammals, other animals, and even fruit flies and slime molds.

The gene is not only an emblem of origin, it is also an emblem of fate. It is commonly taken to be a physical sign of necessity in the strongest possible sense. Genes are frequently referred to as "blueprints," "scripts," and "maps" of a journey we cannot not take. They are often understood in explicitly deterministic terms as when we speak of *the* gene *for*: overt physical traits, diseases, behaviors, and dispositions; for sex, Down's syndrome, Huntington's disease, alcoholism, or a propensity to giggle at inappropriate times. The contemporary prominence, and almost taken-for-grantedness, of deterministic genetic discourse has given rise to concerns about genetic reductionism or essentialism and strong forms of naturalization that seem to obliterate conventional conceptions of humanness. I shall return to these criticisms below. First, though, because science is the source of these powerful representations of nature, we should look at genetics as an object of scientific knowledge production.

GENETIC POLITICS

As has often been noted, the scientific study of genetics is often spoken of in quasi-religious terms. The recently completed "mapping" of the human genome in particular has been described by participants as having been the scientific equivalent of finding the holy grail (Gilbert

1992). What is at issue is nothing less than "unlocking" the secret of life itself. And, of course, among the reasons put forward for this unlocking is that doing so will allow us to gain control over fundamental biological processes and, thereby, our own fate. There has been, in the last generation, an immense accumulation of knowledge about genetics in general and about the workings of particular genetic sequences and the sort of "information" that a gene encodes and transmits. This knowledge has, in turn, facilitated the predictive ability of those trained to read genes in light of this knowledge and for intervening in genetic processes.

One highly visible expression of the genetic revolution is the Human Genome Project. This is a massive international research project involving thousands of scientists and billions of dollars in private investment and public expenditure. A common framing of the Human Genome Project describes it as the culmination of the Enlightenment science project. But other framings situate it within the late twentieth-century context of Big Science and see it as a successor to the enormous governmentally funded science projects associated with the Manhattan Project, cold war defense research, and the space programs. The genealogy of the project supports this view (Kevles 1992). The search for the grail, in this more critical light, is the search for the infusion of seed money for the foundation of new (bio)technologies that, in turn, will provide the foundations for a twenty-first-century (bio)capitalism. Proponents of the project justify the expense by pointing to the dividends to be reaped by everyone as science gains control over, among other things, human genetic diseases. The Human Genome Project and human genetic research more generally are perhaps simply and obviously the latest episodes in the enlightened, progressive conquest of nature. And, as always, conquest signifies the subordination of nature – in this case, fate – to human intentions and desires, choice and freedom. The explosive increase in genetic knowledge promises a previously unimaginable degree of control over the future. In developing the capability to "read" genetic messages we are, we are told, engaging in nothing less than learning how to read the future. By developing techniques for writing our own scripts we might better conjure our desired futures into being. This is the dream.

But for others, genetic discourse is less a projection of dreams than it is a specter of nightmares. One prominent theme among critics of "geneticization" as it appears in the "new" genetic discourse is that in fundamental ways it is indistinguishable from an older strain of genetic discourse: eugenics. Eugenics refers to a similar convergence

of scientific, governmental, and popular beliefs and practices in the first half of the twentieth century that amounted to a social movement. Prominent scientists advanced claims about the heritability of everything from criminality to pauperism, from wanderlust to idiocy. Scientists gave support to ideologies of genetic – that is immutable – superiority of white people over people of color, northern Europeans over southern and eastern Europeans, and Aryans over Jews. They and their allies promoted programs of "positive eugenics" to encourage those with "good genes" to have more children. These included awarding medals to "fittest families" at state fairs. They also promoted "negative eugenics" in the form of the involuntary sterilization of those with "bad genes," that is to say, the poor and the dark. Prominent eugenicist H. S. Jennings, writing in a 1930 treatise, *The Biological Basis of Human Nature*, described the problem this way: "A defective gene – such a thing as produces diabetes, cretinism, feeblemindedness – is a frightful thing; it is the embodiment, the material realization of a demon of evil; a living self-perpetuating creature, invisible, impalpable, that blasts a human being in bud or leaf. Such a thing must be stopped wherever it is recognized" (cited in Paul 1995, 69). State legislatures in thirty states passed sterilization laws. Diane Paul, in *Controlling Human Heredity* (1995), estimates that 60,000 people were "sterilized" – the euphemism says it all – without their consent in the US.

The US Supreme Court lent its support to the program of negative eugenics in the 1927 case of *Buck* v. *Bell* (274 US 200). In this case Justice Holmes, writing for a unanimous court, authorized nonconsensual hysterectomies of women in state custody on the basis that "imbeciles" were a drain on society and that such constitutional rights as they had must reasonably be subordinated to the demands of public welfare and fiscal responsibility. "It is better for all the world," wrote Holmes, "if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind" (202). This, of course, represented the incorporation of one view of nature, humans, and their relationship into the heart of constitutional law. Perhaps a purer expression was given in 1916 by the President of the New York Zoological Garden, Madison Grant. In *The Passing of the Great Race*, he wrote, "The laws of nature require the obliteration of the unfit, and human life is valuable only when it is of use to the community or race" (quoted in Paul 1995, 17). The eugenic shadow of *Buck* v. *Bell*, I shall suggest, has continued to influence later encounters between law and genetic discourse, but mostly by way

of a negative example to be avoided if not explicitly repudiated. In the 1930s and 1940s eugenic arguments provided scientific justifications for the genocidal activities of the Nazis. As Paul reports:

> Most of Germany's leading geneticists [of the period] – including those who prior to 1933 had criticized anti-Semitism – actively helped construct the racial state. They served on important commissions, provided opinions on individuals' racial ancestry, gave courses on genetics for SS doctors, participated in drafting of racial laws. More than half of all academic biologists joined the Nazi party, the highest membership rate of any professional group. (1995, 91)

Contemporary critics fear that the newer form of genetic discourse is simply a "sterilized" version of this older form. One difference between the old and the new, however, is that the latter is not explicitly framed in racial or class terms. Indeed, 3 percent of the National Institute for Health's Human Genome Project budget is devoted to studying social, ethical, and legal implications, in effect, funding some of the critics. Another difference is that appeals to public health are given much less prominence compared to appeals to individual choice. Instead of governmental mandates *compelling* nonconsensual sterilization, new genetic knowledge circulates, like other reproductive technologies, by way of the market. Prospective parents, for example, may be offered genetic information about a fetus. With this information they may choose to allow a pregnancy continue to term or to terminate it. For some, this linking of genetic information with the ideology of choice raises a number of eugenic concerns. One concern is about how these novel representations and technical practices combine with existing ideologies of patriarchy, gynophobia, and the denigration of disabled people. Prenatal testing may be used to facilitate sex selection to the extent that fetuses of the "wrong" sex may be aborted until one of the "right" sex is produced. A related anxiety concerns the confluence of these ideologies with ideologies of perfectionism and the consequent dehumanization of "imperfect" or disabled children (and adults). Disabled rights activists are deeply alarmed about the implications of prenatal screening. Biologist Ruth Hubbard, writing with Elijah Wald (1993), describes the fundamental assumptions of the new "eugenic" ideology as holding that "(1) having a disabled child is a wholly undesirable thing, (2) that the quality of life for people with disabilities is less than that for others, and (3) that we have the means ethically to decide whether some people

are better off never having been born" (29). This theme will resurface in my discussion of wrongful life cases in a later section.

The neoeugenic critique, though, is based on a more fundamental criticism of genetic discourse. This is the view that contemporary gene talk is radically and dangerously reductionist and that it entails the profound naturalization and dehumanization, not only of "the disabled" (which, in any case, they regard as a socially constructed category, not a natural kind) but of everyone. One prominent critic of the reductionist force of the new genetic discourse is Dorothy Nelkin. Writing with Rochelle Dreyfuss in "The Jurisprudence of Genetics," she asserts that

> Genetic essentialism posits that personal traits are predictable and permanent, determined at conception, "hard-wired" into the human constitution. If comprehensively known and understood these inherent qualities would largely explain past performance and could predict future behavior . . . [T]his ideology minimizes the importance of social context. By stressing the importance of immutable biological qualities, genetic essentialism also differs from traditions centered on the importance of life experiences in determining behavior.
>
> (Dreyfuss and Nelkin 1992, 320–321)

Genetic essentialism, that is, is a strongly naturalizing and, by conventional measures, dehumanizing, discourse.

The argument about reductionism shifts attention away from DNA as physical molecules, and directs it toward the cultural or ideological models through which "genes" are comprehended. "The gene" is itself, like other figures of "nature," a cultural artifact that does political work. Another critic, Abby Lippman, says:

> Using the metaphor of blueprints, with genes and DNA fragments presented as a set of instructions, the dominant discourse describing the human condition is reductionist, emphasizing genetic determination. It promotes scientific control over bodies, individualizes health problems and situates individuals increasingly according to their genes . . . Though it is only one conceptual model "genetics" is increasingly identified as *the* way to reveal and explain health and disease, normality and abnormality. (1991, 17)

The issue, according to Nelkin and Lindee, writing in *The DNA Mystique: The Gene as a Cultural Icon*, is that:

> In a diverse array of popular sources, the gene has become a supergene, an almost supernatural entity that has the power to define identity,

> determine human affairs, dictate human relationships, and explain social problems. In this construct, human beings in all their complexity are seen as products of a molecular text. And this text appears in popular culture as the secular equivalent of a soul – the immortal site of the true self and the determiner of fate. (1989, 193)

Part of the problem is that reductionism simply gets the nature of physical reality wrong. "Genetic predictions," say Hubbard and Wald, "whether they involve testing or screening, are based on the assumption that there is a relatively straightforward relationship between genes and traits. However, genetic conditions involve a largely unpredictable interplay of many factors and processes" (1993, 36). Nelkin and Lindee assert that "Genes are, like words, products of (evolutionary) history, dependent on context, and often ambiguous, open to more than one interpretation" (1995, 9). I shall return to the frequently encountered analogy of genes to language below. The point here is that critics are asserting both the ambiguous nature of "genetic information" and the *social* consequences of the denial of this ambiguity. "By elevating DNA and granting it extraordinary powers of agency and control, genetic essentialism erases complexity and ambiguity. Problems and opportunities both disappear behind the double helix that has loomed out of proportion in the social imagination" (Nelkin and Lindee 1995, 196).

One difficulty with how contemporary genetic discourse is used to make humans intelligible or meaningful, then, according to these critics, is that the framework is simply inaccurate. It gets "the gene" wrong and so gets "the self" wrong by rendering the indeterminate determinate and by conferring a large measure of false necessity on what is seen to be a much more open and contingent reality. The critics' strategy is to reverse that. As Dreyfuss and Nelkin put it, "Biology does not offer a determinative answer, only an easy one" (1992, 345). Relocating "the gene" within the realm of the social, the discursive, or the political allows for the possibility of political or ethical interventions. The critique presupposes that we can change what we want the image of "the gene" to do for us. As a tactical matter, this often means directing attention away from "the natural" and toward the social. For example, as Philip Kitcher asks, "[W]hy should we rush to treat the unfortunate genetic inheritance of the few, while ignoring the unlucky social inheritance of the many? Shouldn't we commit ourselves to learning how to change the environments that break young lives as surely as defective proteins? . . . How bad must the plight of discarded children be to justify an analogous

social experiment?" (2000, 240). "Nature," then, is not where the problem is.

There are also consequences for getting the gene wrong. "The ideology of genetic essentialism encourages submission to nature and to constraints on the possibilities for social change" (Nelkin and Lindee 1995, 196). Not only does this provide the justification for denying the possibility of some forms of social change, it does so in a way that arrogates social power to those who shape and wield the discourse itself. Nelkin and Lindee speak of "the ambiguity of the genome – its biological indeterminism" (4). They say that these aspects of genetic language are suppressed for reasons of ideology or material interest. "Much of this complexity disappears when the gene serves its public role as a resource for scientists seeking public support and as a popular explanation for social problems and human behavior, and a justification for policy agendas" (4). That is, reductionist determinism – genetic naturalism – is seen as serving the professional interests of those who produce these representations of nature and put them into circulation. As with other figures of nature, "the gene" is a political resource that is deployed for political ends and calls forth counter readings.

There are still other problems with geneticization of human forms of being and social life. As I mentioned, one of the most prominent justifications for the massive public investment in genetic research is the elimination of disease. Practically speaking, this implicates new technologies of prenatal genetic testing and screening. Like other reproductive technologies, these new products are marketed to potential consumers as resources for the enhancement of choice, freedom, control, and reassurance. Some forms of screening can occur before conception. These include tests for the presence of genes in the parents. Screening may occur in the context of in vitro fertilization in which embryos are tested in a laboratory setting. If the embryos are "acceptable" they may then be implanted in a woman's uterus; if not, they may be destroyed. Testing and screening procedures that occur after a woman has become pregnant, though, create a different set of choices. Because there are, at present, very few genetic disorders that are amenable to any kind of therapeutic intervention, if the test results in disturbing news, the only "choices" that are available are whether or not to terminate the pregnancy. This fact is what allows disabled rights activists to see the eugenic potential of these practices. The elimination of "disease" entails the elimination of kinds of persons who are identified *as* "diseased." Then there are, of course, questions of what

characteristics count as a "disability," and what sort of news counts as "bad news." These practices have also radically transformed the experience of pregnancy to the extent that women and men have taken to regard any pregnancy as "tentative" until the fetus has cleared all of the quality control checkpoints.

There is also the question of what "choice" means if submitting to the testing process itself is presented as an imperative and refusing to submit is construed as irresponsible. Abby Lippman has asked this question in "Prenatal Genetic Testing and Screening: Constructing Needs and Reinforcing Inequalities" (1991).

> Prenatal diagnosis, as it is usually presented, falls into [the] category of behaviors recommended to pregnant women who would exercise their responsibilities as caregivers . . . With prenatal diagnosis presented as a "way to avoid birth defects," to refuse testing, or perceive no need for it becomes more difficult than to proceed with it. This technology creates a burden of not doing enough, a burden incurred when the technology is *not* used . . . pregnant women . . . are bombarded with behavioral directives that are at least as likely to foster a sense of incompetence as to nourish a feeling of control. It is therefore not surprising that a search for proof of competence is translated into a "need" for testing; external verification takes precedence over the pregnant woman's sense of herself. (28–29)

Lippman concludes that "Viewing needs and demands as cultural creations within a social context leads to doubts that assumptions of 'free choice' with respect to the actual use of prenatal diagnosis are appropriate" (32). And, as in the context of genetic stories more generally, these specific tellings are understood in explicitly political terms. "Prenatal diagnosis is . . . a biopolitical as well as a biomedical activity . . . Prenatal testing and screening may provide control. But for whom? To what ends? For whose benefit? . . . Once again, those with great power – physicians – control powerful technologies to monitor, regulate and even obliterate the female body when they situate a fetus in conflict with a pregnant woman in the provision of obstetric care" (34, 36, 41).

We have, then, at least two stories about genetics that are contending for the public imagination. They are, though, of unequal cultural strength. There is the gene story as narrative of scientific discovery, progress, control of fate, and freedom of choice. Then there is the gene story *story* as a narrative of politics, distortion, eugenic regression, and social control. The first presents itself as a story about nature, the second

as one about "nature" and the social and experiential consequences of naturalization.

INTERSECTING CIRCUITS

We have seen in other contexts how figures of nature – wilderness, animals, bodies, sexuality, reproduction – are mediated by language and shaped by metaphor. One distinctive feature of the social, political construction of DNA is that it is, itself, understood as a sort of language: as nature's own language. The discourse of genetics is a discourse of discourse, of letters and texts, books (recipe books and instruction manuals), and libraries. Lily Kay refers to this as "the textualization of Nature" (2000). But this is not just any code. Genes are commonly said to constitute a sort of law: the law of nature – or, at least, biological nature. Evelyn Fox Keller, who has explored the metaphorical structure of genetic discourse, cites physicist Erwin Schroedinger as having identified the chromosome as the "law giver and executive" of life (quoted in Keller 1995, 47). Another common image she has studied is that of the manager of factory production. In human genetics, of course, the products that are turned out are human beings. The most common metaphor – and it is closely related to the lawgiver and production manager metaphors – is that genes encode information or "messages," "instructions," "orders." Genetic language is not an inert semantics, a biochemical hieroglyphics. It is communicative. Information is "transmitted," "processed," and "received." This communicative metaphorical framing implicates an imagery of circuits through which the information is conveyed. In this section I shall describe a set of intersecting circuits and nodes at which translations and transformations occur. One crucial transformation concerns that from information to knowledge as the biophysical text is intercepted and translated into scientific representations. But, reference to translation and representation, in turn, raise the possibility of *mis*representation and *mis*translation. And as we shall see, troubles can arise when these circuits break down.

Genetic information is commonly described as passing from "mother" gene to "daughter" genes and from the gene to "messenger" RNA which then communicates it to specific intra- or intercellular interlocutors. The microcircuits are constituted by links between physical structures and flows of genetic information that are ultimately realized as a functioning metabolic event, the formation of an optic nerve, say, or the production of an enzyme.

The prevalence of language or code metaphors enables a view of genetic research as being a sort of *reading*: more specifically, a reading of nature (Kay 2000; Doyle 1997). In much the same way that one might "read" a landscape or habitat, one might interpret micronatures in genetic sequences. But because that nature is itself construed as a text, such interpretations may more accurately be seen as interceptions. The genetic message that might be sent to a protein, an organelle, or a cell is intercepted and deciphered by human subjects. Its meaning is extracted and, through careful analysis, it is translated and made meaningful in different sorts of ways within other contexts. First, it is translated into the specialized discourse of geneticists and biochemists. Genetic information, now possessed by a subject, is transformed into knowledge, into representations of nature. These are then put into circulation through the community of relevant scientists. They are disseminated in the usual ways – by word of mouth among colleagues and associates, through publications and technical reports. Some forms of knowledge are channeled through the education system, some through biotechnological and pharmaceutical industries, some through biomedicine. Some of the genetic representations that are produced are retranslated and disseminated through the culture at large by the media. This may be in the form of science journalism aimed at a relatively technoliterate readership or in the form of newspaper articles that announce that "science has discovered the gene for . . . X." In some situations it may be retranslated into the clinical languages of medical practitioners such as obstetricians and then retranslated again into the "everyday" language for an end consumer, say, a pregnant woman. In other situations, as we shall see, it may be retranslated yet again into legal discourse. The message, again, is a message about (or, we might even say, "from") the future. In interpreting the message – and its sequence of translations – one may be understood as interpreting the future. Or so it may seem.

PRENATAL READINGS

The medicalization of conception and pregnancy brings the biosocial, epistemic circuits into contact with other circuits within specific institutional and practical frameworks. Genetic knowledge, whatever else it may be, is a commodity that is circulated through networks of exchange. There may be a range of situations through which ordinary people get plugged into these knowledge circuits (or the circuits plugged into them). As I mentioned, one may be genetically "screened" before one

conceives; or screening may be a condition of employment, insurance coverage, semen donation, or a legal defense. In the 1960s large numbers of African Americans underwent involuntary screening for sickle cell anemia. Other episodes of involuntary screening have resulted in the circulation of unwanted knowledge, knowledge whose acquisition was experienced as a profound burden. (It is hard to see how knowledge is empowering to a teenager who is informed that she "has" a gene that indicates a predisposition for Huntington's disease that may or may not become manifest in thirty or forty years.) More typical, perhaps, is when a pregnant woman is encouraged to undergo testing procedures of various sorts such as amniocentesis or chorionic villus sampling (CVS) to, as they say, "make sure that everything is alright." The encouragement may be more forceful if she and/or her partner are in higher risk demographic categories. Older prospective parents, for example, have a statistically higher likelihood than others for giving birth to children with Down's syndrome, Ashkenazi Jews have a higher chance of carrying the gene for Tay-Sachs. Then too, family histories of genetically based anomalies such as Huntington's disease or Fragile X syndrome are strongly urged to undergo testing.

Amniocentesis is a procedure whereby a hollow needle is inserted through a woman's abdomen. The amniotic sac is penetrated and fluid that contains fetal cells is extracted. The cells can then be analyzed (interpreted, read) for known genetic anomalies. CVS involves the insertion of a catheter through the woman's vagina to the placenta from which technicians can extract tissue called chorionic villi. This material can also be read. While amniocentesis is performed during the fourteenth to sixteenth week of pregnancy, that is, at the end of the first and the beginning of the second trimester, CVS may be performed as early as eight or nine weeks.

This "retail" knowledge is, of course, informed by "wholesale" genetic knowledge, that is, by what is known about specific markers and sequences by scientists and technicians.What is known, again, concerns potentials, probabilities, and risks. A given sample of DNA is made intelligible against this – ever-expanding – background. Results of the analysis are reported to the obstetrician or midwife and then communicated to the patient. Usually the test comes back negative, indicating no anomalies. But sometimes what is revealed is bad news. In these cases the woman or couple may be referred to a genetic counselor who may retranslate information sufficient for the prospective parents to make a decision as to what to do next.

The testing context, then, implicates complex circuits of knowledge which are at once material and representational. The circuit begins and ends with a pregnant woman. Materially it begins with the penetration of her body, the extraction of cells, the transportation of the sample from the clinic to a laboratory. Here, the genetic message is intercepted, read, and translated into medical discourse as a diagnosis. What is being read and translated concerns representations about the nature of the future. In interpreting the future we grasp it – or imagine that we grasp it – or, in any case, imagine it. For the end consumer of these representations the genetic message, spelled out in the code of bases, is translated into scenarios about how one's own life experiences may unfold. This is, in a sense, always the case, even when the messages are reassuring. But it is perhaps more acutely the case when the message is experienced as "bad news." The future that is being foretold is spelled out in a message reading "anomaly," or "abnormal nature." And again, the messages, the translations, are representations of nature – made meaningful in particular ways. The language of the gene is read as a message about traits, of categories of disorder or necessity, which are retranslated into images of hardship, pain, suffering, loss, and often, the extraordinary expenses that will affect all aspects of a couple or family's life. These are, in turn, translated again into the felt experiences of fear, disappointment: "The whole time I was getting ready, the tests, the visits, the hospital procedure, I kept thinking 'this is awful, this is the most terrible thing.' I never, ever wanted to be here. But here I am . . ." (Rapp 1988, 294). Medicalization brings reproduction within an institutionally structured economy of knowledge. It brings events within the domain of specialized representational practices. The point of return, when the woman from whose body the sample was extracted is told that all is not well is the point at which she begins to decide what to do with what has been made known to her. Actually, she may have already decided: "The decision comes with the disease" (Rapp 1988, 294). As in other contexts, knowledge may be understood as yielding the possibilities of choice or control. But often enough, it may be experienced as having neither.

Imagine being told that the child you are carrying will be born with Tay-Sachs disease and that experientially this means that for the first few months of your child's life she will appear to be happy and healthy but at about six months of age she will stop smiling and crawling. Over the next few months she will become blind, deaf, and paralyzed. Eventually she will lose all awareness of the world and will die before her fifth birthday. Before *Roe* v. *Wade*, which is to say before the widespread

availability of prenatal testing, were one to be given such information, the "choices" were severely limited: prepare for the worst, undergo an illegal abortion, or travel to a place where "eugenic" abortions are legally available. Since that time, the context of "choosing" has in an important sense been radically altered for women. In an article entitled " 'Healing Fictions': Stories of Choosing in the Aftermath of the Detection of Fetal Anomalies" (1996), Sandelowski and Jones discuss surveys of women and couples who were faced with these situations. Some understood themselves as having had choices, others as having had no choice. Yet others felt that "nature had already determined the outcome and, by terminating the pregnancy they were simply acting in line with what nature had intended if they were choosing anything at all, it was the time of death and not between life and death. Indeed, had 'nature just taken care of it', they would not have had to" (357).

In any case, these events take place within the context of shifting circuits of knowledge and representation and novel practices. As reference to *Roe* suggests, they also take place within an historically changing domain of rights. Medical patients generally, and pregnant women more specifically, have a constitutionally protected right to make informed decisions about their medical treatment. In the contexts under discussion these include the decision to continue or terminate the pregnancy. These rights imply the logically prior right to be given information, that is, accurate representations of nature – about their bodies and about the fetus. Sometimes, the troubles one has with "nature" are exacerbated by troubles one has with the (mis)representation of nature and the circulation of these misrepresentations. Sometimes there is a breakdown in the circuits of knowledge or sometimes nature's message is mistranslated. A testing procedure is not offered or is incompetently performed. The genetic message is incorrectly intercepted or interpreted. The message is miscommunicated. A woman might be told that everything is just fine, that there is nothing to fear. This is information that enters into the imagination of the future. Later, perhaps when abortion is no longer a choice, or as late as the birth of the child, the truth comes out. The future arrives, but it is the wrong future.

LEGAL CIRCUITS

These complex biosocial circuits intersect with law at various points. Some scientists have called for mandatory prenatal genetic testing. Nelkin and Tancredi, for example, quote geneticist Margery Shaw as

having said that "The law must control the spread of genes causing severe deleterious effects, just as disabling pathogenic bacteria and viruses are controlled" (1989, 13). And in 1970, Bentley Glass, then president of the American Association for the Advancement of Science, advocated "the use of the new biology to assure the quality of all new babies." In his imagined future, "no parent will have the right to burden society with a malformed or mentally incompetent child" (quoted in Nelkin and Tancredi 1989, 12). The absence of a "right to burden" presumably entails a "duty" to abort. That the enforcement of these regulations would necessitate the nonconsensual invasion of a woman's body by state agents does not seem to have troubled them. Indeed, refusal to undergo such invasive procedures has been construed as grounds for "fetal abuse" (Henifin, Hubbard, and Norsigian 1989). The strangeness of this claim can be seen when one considers that if a child whose mother had refused the procedure is born without significant "abnormalities" then it is hard to see where the "abuse" is, but if the child does have significant disabilities, were it not for the refusal, it might not have been born at all. I shall return to a legal version of this conundrum in the following section. It should be noted that there are also strong arguments that access to prenatal testing should be severely restricted by law. These arguments are advanced by antiabortion activists who see the proliferation and routinization of these technologies as encouraging abortion. And, in fact, some state legislatures have enacted restrictive laws (Clayton 1994).

But, in an important sense, law is already implicated in these circuits just as law is already present in the wilderness, the ecosystem, the laboratory, and the body. As Nelkin and Tancredi claim:

> The threat of litigation drives the practice of testing in the health care system. Physicians are inclined to offer tests as soon as they are available, for litigation has established the physician's obligation to warn patients of potential problems if it is possible to gather such information through diagnostic technologies . . . The threat of malpractice has become a critical variable in shaping daily operations, long-term planning and patient treatment. (1989, 57)

And, as the social reality of these fears suggests, the circuits of genetic information intersect with law most dramatically when the former break down and people come to law to fix what is broken.

Now there are other choices and other troubles to contend with. Novel representations and novel material practices are generative of

novel troubles. One response to these troubles is to construe the misrepresentations of nature as having prevented a rights holder from exercising her right to intervene in the process, from controlling nature through her right to terminate the pregnancy (founded on her right to control her body). This response entails a further translation into legal discourse. The most likely tools for the job are the doctrines that constitute tort. Tort, as we saw in the landslide cases, is a legal form or discursive template that makes noncontractual relationships – and the troubles that arise within these relationships – legally meaningful. Its core elements are duty, injury, negligence, responsibility, and remedy. It is a device for fixing broken things. If one can successfully translate one's story into the structures of the legal form provided by tort then one might obtain an order directing the responsible defendants to redistribute material resources (money) to injured plaintiffs. In these situations there are a number of claims that the affected plaintiffs might make. One is the claim of "wrongful birth." In this framing the parents are the plaintiffs. They are the injured parties. As a result of the defendants' misrepresentation of nature the mother was denied the opportunity to determine the course of her pregnancy. The argument is that the woman gave birth to a child who, but for the negligence of medical practitioners, would have been aborted. Usually she and her husband seek damages to cover the extraordinary expenses of raising the child and compensation for emotional pain.

When this argument prevails, damages are awarded to the parents but, theoretically, support stops when the child becomes an adult. Because the need for support may not stop when the child reaches the legal age of majority, there is the motivation to situate the child herself as a plaintiff. As a response to this very practical concern attorneys have invented the distinct claim of "wrongful life." This differs from wrongful birth in that it is brought on behalf of the child in her own right. The wrongful life claim is, then, a representational vehicle that construes "the facts" in such a way as to fit the form. If we see it as a cultural artifact in and of itself, it expresses a particular vision of knowledge and power, humans and nature, law and justice. It is, like other artifacts, made out of available materials for particular culturally meaningful purposes. It is important to bear in mind that its invention was driven by the seeming imperatives of legal form. The child must state an injury, a right that was violated. There must also be a duty that was breached. The connections between breach and injury must be sufficiently close to justify finding liability. In a very real sense, though, the claim is a

sort of doctrinal mutant. It is very much like "wrongful birth" but with a twist.

The wrongful life argument is often construed as entailing the position – on the part of the child – that they would be better off never having been born. As numerous legal commentators and judges have noted, this claim raises profoundly difficult questions of logic, ethics, and law. As one scholar put the question, "[D]o people have a right not to be born? Is non-existence preferable to impaired existence? What calculus can be applied to figure out just how much better off a person would be if she or he had not been born, in order to determine the amount of damages to be paid?" (Hanson 1996, 2). The claim, again, is not "I would be better off dead" but "I would be better off never having existed." This is problematic. The story that is seemingly required to fit the facts to the form has a fatal defect, a deformation. As we shall see, accepting the argument into law, incorporating it into the form – thereby allowing it to replicate itself – has been construed as constituting a profound threat to "the basic assumptions upon which our society is based" (*Berman* v. *Allen*, 404 A 2d 8, 1979, 14) and "to the moral code that informs our system of justice" (*Walker* v. *Mart*, 790 P 2d 735, 1990, 740). The mutant doctrine would be fatal to the intelligibility of the legal subject and to law itself. Because it is such a profound threat to law, many judges see their primary task as expelling it. The job of judging, then, changes from trying to fix what may be broken to protecting law from being infected by its antithesis: meaninglessness. As in other contexts, the troubles with nature that people bring *to* law may become problems *for* law. The problem is neither the experiential suffering of the would-be plaintiff nor the mistranslations of genetic messages by medical professionals. The problem stems from the mistranslation of lawyers. The strategy that many judges have adopted in response is to reinforce a particular vision of the legal subject, thereby rescuing the integrity of law.

In these cases, again, the injury – if there is an injury – cannot be undone. The child cannot be unborn. But the burdensome consequences of whatever mistakes were made might be amenable to mitigation and the resultant suffering lessened. If defendants are found liable they may be assessed damages. They (or their insurers) might at least pay for the material consequences of their errors. As in any tort case, a preliminary question concerns the assignment of responsibility. And there is a problem here that is analogous to the landslide cases. Defendants argue – often successfully – that they didn't "cause" any injury. Nature – that

is, genes – caused the defects or abnormalities. And even if the defendant's failure to provide prospective parents with important information in some sense contributed to someone being born, this simply cannot be construed as an "injury." The troubles – the pain, suffering, and emotional devastation – are real enough, but they are not *legal* troubles. They are, in fact, beyond the law.

As it turns out, many judges accept the wrongful *birth* claim. It is relatively easy to see the failure to inform or the communication of mistaken information as an injury to the mother or parents. The wrongful *life* claim, however, has been rejected by most judges who have considered it.

BEYOND THE FORM

There are, I should note, a lot of different "fact situations" that give rise to wrongful life claims. Some of them have to do with genetic prenatal screening but some do not. For example, a number of cases involved women who contracted rubella while they were pregnant and were informed by physicians that this condition posed no health risks to the fetus but who subsequently gave birth to children with severe disabilities. Some cases arise from a failure to offer tests, some from mistakes involved in communicating the results of tests, and some have to do with the incompetent performance of surgical procedures such as vasectomies and abortions for people who have learned that they are carriers of genes. There is also a range of very different "conditions" that the children are born with. These include Down's syndrome of varying levels of severity, cystic fibrosis, Tay-Sachs, and neurofibromatosis. Obviously, these are not all "the same" medically or experientially.

As an initial matter, judges contemplating the claim of wrongful life sometimes invoke the theme of legal wilderness. One judge noted the "judicial hesitance to chart a novel course beyond the safe harbors provided by legal theory" and expressed anxiety about being "drawn toward the murky waters at the periphery of existing legal theory to test the validity of a cause of action for what has been generically termed 'wrongful life' " (*Becker* v. *Schwartz*, 386 NE 2d 807, 1978, 808). Or, as another judge wrote, "To recognize a right not to be born is to enter an area in which no one could find his way" (*Gleitman* v. *Cosgrove*, 227 A 2d 689, 1966, 711). This may be taken as a sign of their discomfort, a sign that they are regarding something beyond their own imaginings, an indication that they have encountered the limits of law.

The most common strategy for justifying the rejection of the claim is to rely on the structures of form. Judges may simply assert that there is no legally cognizable cause of action. "In the instant case, we deny Francine's claim to be made whole . . . There is a failure to state a legally cognizable cause of action even though, admittedly, the defendants' actions of negligence were the proximate cause of her defective birth" (*Speck* v. *Finegold*, 408 A 2d 496, 1979, 508). Another way of putting this is that the plaintiff – the child – had no preexisting "right" that could possibly have been violated by the defendant. As the judge just quoted continued, "Her claims to be whole have two fatal weaknesses. First, there is no precedent in appellate judicial pronouncements that holds a child has a fundamental right to be born as a whole, functional human being" (*Speck*, 508). Another judge put it like this: "[T]here is no right not to be born, even into a life of hardship, and thus no right cognizable at law which defendant can be said to have violated" (*Becker*, 817). Or, as yet another judge said: "Thus, we face the basic question: is life an injury? Christy had no control over whether to be conceived and no ability to prevent her birth . . . Children, of course, have neither the ability or the right to determine questions of conception, termination of gestation, or carrying to term" (*Walker* v. *Mart*, 790 P 2d 735, 1990, 740).

There being no preexisting "right," then, according to the structure of the form, there can be no "injury." "The question before us, therefore, is narrow: is birth, even in an impaired condition, a legally cognizable injury?" The answer to this question was provided by the legal form: "An injury is the invasion of some right possessed by the plaintiff . . . We believe, therefore, the limited recovery allowed by the courts recognizing the tort of wrongful life exhibits a fundamental casuistry in their reasoning. The conclusion that the child is impaired does not ineluctably imply that the child has suffered a legally cognizable injury" (*Walker*, 739). All of this means that the required connections between the defendant's actions and the finding of liability are absent. What stands in the way of making these connections is nature understood in terms of causal necessity. "The heart of the problem in these cases is that the physician cannot be said to have caused the defect. The disorder is genetic and not the result of any injury negligently inflicted by a doctor . . . The child's handicap is an inexorable result of conception and birth" (*Becker*, 816). In ways that are directly analogous to the landslide cases, nature is used here to position the defendants beyond the reach of a legally compelled remedy. Indeed, some judges emphasize the injustice

of finding physicians liable in the absence of "injury" so construed. As one court put it, "In essence, Mr. and Mrs. Berman desire to retain all the benefits inhering in the birth of a child – i.e. the love and joy they will experience as parents – while saddling defendants with the enormous expenses attendant upon her rearing." This would be "wholly disproportionate to the culpability involved" and would "constitute a windfall to the parents and place too unreasonable a financial burden upon physicians" (*Berman* v. *Allen*, 404 A 2d 8, 1979, 18). If there is a problem in the world it is a problem that arises out of the nature of genetic transmission and not its social, communicative misrepresentation. It is therefore not a legal problem.

NOTHINGNESS AND THE LIMITS OF TORT

As I suggested earlier, other judges see even greater risks should they themselves mistranslate. "Any attempt to find a physician responsible, even to a limited extent, for an injury which the child unquestionably inherited from his parents requires a distortion or abandonment of fundamental legal principles," wrote one judge (*Becker*, 816). This theme was echoed by another. Quoting a law review article, he said, "It is unfair and unjust to charge doctors with the infant's medical expenses. The position that the child may recover special damages despite the failure of his underlying theory of wrongful life violates the moral code underlying our system of justice from which the fundamental principles of tort law are derived" (*Walker*, 740). Accepting the claim, incorporating it into the stock of legitimate legal arguments, poses a direct threat to the foundations of law.

Behind these formal deficiencies there is also what many judges consider to be insuperable barriers for fashioning a remedy without themselves trafficking in meaninglessness.

> The primary purpose of tort law is that of compensating plaintiffs for the injuries they have suffered wrongfully at the hands of others. As such, damages are ordinarily computed by comparing the condition plaintiff would have been in, had the defendants not been negligent, with plaintiff's impaired condition as the result of negligence. In the case of a claim predicated on wrongful life, such a comparison would require the trier of fact to measure the difference in value between life in an impaired condition and "the utter void of nonexistence." Such an endeavor, however, is literally impossible. (*Berman*, 11–12)

Other judges reiterate that this conundrum is simply beyond legal capacity. "[T]he improbability of placing a child in a position she would have occupied if the defendants had not been negligent when to do so would make her nonexistent . . . demands a calculation of damages [that is] dependent on a comparison between a Hobson's choice of life in an impaired state and nonexistence. This the law is incapable of doing" (*Speck*, 508).

The impossibility of measurement, though, pales before the impossibility of imagination that judges confess to when confronting the existential meaninglessness of the claim. This theme is repeated over and over. "[M]an, 'who knows nothing of death or nothingness,' simply cannot affix a price tag to non-life," said one judge, and "[P]lacing a value upon non-life is not simply difficult – it is humanly impossible" (*Gleitman*, 711). Another judge invoked "the specter of improbabilities approaching the supernatural" (*Speck*, 499), which put the question "beyond the ken of human understanding" (501). Others are more expansive,

> Whether it is better to have never been born at all rather than to have been born with serious mental defects is a mystery more properly left to philosophers and theologians, a mystery that would lead us into the field of metaphysics, beyond the realm of our understanding or ability to solve. *The law cannot assert a knowledge which can resolve this inscrutable and enigmatic issue*. (*Becker*, 812, emphasis mine)

And again: "The value of a healthy existence over an impaired existence is within the experience of imagination of most people. The value of nonexistence – its very nature – however, is not" (*Speck*, 512). Judge Fucshberg in a concurring opinion in *Becker* wrote: "[W]hatever be the metaphysical or philosophical answer – speculative, perhaps debatable, but hardly resolvable – and however desirable it may be for society to treat these problems with sensitivity, *I am compelled to conclude that the matter is just not justiciable*" (815, emphasis mine).

One commonly employed device for highlighting the meaninglessness of the claim is to read "choice" back to – or beyond – the moment of conception and imagine asking the proto-subject what its preferences would be. "Who's to say . . . had it been possible to make the risk known to the children-to-be – in their cellular or fetal state or, let us say, in the mind's eye of their future parents – that the children too would have preferred that they not be born at all?" asked Judge Fucshberg. He then responded, "To ordinary mortals, the answer to the question is 'no one' "

(*Becker*, 815). This move renders the would-be plaintiff as a rational chooser even before it has a physical existence – indeed, even as it exists only, at most, in someone else's mind. It figures the human as a proto-subject in order to deny it the status of a plaintiff. Another asserted:

> It is basic to the human condition to seek life and hold onto it however heavily burdened. If Jeffrey could have been asked as to whether his life should be snuffed out before his full term of gestation had run its course, our felt intuition of human nature tells us he would almost surely choose life with defect as against no life at all. (*Gleitman*, 693)

Another judge, though, was less certain what the answer might have been.

> If it were possible to approach a being before its conception and ask it whether it would prefer to live in an impaired state, or not to live at all, none of us can imagine what the answer would be. We can only speculate or refer to various religious or philosophical beliefs. We cannot give an answer susceptible to reasoned or objective valuation. (*Speck*, 512)

All of these moves put the claim beyond tort, beyond remedy, beyond law by rendering the subject who would make the claim as having a precorporeal existence.

These reasons are supplemented or supported by other, perhaps even more fundamental, reasons. One commonly mentioned countervailing value is "the sanctity of life." "One of the most deeply held beliefs of our society," said one, "is that life – whether experienced with or without a major physical handicap – is more precious than non-life" (*Berman*, 12). The same judge said that, "To rule otherwise," that is to accept the claim of wrongful life as a legitimate legal argument, "would require us to disavow the basic assumption upon which our society is based. This we cannot do" (14). The sanctity of life argument is also used to provide a more "balanced" point of view.

> We sympathize with [the child's] plight. We cannot, however, say that she would have been better off had she not been brought into this world. Notwithstanding her affliction with Down's syndrome, Sharon, by virtue of her birth, will be able to love and be loved and to experience happiness and pleasure – emotions which are truly the essence of life and which are far more valuable than the suffering she may endure. (*Berman*, 14)

The majesty of the law is to recognize the inherent equality of all legal subjects. As the same judge put it, "No man is perfect. Each of us suffers from some ailments or defects, whether major or minor, which

make impossible participation in all the activities the world has to offer. But our lives are not thereby rendered less precious than others whose defects are less pervasive or less severe" (13). Another judge claimed that "The pain of the parents must be measured against the joy they find in him as he is," and averred that "No one who has witnessed the love of a parent for an imbecile could expect so crass a computation" (*Gleitman*, 712). These moves all reinscribe the subjecthood of the plaintiff and resist the naturalization that the claim seems to entail.

In addition to these implicit concerns about the dehumanization of legal subjects there is also explicit awareness of the dark shadow that eugenics casts over the issues.

> Even as a pure question of law, unencumbered by unresolved issues of fact, the weighing of the validity of a cause of action seeking compensation for the wrongful causation of life itself casts an almost Orwellian shadow, premised as it is upon concepts of genetic predictability once foreign to the evolutionary process. It borders on the absurdly obvious to observe that *resolution of this question transcends the mechanical application of legal principles*. (*Becker*, 810, emphasis mine)

Raising the specter of the animalization of humans, one judge said, "We are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle" (*Gleitman*, 693). Even a judge who ultimately accepted the claim acknowledged the issue directly:

> Until recently, medical science was unable to provide parents with the means of predicting the birth of a defective child. Now, however, the ability to predict the occurrence and recurrence of defects attributable to genetic disorders has improved significantly. Parents can determine before conceiving a child whether their genetic traits increase the risk of that child's suffering from a genetic disorder such as Tay-Sachs disease or cystic fibrosis. After conception, new diagnostic techniques such as amniocentesis and ultrasonography can reveal defects in the unborn fetus . . . Are these developments the first step towards a "Fascist-Orwellian societal attitude of genetic purity" or Huxley's brave new world? Or do they provide positive benefits to individual families and to all society by avoiding the vast emotional costs of defective children?
> (*Harbeson* v. *Parke-Davis*, 656 P 2d 483, 1983, 491, internal quotes deleted)

Without using the word, the object of dread is the face of evil itself. All of this is more than enough to put the claim (and the images behind the claim) well beyond reason, beyond measure and the imagination, beyond the merely human capacity even to comprehend. The argument and the request for justice are put beyond tort, beyond remedy, and beyond law.

We can take the judges' explanations for their reluctance at face value. They seem to be confronting meaninglessness and to be genuinely perplexed. There is in the confrontation with these questions a palpable sense of dread. This, perhaps, is enough to account for their seeking the security offered by form and the "safe harbor of legal theory." Additionally, it is not unreasonable to suggest that some of the judges may have been motivated by anxieties about genetic reductionism and by the law's historic complicity in the eugenic project of dehumanization as expressed in *Buck* v. *Bell*. Hence the repeated assertions about the sanctity of any and every life. In this sense these cases can again be seen as repudiating the naturalization of legal subjects. These judges render the subject more in terms of the fullness of human emotional complexity and rationality.

But looked at another way, these cases are consistent with others in which we saw formalist styles of reasoning facilitating a repudiation of a different sort of nature. Specifically, confronting the antitheses of law: judges repel the threat of meaninglessness, evil – call it "nature?" – by expelling the body and its physical claims. But the more they recoil from "the metaphysical," the more tightly these judges become embroiled in it, and the further they move from the factuality of the bodies in question. These renderings can all be read as suggesting that, in the final analysis, bodies don't matter. These judges all turn away from the body and embrace disembodiment. "Pain and suffering" as words can be recognized, but this recognition must be balanced – and their existence mitigated – by an acknowledgment of the supremacy of love and the sheer joy of being alive. Nobody's perfect, they seem to say. Dwelling on the legal form, and its structural incapacity to accommodate the meaninglessness that the claim seems to presuppose, allows the physicality of pain and the material dimensions of alleviating pain to recede from view. Above all, one must not focus on the symptoms and the experiences that these might suggest. While judges who accept the wrongful life argument often at least minimally describe the physical conditions of the plaintiff's existence, those who reject the claim typically do not. In a way the material claims and bodily needs of Sharon, Jeffery, and

Christie are sacrificed in order that judges might expel the threat to legal integrity – and alleviate their own sense of dread.

And, of course, whatever errors occurred in the transmission of information about the fetus also recede into the background. The stories that these judges tell all reach the conclusion that, whatever mistakes the physicians may have made, there is, after all, nothing wrong. There is no injury. There was no harm done. The circuits may have broken down but there are no consequences – or at least none that make legal sense. Form rules.

WITHIN THE REACH OF THE LAW

Analysis of the arguments of judges who have accepted the claim of wrongful life support this interpretation. With respect to form, some take a more explicitly "realist" stance by simply brushing formalist concerns aside. One dissenter wrote, "Solution to this legal conundrum – whether and how to protect the infant's interests – should not turn on labels or definitions. It should be emphasized in this case that the doctors' medical malpractice encompasses the child" (*Berman*, 20). Another dissenter said, "While logical objections may be advanced to the child's standing and injury, logic is not the determinative factor and should not be permitted to obscure that he has to bear the frightful weight of his abnormality throughout life, and that such compensation as is received from the defendants . . . should be dedicated primarily to his care and the lessening of his difficulties" (*Gleitman*, 704). The task for these judges is not how best to repel the threat that the wrongful life claim poses to the integrity of the form or the intelligibility of law, but how best to respond to the needs that were brought about by professional malpractice. Seeing through form allows one to see the body in pain better and refocus attention on the experiential aspects of chronic suffering. In the case of *Curlender* v. *Bio-Science Laboratories* (165 Cal. Rptr. 477, 1980) the California Supreme Court accepted the claim. Justice Jefferson wrote:

> The reality of the "wrongful-life" concept is that such a plaintiff both exists and suffers, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had the defendants not been negligent, the plaintiff might not have come into existence at all. The certainty of genetic impairment is no longer a mystery. In addition, a reverent

> appreciation of life compels recognition that plaintiff, however impaired she may be, has come into existence with certain rights. (488)

The claim has also been accepted by the Washington state courts. There the judge argued:

> It would be illogical and anomalous to permit only parents and not the child, to recover for the costs of the child's own medical care . . . The child's need for medical care does not disappear when the child attains his majority. In many cases, the burden of those expenses will fall on the child's parents or the state. Rather than allowing this to occur by refusing to recognize the cause of action, we prefer to place the burden of those costs on the party whose negligence was in fact a proximate cause of the child's continuing need for such special care and training.
>
> (*Harbeson*, 479, internal quotes deleted)

A variation on this theme is to assert that there is not, after all, a lack of fit between the claim and the form. There are rights, injuries, duties, and breaches. The *Curlender* court found that "the necessary element of *injury* is present" (486). Employing the same sort of analysis used in the landslide cases, it also found the necessary elements of foreseeability of harm, certainty of harm, closeness between the negligent act and the resultant injury, and moral blame. The Washington court also found no problem that form couldn't handle. "We now consider whether the wrongful birth action should be allowed in this state. We conclude that the action conforms comfortably to the structure of tort principles and that recognition of wrongful birth claims is a logical and necessary development" (488). Finding that the fit between the claim and the form is facilitated by harnessing legal change to the dynamism of scientific and technological progress, though, may require bringing law into line with progress in science and technology. As Judge Jefferson said, "Decisional law must keep pace with expanding technological, economic and social change" (484). "Keeping pace" with the representational and practical transformations allows legal thought and practice likewise to progress, or, at least, not to be left behind. "[A] factor of substantial proportions in 'wrongful-life' litigation is the dramatic increase, in the last few decades, of the medical knowledge and skill needed to avoid genetic disaster . . . [L]aw reflects, perhaps later than sooner, basic changes in the way society views such matters" (487). The implication is that failing to keep up with science is a greater threat to law than responding affirmatively to the wrongful life claim.

Looking at things this way allows one to look past any of the metaphysical or philosophical conundrums that troubled the other judges. Dreyfuss and Nelkin understand *Curlender* as giving voice to reductionism. "By rejecting the 'sanctity of life' principle," they say, "the court legitimated the central thesis of genetic essentialism that persons are defined by their genetic qualities . . . It . . . implied a willingness to treat wrongful life as, indeed, wrongful: irrevocably bound by biology, unsuited to normal opportunities and life experiences" (1992, 333–334). In contrast, I see *Curlender* as not at all articulating a dehumanizing position – a modern day *Buck* v. *Bell* – but as rejecting disembodiment and the formalist style that facilitates disembodiment. As another court said, "[I]t is hard to see how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society" (*Turpin* v. *Sortini*, 182 Cal. Rptr. 337, 1982, 344–345). These judges are not troubled by meaninglessness, and these cases are not invitations into the legal wilderness. Focusing on embodiment or physicality simplifies the question: was the defendant responsible for causing this situation or not? The judges also say that this is not a question that law cannot handle: "The dissents, written along the way, demonstrate that there is not universal acceptance of the notion that 'metaphysics' or 'religious beliefs,' rather than law, should govern the situation" (*Curlender*, 486). Neither the situation nor the claim is beyond law, beyond form, beyond reason, measure, or imagination.

CONCLUDING REMARKS

Genetic stories of different kinds circulate through the culture and become entwined with other expert and popular discourses and ideologies. They are powerful devices for making sense of ourselves (or of some of us) to ourselves. Some have the potential to underwrite strongly naturalistic renderings of "the human" and, in fact, to problematize the root distinction itself. Many scholars have alerted us to the dangers of determinist, reductionist genetic discourse. Many judges have responded to the wrongful life claim, interpreting it as entailing the dehumanization of the subject in whose name it is advanced. The cultural production of novel representations of nature and the genesis of what were, until quite recently, unimaginable material practices vis-à-vis that nature have given rise to novel problems with nature. These, in turn, create

the conditions for the invention of novel legal claims. To indulge again in the metaphoric possibilities of the topic, the wrongful life claim is usually responded to as if it were a doctrinal mutant. Most judges who have encountered it have noted its defects and "fatal weaknesses," and have sought to eliminate it. Others, though, perhaps more attuned to both the physicality of human existence, the trajectory of scientific and technological progress, or the restorative possibilities of justice, have been more willing to incorporate the claim as a useful adaptation and a vehicle for the continuing evolution of law itself.

CHAPTER THIRTEEN

RETURN OF THE BEAST WITHIN: LAW AND BIOLOGICAL CRIMINAL DEFENSES

INTRODUCTION

Violence is an abiding presence in this world. Humans practice it and experience it. Humans control it, focus it, or amplify it. We name it, categorize it, and argue about its limits. We argue about what events in the world count as "violence" or as something else. For some, violence must include some measure of physical force or destruction. For others, limiting the expression of violence to the physical may itself be an enactment of violence. Thus, we now hear about discursive or representational violence, and, as we saw in connection with animal experimentation and endangered species, physical violence may be encouraged precisely through the denial that it even counts as violence. Violence is a problem and violence is a solution. Violence is, as we know, even the solution to the problem of violence. And while we argue about its limits, its causes and cures, its pleasures and uses, we are commonly aided by a rough but durable taxonomy in which conceptions of nature play a fundamental role. When we consider violence in general or in regard to specific events, when we want to explain or assess it and gauge our response to it we work with a fundamental distinction between natural and human violence.

Natural violence comes in many varieties, large and small. It includes the violence associated with the forces of nature that provided the grounds for Mill's indictment: earthquakes, hurricanes, fire, and pestilence. It includes the stories of the spider and the fly, the cat and the mouse, the grizzly bear and the sheep, the virus and the immune system.

Natural violence is physically caused and its causes can be known, its occurrence sometimes predicted, controlled, or mitigated. Human violence, in contrast, is commonly regarded as a fundamentally different force in the world. Its distinctiveness is rooted in the distinctiveness of humans vis-à-vis the rest of nature. Human violence may be realized physically but it is commonly understood as originating in the immaterialities of mind. Will, intent, motive, malice, or justice, these are the wellsprings of human violence. Natural violence follows from causes, human violence flows from reasons.

Human violence is made meaningful by a second-order taxonomy. There is, of course, human violence directed at figures of external nature or animals that may not be counted as violence at all. Likewise, forms of structural violence based on the prerogatives of property are also commonly excluded. Importantly, there is the violence that individuals immediately direct toward other humans. This sort of violence may also be understood in terms of the nature–human distinction. "In doing violence to the Other," writes Ronald Santoni, "I treat him in the mode of objectivity, not subjectivity; I dehumanize him" (1993, 143). But one may also dehumanize one's self. "In impulsive or even cathartic violence . . . I act as though I'm a 'vitalistic organism', as though I am determined, not a distinctively free being . . . I violate my distinctive freedom by acting as though I'm controlled by 'forces' beyond my control. I treat myself, not just the other, as an unfree object" (144). This, of course, is not the usual way that human violence is understood. It is understood as nearly always chosen, nearly always the product not the denial of freedom. In any legal order, some forms of violence are permitted while others are prohibited. Consider the difference between boxing and assault. Some socially unacceptable forms of violence implicate criminal law but may, upon examination by legal authorities, be justified or excused. Among these are killing in self-defense or assault by someone who is mentally incompetent to stand trial. Questions of justification and excuse, of course, may turn on assessments of the reasons or the mental state of the perpetrator which impelled the violence.

Another important category of human violence is legal violence enacted in the name of the collective, the community, "the People," or the state. While certainly no less forceful or effective than "private" violence, it is conventionally understood to occupy a fundamentally different conceptual and moral position. Legal violence may manifest

itself in the context of war. It may be realized by the police in the furtherance of their mission to maintain public order. Different still from these episodic instances of legal violence is punishment. While not all forms of punishment are violent, violence, in its many expressions, is at the conceptual heart of punishment. When we punish we bring bodies to or beyond the threshold of pain. We control other human bodies by restraint or compelled movement. We may do it with words or with tools designed for the efficient delivery of pain. When words are used – "freeze," "put your hands where I can see them" – the tools that can make pain blossom are immediately at hand. One thing that makes this sort of legal violence different from private violence is that it is presumptively justified and legitimate. Its unjustified occurrence, as in the case of torture or when delivered without due process, removes it from the category "legal." The legal violence of punishment differs from private violence in that it is understood to be formal, rule based, procedural, proportional, constrained, and, crucially, deserved. To the extent that legal sanctions are known in advance by would-be offenders it can also be understood as, in a way, consensual. "You asked for it."

In our world, human violence is made intelligible by visions of the mind, of what makes humans – and our violence – radically different from nature and its violence. It is a vision of mind at once informed by and, in a sense, discrepant with, commonsense understandings of human behavior. As such it is a vision that implicates a particular conception of mind and body or mind and nature. We saw in some of the previous chapters that there are other bodies that compete with "the legal body" for our allegiance. Some of these other bodies present a problem for "the legal mind," or the picture of mind that informs modern law generally and the law of crime and punishment more specifically. One focus in this chapter will be a range of scientific renderings of the relationship between body and behavior – between brain and violence – that, some argue, naturalize violence and render the inherited taxonomy obsolete. These renderings describe and explain human violence as the physical expression of physical processes or causes. Reason, reasons, and reasoning have little to do with it. As these representations efface the root distinction between natural violence and (some instances of) human violence, they may also potentially undermine the distinction between justifiable and unjustifiable forms of legal violence.

We have also seen in previous chapters how representations of nature have been used to limit the scope of legal liability, rights, and

obligations. Here we shall encounter nature stories that fix the boundaries of criminal law, responsibility, culpability, and punishment. As in other contexts, these boundaries are the foci of political disputes that take place within the cultural arena of legal argument. In following the course of boundary making from "the outside" (human/"external" nature, humans/animals) to "the inside" (mind/body) we have arrived at a point at which the very idea of "mind" and the ontological distinction between humans and the rest of the universe that it anchors is explicitly called into question. Many scholars have noted that epistemic and technological developments in neuroscience, for example, challenge the conceptual foundations of basic legal categories and of the law idea itself (Dresser 1991; Shapiro 1992). These developments have also forced a fundamental rethinking (or defense) of basic understandings of what it means to be human. In these contexts, the politics of nature takes the form of the politics of the brain, and the politics of mind. And the politics of mind is inseparable from the politics of law itself. It also implicates or exacerbates potentially antagonistic relations between law and science as competing representations of reality. And while I shall concentrate my attention on contending discursive representations of the human/nature distinction, it is important to remember that these disputes are ultimately – materially – played out on the bodies of persons who are accused, excused, punished, or "treated."

But first, let's look at some bodies that are connected by the flow of violence. As the previous two chapters were concerned with the bodies of babies, we might begin by considering other babies who represent for us the embodiment of innocence and whose encounter with violence seems the furthest from imaginable justification or excuse. We shall end the chapter, though, by looking at the body of the condemned, whose reciprocal encounter with violence, we are told, represents the realization of justice in the world.

Consider these events: a five-week-old baby is dropped from a pier; a two-month-old is thrown into a river; an infant is swaddled, placed on a driveway, and repeatedly crushed under the wheels of a car. Another baby is smothered in her crib. In all of these cases the actor is the child's mother. Then there are other bodies: the bodies of adults and strangers, friends and parents that are shot, stabbed, strangled, and mutilated. In all of these cases the people who performed these horrendous actions were arrested and tested and tried. They all claimed that, because of one or another biochemical disorder at the time of the event, they were not able to control their behavior, could not control their "selves."

Indeed, in a sense, they claimed that it was not their "selves" that did the killing but their bodies that did it. When these claims are accepted their "selves" are held blameless – and their bodies are not exposed to the violence of punishment.

THE LEGAL MIND

The vision of mind and mental life that is presumed by law and legal discourse is the counterpart of the legal body described in previous chapters. That body – and its competitors – is constructed through representational practices and so are the legal mind and its rivals. Mind, in this sense, is a historical artifact. Indeed, it could be argued that because it is the necessary ingredient in the construction of the modern self and subjectivity, mind may be modernity's most significant artifact. But regarded as a historical artifact its genealogy is characterized by elements of continuity and change. Some of this may be seen in the history of the science of mind: psychology, psychiatry, behavioral sciences, and, more recently, neuroscience and cognitive science. I shall return to this later in the chapter.

The legal mind has had a complex relationship to the scientized or medicalized mind. The attraction and repulsion from more naturalized readings of mind constitute some of the most intense instances of legal ambivalence with respect to nature precisely because so much seems to be at stake. As in other contexts, the dominant position repudiates more materialist conceptions of mind. The legal mind is deeply conservative. So conservative, in fact, that in its own way it is understood as a natural kind – unique and essentially unchanging. In contrast, the succession of alternative minds offered by science is rather easily seen as a parade of social constructions. Above all, the legal mind is an elaborated version of the commonsense mind – the vision of mindedness that most of us use to understand our own behavior and that of others; the mind as the mind allegedly sees itself. In the philosophical and cognitive science literatures on the topic this vision of mind has been given the name of folk psychology to distinguish it from more specialized scientific, biological, and highly technical alternative renderings of mind (Stich 1983). The picture of mental life and processes described by folk psychology has been denounced and celebrated, attacked and defended by scientists, philosophers, and legal scholars. The arguments might be seen as constituting a sort of politics of the mind (and brain) – the Mind Wars we could call it. And because the consequences of

changing (our prevailing picture of) minds – or refusing to – seem to be so high, the politics is, at least rhetorically, of correspondingly high intensity. As many commentators claim, what is at stake is the very idea of human distinctiveness.

Inside the legal mind

The most salient feature of the legal mind and the mind of folk psychology is its difference and autonomy from the body, or the idea "that persons are possessed of a self that is free, rational, and unique to itself, an entity causally and morally set of from the nomic web that ensnares the rest of material reality" (Hill 1997, 291). The immateriality of mind presupposes that mental events and processes are not caused in a physical sense. That is, the human/nature and mind/body distinctions are given a more specific figuration by way of the mind/brain distinction. Nearly every conception of mind must recognize that it is somehow connected to the brain that contains it but how these "connections" are understood is the, some say irresolvable, question. What makes minded beings radically distinct from – and often, therefore, superior to – other beings is the presence of consciousness and mental states. Mental states are commonly described as propositional. They are made out of the words or images that our minds produce. They include beliefs, for example, or units of knowledge. Mind is also described in terms of various faculties such as those associated with reason, will, or judgment. There is a sort of division of mental labor within the mind. And mind is also, of course, dynamic. We speak of mental *processes* such as reasoning, deliberation, wishing. We can change our minds, our minds can change themselves, but these processes are not physical processes. This is what makes the happenings of consciousness of a radically different order than all other known happenings in the universe. If there is a division of mental labor this division is also characterized by a hierarchy through which the various faculties are related. As was discussed in chapter 10, an important division within the world of the mind as mapped by folk psychology is that between the rational mind and the emotional mind and an important set of processes concerns how these are related to each other in terms of control.

If the mind is the seat of the self, that self is still a social self. The propositions, that is, the content of mental states, are made possible by learning the language of the community into which we are born and socialized. Human children internalize language and with it culture and its rules. As I discussed in chapter 4, through these processes we become

actual persons and members of the wider human community. The basic ground rule of membership concerns achieving self-control which is understood as requiring the dominance of the rational mind over the emotional mind, and of reason over will. As Hill (1997) writes, "The central idea underlying the concept of the unity of the self is the notion that there is a will that stands over and above one's various, often conflicting desires" (327). And this will is, in turn, subordinate to reason. Within the world of the mind, reason is enthroned as the highest and most distinctively human faculty. In a sense, emotion is positioned in relation to reason as nature is to human. Gradations in humanness are determined with reference to the degree of control of reason over emotion. Historically children, women, people of color, and others have been (relatively and relationally) naturalized through their closer association with emotion as compared to adult white men. This closer association has conventionally been seen to account for their corresponding limited capacity for self-control. As we have also seen, desire is also aligned with corporeality. The power of reason over desire in an individual's mind, as writers as diverse as Hobbes and Freud have asserted, represents the front line of the enduring struggle of humans over nature and the forces of civilization over savagery. Again, the story of this struggle is the story of emergence and progress. Importantly, the struggle is understood as implicating a real measure of choice, that is, freedom. As a human individual matures, develops, she gains greater rational control over her emotions, greater freedom *from* her more wild, impulsive, self. This augmentation of control is socially recognized by the incremental accrual of rights and responsibilities. But again, these processes are understood in terms of the mind operating on itself, albeit guided and reinforced by social rules, by "nurturing," and occasionally by the infliction of corporeal discipline.

The central feature of mind in law is the presence of free will where "free" carries connotations of being both unconstrained and uncompelled. In folk psychology and legal discourse, this is the most "unnatural" entity in the universe. And its unnaturalness seems to entail, for many, its recalcitrance to the sort of explanations that apply to the physical world. As many have noted, the very existence of rationality is rationally improbable in the extreme. Legal scholar Michael Moore puts the question in his influential article "Causation and the Excuses" (1985): "After all, is it not extraordinary to think that part of our most basic metaphysical picture of what the universe is like – in terms of causal relations – should have no application to persons? Is it not

extraordinary to think that agents who can clearly cause changes to occur in the world are themselves uncaused?" (1112). In the face of this, some simply assert the irresolvability of the mind/body problem and counsel that we simply accept the "mysteriousness" of mind, consciousness, and humanness. Others, as we shall see, disagree.

The mind in the body

The mind of folk psychology, the modern mind, the Cartesian mind, are understood as radically other than the body. While consciousness, mental states and processes are understood as not caused or produced by physiological processes, human minds are recognized as being, in some sense, "in" bodies and as connected to bodies in important ways. In law as in everyday life these connections are understood as manifest in behavior and conduct. Mind is made known to the world by what bodies do. Much of what human bodies, like other bodies, do is not, of course, volitional. Respiring, aging, metabolizing, healing; these are things that bodies accomplish on their own. But much of what human bodies do is understood as being under the direction of mind. Actions are willed, purposive, done for reasons. Much of the observable behavior of human bodies is intelligible with reference to mental states, and when we have occasion to explain or assess behavior we usually refer to a part of the mind picture that describes how the mind of a person controls her body. Self-control implicates the control relations of reason over desire. "Being free," says Hill (1997), "is roughly equivalent with one's being "in control" of one's actions" (351) or, as Alan Hyde (1997) says in a more legal framing, "The legal subject has a sort of free will, a mental autonomy. It commands the body and the body obeys . . . The legal subject is distinct from the body, not identical to it" (259). This most common understanding can be schematized as follows:

mind (self, will, reason, choice) –> (commands) –> **body** (behavior)

And behavior has a worldly aspect. It is often observable and it often involves manipulating other material objects. When we speak, the mind commands our mouths and vocal apparatus to produce sensible sounds. We may or may not choose our words carefully, but we are responsible for what we say. When we move our bodies through the world we, through introspection, know that we have reasons. When we see others move, we do not assume that they are automatons but that they, like ourselves, are also directed by reasons. We open doors, wave to acquaintances, order Hunan crispy fish, cut down trees, operate on

monkeys, sign contracts, make love, or slap faces because we intend to. The schematization can then be extended:

mind —> body —> world

Much of the transformativity of the world is attributable to nature: it rains and the world becomes wet, tectonic plates shift and a hillslope collapses, a gazelle is weakened by drought and is picked off by a lion, a sperm and egg fuse and a zygote is produced. But much is attributable to the intentional guidance of human bodies by human minds.

The human world is, of course, a social world. It is a world in which humans act together. It is a symbolic world. It is a world made meaningful, in part, by rules and these rules also have reasons. It is a normative world. The legal subject, ideally, internalizes the rules and their reasons. He may make them his own – and direct his body accordingly, or, in a given instance, he may ignore or renounce them and direct his body accordingly. Some human behaviors are socially unacceptable, some are even criminal. We lie but not all lies are crimes. We take things from others without asking but not all takings are crimes. We kill other humans, but not all killings are crimes. Some may even be duties.

Because human behavior is understood as presumptively controlled by mental states and processes such as beliefs and intentions, reasoning and deliberate choice, then explaining and assessing the whys and wherefores of bodies in the world requires the inferential examination of their reasons and motives. The act may be tragic but the culpability of the actor, the level and scope of her responsibility, is assessed with reference to the mental states. This picture of mind grounds the distinction between natural violence – or acts of God – and human violence. Within the domain of human violence it may ground the distinctions between acceptable and unacceptable, justifiable and unjustifiable, excusable and punishable violence. It therefore provides the foundation for justification and for punishment, that is, for the violence that is deployed in answer to violence. Because all of these distinctions may be dependent on (an increasingly controversial) understanding of nature, then the various renderings of nature, of the human/nature distinction, the relationship between humans and nature, minds and bodies, minds and brains, may give rise to competing answers to the questions of how the line should be drawn between justifiable and unjustifiable legal violence. But this is getting ahead of my argument. First, as in other contexts, we should turn our attention to the use of legal forms and the ways

in which more detailed renderings of mind inform the structure of legal categories through which human violence is made legally meaningful.

Formal taxonomies of killing

In an important sense, any episode of killing human beings is unique. Every killing marks the end of a singular biographical life. But precisely because of that, all killings are, in another sense, the same. Nevertheless, we do differentiate among events that have the shared schematic form: A killed B (Dressler 1994). We do have categories of killing. The legal forms with which we make sense of killings are, in general form, statutory, but the boundaries that give structure to those forms may be reworked by argument and judgment. Given a killing and an accusation, prosecutors and defenders navigate the formal field of legal meanings. The forms admit of different levels of culpability and, in turn, guide types, degrees, or amounts of punishment. As in other contexts, the practice implicates questions of "fit" – fitting events to the forms and fitting legal response to the level of culpability. The existence of levels is, in principle, guided by the rights of the accused, by a fundamental commitment to proportionality of punishment (legitimate violence) to the offending act (illegitimate private violence), among other considerations.

Among the familiar categories of illegitimate killing are first- and second-degree murder, voluntary and involuntary manslaughter, and negligent homicide. The most important criteria for distinguishing them concern elements of the mental state (or mens rea) of the accused at the time of the event. For example, first-degree murder might require that the act be "willful, deliberate and premeditated" (Dressler 1994, 208). Some criminal codes mention "lying in wait" as a prototypic element. Second-degree murder is also intentional but may have occurred when the accused was suffering an extreme emotional disturbance. Voluntary manslaughter may be charged when the accused intended to physically harm but not to kill the victim who, nevertheless, died as a result of the act. It may also include so-called "heat of passion" killings. Involuntary, or second-degree, manslaughter is the result of "recklessness" and, as the name implies, negligent homicide requires only carelessness, not recklessness or intent. There may be other distinguishing criteria such as whether the killing happened during commission of a felony, but the legal response to "A killed B" largely turns on retrospective assessments of the accused's mental state. What is important here is, first, that the categories of killing constitute a formal field

for making events legally meaningful, and second, that the form that punishment will take follows from what is claimed about the contents of mind.

Inferences are made about "mind" in large part from what is known or inferred about the accused's body – her behavior, actions, or comportment, as well as other physical evidence. Claims about what she did before, during, and after the event are woven together into a narrative that is taken to reveal the workings of her consciousness. The inferences that are made about her mind, for example, the presence or absence of malice or a guilty mind, determine what will become of her body, that is, what form, if any, punishment will take.

Punishment and blame in specific instances are seen to follow from and be justified by post hoc readings of the accused's mind. Punishment more generally presupposes a reading of the generic or normal mind posited by folk psychology. This mind, again, is radically other than the body. As prominent criminologist Joshua Dressler (1988) writes:

> We affix blame to people, but not to other living things because we believe that humans are unique in their capacity to make moral decisions about how they act. The concept of blame, in other words, is predicated on our view of persons as autonomous agents whose actions stand on an entirely different footing from events in the universe . . . Desert is based on the principle that a specific blameworthy act can be imputed to a person – not just to the body of a person . . . if, but only if, he had a capacity and fair opportunity to function in a uniquely human way.
>
> (701, internal quotes deleted)

Or, as expressed by the court in the case of *US* v. *Lyon* (739 F 2d 994, 1994), the insanity defense is a reflection of the "fundamental moral principle of our common law" (994). That principle is that punishment – violence – is justified when deserved and not justified when not deserved.

Most justificatory theories of punishment – as distinct from other responses to troublesome events such as eradication or treatment – are based on understandings of the effect of the experience of suffering. The mind of the evildoer is the desired site of transformation. Deterrence, rehabilitation, and retribution are all, though in different ways, assumed to have some positive effect on the mind of the criminal, even if this is simply and brutally to "learn a lesson he won't forget." As Blecker describes the image, "we impose pain and suffering for [the criminal's] sake. Through punishment, we make him whole" (1990, 1167). If the

mind of a particular offender is such that we cannot reasonably expect these transformations to occur, then not only is punishment not justifiable, but excusing – that is, exercising the capacity to discern when collective violence is neither just nor effective – becomes the mark of civilization. In excusing for reason of insanity we remove bodies from a circuit of violence because to do otherwise would be demeaning to ourselves and our claims of being civilized. That is, in the practice of excusing – or at least in the formal fact of having excuses available, even if access to them is extremely limited – and in adherence to the commitment of proportionality, we reveal which side of the civilized/barbaric divide we are on.

OTHER MINDS

In many ways, then, renderings of the mind, the body, their differences and relationship provide the conceptual ground for the modern economy of physical violence and its relation to justice and order. To speak of *the* mind is to suggest an image of a generic mind against which specific minds and particular mental states and events are interpreted and assessed. We might call this mind the normal mind. But, there are other aspects of legal form that express a recognition that not all minds fit the normal framing and that the utility of the normal models and forms may, in some situations, be limited. These aspects of form pertain to the system of justifications and excuses. Some justifications for killing may refer to normal minds under extraordinary circumstances, such as self-defense. Anyone would be justified and, hence, blameless in this situation. Some excuses, such as those implicated in insanity defenses, refer to these other kinds of minds. The insane are "not like us." They are, as one judge put it, "alienated from human experience" (*US* v. *Torniero*, 520 F Supp. 721, 1983, 724). While the insane have minds, their minds are "defective," sick or broken. There are many ways to make sense of "them." All of these ways also, of course, make sense of "us" as well. In many ways, the figure of "the insane" does the same sort of work that the figure "animal" does: if they are not us, then we are not them. And, indeed, the figure of the animal has been an historically important trope for making sense of "them." As Foucault has written, "madness borrowed its face from the mask of the beast" (1965, 72).

This comports well with popular imagery of the violently insane. They are beasts, predators, monsters. Projecting animality onto them might be understood as an attempt to underwrite and purify our own

claims to humanness. But, on the other hand, regarding them not as animals but merely *like* animals highlights the moral foundations of law and legal violence. The insane are, therefore, figures of both humanity and animality. We may regard them as human enough for compassion but not for punishment. "The insane," writes Moore, "like young infants, lack one of the essential attributes of personhood – rationality. For this reason, human beings who are insane are no more the proper subjects of moral evaluation than are young infants, animals or even stones" (1985, 1137). And as criminologist Fingarette claims, "The very fact that the [insanity] defense is ultimately available expresses, even if only in a symbolic way, the concern of the law with citizens as rational beings and not as mere creatures" (1972, 7).

Because the insanity defense is available, attorneys may attempt to navigate the formal categorical field in an effort to protect clients from punishment or allow them access to treatment. I shall examine the pragmatics of this distinction in the next chapter. For the present we can say that in navigating this field attorneys might tell a different kind of story about

mind —> **body** —> **world**

that reveals the limits of the standard model. The story might include a recitation of "crazy reasons" ("God told me to kill her," "I was trying to impress Jody Foster") (Morse 1999). These stories may be reinforced by expert testimony. The general idea, though, is that if the first part of the model

mind —> **body** —> **world**

is inaccurate in a particular case, then its reciprocal form

world (law) —> **body** (punishment) —> **mind** (deterrence, rehabilitation, desert)

is also inapplicable. If, as judges and criminologists claim, blaming or "moral evaluation" of the insane is misplaced, then so too is punishment. As one leading legal commentator writes: "[T]o blame a person is to express a moral criticism, and if a person's action does not deserve criticism, blaming him is a falsehood . . . Blame and punishment give expression to the concept of personal responsibility which is a central feature of our culture" (Kadish 1987, 264). But the justifications for excusing, in these cases, are not confined to issues of fairness to the accused; rather, they implicate the integrity of law and *its* claims to being

a civilizing force. The insanity defense, as I have already noted, has been identified by judges as expressing "the fundamental moral principle of our criminal law," that punishment accrues only to those who deserve it and desert is a direct function of rationality and control. As Justice Marshall said in *Ford* v. *Wainwright* (477 US 399, 1986), "The reasons at common law for not condoning the execution of the insane – that such execution has questionable retributive value, presents no example to others and thus has no deterrence value, and simply offends humanity – have no less logical, moral, and practical force at present" (499). For law to act otherwise than in accordance with these facts, for law to direct the force of violence onto and into the bodies of those who are morally blameless would represent, in Marshall's words, "The barbarity of exacting mindless vengeance" (510). On this view, the ways in which the law treats the body of the insane offender is a rather direct measure of where to locate law on the scale of barbarism (mindless brutality) and civilization (reason and humanity). The stakes may be high because if the law makes the wrong move it may effect a reversal with the alleged criminal. Legal violence – mindless and barbaric – then goes unjustified, unrestrained, and unanswerable.

Sometimes there is no question about an accused's insanity. Prosecutors, defense attorneys, and judges may all agree that the killer would have no understanding of legal procedure and would not be competent to stand trial. But often there are questions and disagreements: disagreements about competence to be tried, about the contents of the killer's mind at the time of the killing, about the utility of the model, about the justifiability of legal violence. As in other contexts, these questions are addressed with reference to the forms. And because they are formal questions, they are all versions of the question: where do we draw the line? The most immediate line is the one that constitutes the boundary of the categories "sane" and "insane," or "normal" and "abnormal," or "us" and "them." Other lines and distinctions are derivatives of this one. And, as one reading of the form has it, "for the purposes of guilt determination, an offender is either wholly sane or wholly insane."

Testing the firmness of the line

To assist legal actors in drawing the line in the right place, the law of insanity contains a small number of what are called "tests" but which are more accurately simply interpretive rules of thumb for generating answers. If the defendant is seen to have (or not have) the characteristics named by the rule they "pass the test" for insanity; if otherwise,

then they are rendered sane and fit candidates for legal violence. Not all American jurisdictions have the insanity defense. In those that do the most common test is the right and wrong test or the *M'Naughten* Rule (8 Eng. Rpts. 718, 1843). To use it one simply asks whether the accused was able to tell the difference between right and wrong and was aware of the consequences of his or her action. This test is historically derived from an eighteenth-century test called, not incidentally, "the wild beast test" (Robinson 1996). Many legal scholars contend that the wild beast test, though now operating under different names, remains the prevailing standard by which to assess criminal responsibility and justify the withholding of legal violence. Laura Reider (1998), for example, has criticized the continued viability of the *M'Naughten* Rule because "it unrealistically distills the ability to know down to a purely cognitive function" (305), and so in practice only applies to "drooling idiots." Another legal commentator (Perlin 1994) has called it "the lemon squeezer test" because it is only available to defendants who could not tell the difference between the victim's head and a lemon.

Among the alternative "tests" for insanity is the "irresistible impulse test" which does not focus on what the defendant *knew*, but rather asks if a "mental disease impaired an offender's abilities to *control* her actions" (Reider 1998). This test "rests on the assumption that there are mental diseases which impair volition or self control even while cognition remains unimpaired and that persons suffering from such diseases would not be acquitted under [the traditional test for insanity]" (307). But there are worries here.

> Some theorists argue that the irresistible impulse test broadens the defense far too much, making it available to psychopaths, to neurotics, perhaps to all who commit crime. This is said to follow from the impossibility of determining which acts were uncontrollable rather than merely uncontrolled, and the attendant suspicion that the former category does not really exist. Therefore, an underlying problem regarding the implementation of the irresistible impulse test is a worry that the test has no scientific foundation. (308, internal quotes deleted)

Another alternative is the "product test," under which "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." This too seems to allow a conception of mind that is not reducible to only cognitive abilities. Part of the justification for this rule as announced in the case of *Durham* v. *US* (214 F 2d 862, 1954) concerned the connection between blame and the

normative grounds for punishment. "If the defendant had a mental disease, his mind could not be expected to respond properly to the threat of sanction" (Goldstein 1967, 82) or to the imposition of punishment on his (or her) body. These alternative tests have overwhelmingly been rejected, leaving the insanity defense available only to those for whom the inapplicability of the legal model of mind is manifest. It is much harder to tell the difference between those impulses that are really irresistible and those that the agent chooses not to resist or between those actions that are really beyond control and those that the agent chooses not to control. The default test, then, is a rhetorically updated version of the wild beast test.

The insanity tests all project relatively simple, and relatively ancient, images of mind, mindedness, and humanness. It may be worth while to point out that, as the image of the drooling idiot suggests, the inference of insanity is often a direct function of a reading of the accused's body. As Michael Perlin argues, in order to be legally categorized as insane in criminal cases, the defendant has to look and act "crazy" as this is popularly imagined. He has to look and sound like a raving maniac or a drooling idiot. If he "looks OK" to the police, lawyers, judges, or juries, he is presumed to be OK. One problem with this, though, is that most mental illnesses do not present these kinds of symptoms (Perlin 1994). But insanity, after all, may have little to do with mental illness as understood by mental health professionals. It is a category of legal thought not medical discourse. Another problem is the catch-22 problem: the often expressed anxiety of judges and scholars that what amounts to a behavioral "test" creates opportunities and incentives for some defendants to "act" crazy, that is, to fake insanity as a way to cheat the legal system and escape the force of legal violence.

THE FACE OF EVIL

"The insane," then, is an important legal figure. But some of the issues here are raised in consideration of another legal figure who is also radically different from "us" but also differs in important ways from the insane. This figure is the psychopath. The psychopath is not a drooling idiot. Psychopaths such as Ted Bundy, Jeffrey Dahmer, or Theodor Koszinski are commonly described as intelligent, rational, or even charming. Except when they are murdering, dismembering, or, perhaps, eating, their victims, they are just like us. But, as Reider says, "For those of us who have been successfully socialized, imagining the world

as a psychopath experiences it is close to impossible" (1998, 324). Psychiatrists understand the psychopathic mind as one in which there is no "defect of reasoning." Rather, their impairment is localized in the emotional or volitional faculties. Part of the problem is that *they* fail to recognize *our* humanity. But because they are rational, in the sense of being able to reason, or to provide coherent narratives, they are understood as conforming to the standard model of

mind —> body —> world

and therefore as being appropriate candidates for the legal response to transgression. One way of making sense of the insane/psychopath distinction is to see the former as lacking, to a significant degree, the specific faculty that makes humans distinctively human. Through no fault of their own, they lack the "executive function" of mind and are governed by "emotion" or perhaps even "instinct," the more "naturalized" faculties of mind. Psychopaths do not lack this executive function. Because they are understood as possessing free will and the capacity to choose, they are like the rest of us except that instead of choosing to resist their impulses, they choose instead to ignore "the voice of humanity" and kill other humans. They allow their (lower) natures to guide their actions in the world.

There are other ways that we can make sense of the psychopath and his or her choices. One makes use of the older, fundamentally theological distinction between good and evil. This allows us to distinguish "the mad" from "the bad." Forensic psychologist Barbara Kirwin, for example, draws a clear and firm distinction between "the truly insane" (by which she means those who can be categorized according to prevailing diagnostic symptomology as suffering from a cognitive incapacity to know what they are doing) and "the evil" (or those who know but do not care, who can control but choose not to). She writes: "I have seen the courts let too many people . . . get away with murder and other crimes by saying, in essence, the devil made me do it. With killers [like them] I believe that devil is a devil they *choose* to listen to" (1997, 35). They are not mad, they are bad. While the bad may be rhetorically dehumanized as monsters or as evil incarnate they are human enough to be tried, convicted, and punished. Kirwin says, "There is no doubt . . . that notorious serial killers Ted Bundy and Jeffrey Dahmer were both psychopaths. [But] they were not crazy; they were evil" (24). And, as Malcolm Gladwell says, "The difference between a crime of evil and a crime of illness is the difference between a sin and a symptom" (1997,

147). As we shall see, the imagery provided by the story of good and evil is repudiated by other, more biologically inclined psychiatrists. One, Dorothy Lewis, who specializes in the psychopathology of killers says, "Forensic pyschiatrists tend to buy into the notion of evil. I [feel] that that's no explanation. The deed itself is bizarre, grotesque. But it's not evil. To my mind, evil bespeaks conscious control over something. Serial murders are not in that category. They are driven by forces beyond their control" (quoted in Gladwell 1997, 134, see also Lewis 1998). They are driven, perhaps, by nature. Nonetheless, the lexicon and iconography of evil remain potent conceptual resources for making sense of some manifestations of human violence. Moreover, they sometimes find expression in legal discourse.

For a number of reasons it may be worth while, then, to look a bit more closely at the idea of evil; to look it in the face. First, ideas of evil are implicated by some conceptions of nature, of humanness, and of the relations between them. Second, within this framework of good and evil, law is commonly identified as a force through which good may be realized in the world. Law, and especially criminal law, is what we use to vanquish – or at least, constrain or contain – evil. Law is infused with morality. It is the antithesis of evil. But, third, law may, in a sense, need evil to exist in order to present itself as good. This is an important point to consider because there are other, more materialist explanations of psychopathic violence that threaten to obliterate the very framework of good and evil. According to some, banishing evil problematizes the very notion of normativity. These materialist, physicalist, biological frameworks, then, are resisted, in law as elsewhere, precisely for this reason. The resistance to these naturalizing moves sets up an overt conflict between science and law. But to the extent that scientific representations of violence are repudiated, some argue, law becomes its supposed opposite. Far from being the product of reasoned constraint, legal violence comes to be seen as an expression of an emotional craving for revenge. Law becomes a manifestation of evil itself. And to the extent that evil is associated with nature – irrationalism, emotionalism, animality, wild disorder – then repudiating biological accounts of human violence may be understood as resulting in the regression of law into a figure of nature. This effects a reversal of the emergence stories we examined in chapter 4 and we have already encountered other expressions of reversal in chapter 10. This, indeed, is the thrust of Justice Marshall's anxiety about the infliction of unjustified punishment as constituting "the barbarity of mindless vengeance."

My discussion of evil draws on a remarkable book by Fred Alford, *What Evil Means to Us* (1997), a series of essays written after conducting interviews with ordinary Americans and with prisoners – including rapists and murderers – about evil. From a more pragmatic or constructionist point of view we might change the question to: What do we do with "evil"? What do we make of it? How do we make use of it to make sense of the human experience?

In Alford's view, evil is about a type of willful obliteration of boundaries, most importantly, the boundary defining self and other. "Evil," he says, "is a version of cutting."

> In evil we cut another rather than ourselves. We may do it literally or figuratively, as in a cutting remark, but the goal is the same: to implant our dread within another, and so define its boundaries, its limits, containing the uncontainable in the form of another so we might live . . . we do evil so as to feel the boundaries for a little while, even false ones. In evil we scratch the surface of the other in order to mark the separation. At the same time we do the opposite, acting as if there were no boundaries, no limits. My access to your body limited not even by the envelope of your skin which I slice open before you even feel the pain . . . your boundaries nothing more than the expression of my will. (1997, 101)

Violence motivated by evil, then, is the physical expression *of* evil in the world. He quotes one informant as saying, "Evil people don't just want to hurt you, they want to hurt you from the inside, so it's like you're hurting yourself" (21). But evil may be present in all of us. It may, in fact, be constitutive of humanness. "Much evil," Alford asserts, ". . . has a psychopathic quality to it, a quality in which we all participate by virtue of being human" (7). But he also says that "evil is not only the cruelty that another intends, it is the human suffering we cannot escape" (16). The project of being consists in containing that evil, to prevent its leakage into the world. The ground of evil is the sense of existential dread. He cites Ernst Becker, who in *The Denial of Death* (1973), wrote that "Full humanness means full fear and trembling, at least some of the waking day" (45). Alford elaborates: "Capable of transforming the external world, reason is finally powerless before the dread that motivates this transformation: dread of limits, of mortality, of meaninglessness, of vulnerability, of loss" (1997, 80). This understanding, then, allows a rather different figuration of humanness. "Perhaps we misunderstand what humanity is, equating it with warmth and tenderness, Disney humanity. Perhaps it is much simpler, a willingness to contain one's

dread and terror. Not inflicting it on others, transforming it into art, including the art of living. Everything else is detail" (108). Evil, then, is the pouring out of one's dread into the mind – or soul? – of another, often by way of the other's body. And this implicates another sort of boundary. While the possibility of evil is available to everyone, the failure – or inability – to contain it compromises one's claim to humanity. "Evil is the absence of humanity; the failure to understand or appreciate the humanity of the other" (22). Indeed, "evil is what reveals to us the limits of being human" (50).

But, if evil is "the absence of humanity," if it marks "the limits of being human," is evil then a figure of nature? Perhaps it is. We saw in previous chapters how nature has historically been seen as a figure of evil. Wilderness – and wildness – had for centuries been understood as evil's place in the world. As such it was made the object of fear and dread and avoided or "conquered" on that account. We also saw the rationalist Mill demonize "Nature" and justify "her" domination for the same reason (see also Merchant 1980). The conquest of nature and the conquest of evil have historically been identified with each other; each has therefore implied the other. Wild beasts and monsters are also significant figures of nature. One of Alford's incarcerated informants, a rapist, describes his prepenitentiary life like this:

> I was out of control. I was acting like an animal. I knew it was wrong. But I couldn't stop. The more bad shit I did, killing cats, hurting people, the more evil I felt, and the more evil I did. Finally, I took her out of spite. I didn't even want her. I wanted to be a beast. I didn't know any other way to live. (1997, 11)

If nature and evil are identified with each other, then the discursive processes of naturalization and demonization may be variations on a common theme. Thus, from the standpoint of power, to naturalize other humans is often to render them as the embodiment of evil and fit candidates for domination. Alford makes the point explicitly: "Marginal groups such as Jews, blacks, and prison inmates are identified with unconquered nature, in the vain hope that with their containment or destruction the terror of nature itself can be overcome" (81). In segregating, confining, expelling, or controlling the bodies associated with nature-evil, power purifies itself. And in purifying itself it demonstrates and enacts the reality and primacy of human goodness over the forces of darkness associated with nature-evil. From this perspective, law is the instrument that humans have devised to effect this. And as law purifies

power, it purifies itself. But on this point Alford recommends cautious skepticism.

> It is the freelance quality of criminal violence which makes that violence socially intolerable to a civilized society. It is not obvious that that quality makes the violence more evil. [But] its presence does thwart our consideration and confrontation of the organized evil of states and societies, as we tend to confuse organization, rationalization, and legitimation with goodness, at least when it is our own. (30–31)

Perhaps this story about evil, nature, and law makes sense in its own terms – that is, we can understand how it is used to make sense of violence and law, crime and punishment. If it does, though, the nature that we are using is very much a pre-Enlightenment artifact. It is a theological, cosmological – some might say, primitive, atavistic, even animistic – figure. Evil, here, is inseparable from the notion of sin. Evil is the handiwork of the Devil, of Satan. Evil represents one of the two fundamental forces of cosmological Nature. Human existence may be nothing other than the site where the workings of this cosmic struggle between Good and Evil are played out. But it is precisely because this pre-Enlightenment imagery of nature-evil continues to animate legal forms and practices that many contemporary observers are repelled by it. On the other hand, the summary dismissal of evil as an organizing tool is also not without problems.

STILL OTHER MINDS

The conflicts between the legal mind of folk psychology and the psychodynamic mind of professional psychoanalysis reveals something of the anxiety of legal thought when challenged by other renderings of mind. It also shows some of the ways that legal actors respond to those anxieties. Nevertheless, this conflict is one between alternative readings of mind that in general share a common perspective on the body. They diverge on questions about the mechanics of immateriality as these are manifest in behavior. The psychodynamic mind is relatively easy to dismiss, owing, perhaps, to psychology's relatively tenuous claims to the status of hard science. But there are other construals of minds and bodies that are seemingly more firmly grounded in physicalist, biological frames of reference. There are more naturalized accounts of violence that claim to render obsolete both the legal mind and its psychodynamic competitor. In fact, some of these newer challengers assert that the very idea of

mind and mental states should go the way of evil as an essentially superstitious way of making sense of humans. As legal thought confronts these rival minds it finds that the intelligibility of fundamental distinctions between humans and nature, minds and bodies, minds and brains is called into question. These more materialist, perhaps determinist, accounts are also characterized by rather specific and detailed representations of physicality; that is, of nature. The conflict between law and science, therefore, may be sharper here and the stakes for incorporating or repudiating these representations of nature are, presumably, much higher. In this section I shall trace the outlines of these conflicts.

If, as I suggested earlier, "mind" can be viewed as a cultural artifact, it is an artifact with a history. The emergence, elaboration, and displacement of the psychodynamic mind illustrates some of this history. The twentieth century witnessed a proliferation of competing mind stories. And while the legal mind of folk psychology may be characterized by a large degree of apparent stability – to the extent that this "commonsense" mind may be read back in time to pre-Enlightenment eras – other minds are much more fluid and changing. According to many, while the psychodynamic mind may remain the mind of choice in the practice of psychology, the practice of psychiatry has largely abandoned it in favor of more biological understandings. Treatments, or what to do about troubled minds, have shifted from analysis to pharmacology. Then there are still newer minds associated with the fields of neuroscience and cognitive science. With respect to explaining violent behavior, one commentator simply states that "The concept of a sick brain [has replaced] the concept of a sick mind" (Jeffery 1992, 172). Some sense of the stakes for legal models and forms is suggested by the same author, who says, "What we call 'free will' is the activities of the brain controlling the somatic nervous system" (164).

There has been a parade of more speculative or philosophical materialist conceptions of human behavior throughout the twentieth century. Prominent among these in the middle decades was the behaviorism promoted by B. F. Skinner. As Hill describes it, "According to behaviorist theory, not only is all we know a function of external influences, so is all we are and do" (1997, 324). And according to Andrew Lelling, "Behaviorists look only to observable physical activity for an explanation of human behavior, maintaining that folk-psychological talk of 'mental states' is just so much unverifiable conjecture" (1993, 1487). He continues: "By removing mental states and the peculiarly human trait of consciousness from consideration, Skinner dehumanized psychology"

(1488). Then there was sociobiology and its more recent incarnation as evolutionary psychology which situate human behavior within the framework of evolution and regard *Homo sapiens* as a species among – and generally continuous with – other species. A more recent participant in what we might call the mind wars is eliminative materialism, which draws its sustenance from developments in neuroscience. As a materialism its focus of attention is the brain as organ, as tissue in its connections with the rest of the body. And what "eliminativists" eliminate is the very idea of mind. As Lelling understands it,

> Eliminativists attack the most basic presumptions of common-sense psychology, declaring them an elaborate fiction waiting to be destroyed by a completed neuroscientific explanation of human behavior . . . Eliminativists assert that there is simply no such thing as beliefs, desires, and intentions, or any other mental states and that we all operate under profoundly incorrect views of human cognition and behavior. (1492)

He quotes philosopher Paul Churchland as predicting the ultimate demise of folk psychology: "[C]ommon-sense conceptions of psychological phenomena constitute a radically false theory, a theory so fundamentally defective that both the principals and the ontology of that theory will eventually be replaced . . . by completed neuroscience" (1476). As Rebecca Dresser states the position, "Mind is part of the natural order" (1991, 28).

These renderings repudiate not only the legal mind, they also repudiate the legal body as the passive substrate-cum-instrument of that mind. But in biologizing mind, materializing behavior, and (by implication or application) scientizing violence, they also are seen to threaten notions of responsibility and crime. These threats may be more difficult for legal actors to dismiss than was the psychodynamic mind. In these newer mind stories reasons are dismissed in favor of causes: it is the brain that causes the rest of the body to do what it does. Because this brain is continuous with the rest of the body, what *it* does may be explicable in terms of genetics, endocrinology, and neurochemistry. For example, as one supporter of these naturalized renderings explains:

> Individuals are responsible for their actions to the extent that they are able to evaluate and make decisions about the consequences of their behavior. Responsibility means that the rational brain is in control of the emotional brain. A brain that lacks certain biochemicals or certain past environmental experiences is not capable of making rational decisions. Since behavior is dependent on the serotonin levels of the brain,

> whether or not one is rational depends on the serotonin levels of the brain. I may be calm or irrational depending on the serotonin level. My moral self is thus defined by my serotonin level. (Jeffery 1992, 168)

The occurrence of violence still requires specific explanation insofar as the brain of a killer may differ significantly from most human brains but, as Jeffery says, "The law does not call our heartbeat, or our reflexive acts, voluntary. The law uses the division of the nervous systems into somatic and automatic as a basis for talking about voluntary versus involuntary behaviors" (173). These challenges are not only theoretical. They are also quite practical. And as the more theoretical accounts challenge the legal, folk-psychological mind as such, the more practical versions are concerned only with readings of the specific brains and bodies of actual killers.

All natural violence

Here are some events in the social life of violence that have been naturalized by defense attorneys. Stephen Mobley reportedly boasted to his cell mate that before he shot the manager of a pizzeria he had forced him to beg for his life (*Mobley* v. *State*, 445 SE 2d 61, 1995). Raymond Tanner forced his way into a neighbor's apartment and sexually assaulted her with, prosecutors claimed, the intent to kill her (*People* v. *Tanner*, 91 Cal. Rptr. 656, 1970). Sheryl Masslip placed her six-week-old son Michael under the tire of her car and drove over him. She then placed his body in a trash can and reported him kidnaped (*People* v. *Masslip*, 271 Cal. Rptr. 868, 1990). Sharon Comitz dropped Garret, her one-month-old son, off a bridge into an icy stream. Like Masslip, she also told police that her baby had been kidnaped (*Commonwealth* v. *Comitz*, 530 A 2d 473, 1987). Shirley Santos did not kill her daughter. She did, however, beat her so badly that the child required emergency medical care and Santos was charged with felony assault (discussed in Carney and Williams 1983 and Solomon 1995). Danny Jones beat his friend Robert Weaver to death with a baseball bat. He then killed Robert's grandmother, Katherine Gumina, and Tisha, Robert's seven-year-old daughter (*State* v. *Jones*, 917 P 2d 200, 1996).

Each of these violent actors was prosecuted. At various points in their entanglements with law each made a claim about how their bodies were significantly different from normal bodies. Each attempted to reframe the topic away from minds and reasons and toward bodies and causes. Each offered a redescription of violence as a purely physical event with

physical causes over which they had no control and about which they had no knowledge. The redescriptions were offered in the idiom of scientific representations of intracorporeal physical processes. Each told a story about nature in order to be excused, to have the charges lessened, or to have punishment reduced.

Mobley was convicted and sentenced to death. On appeal he made various claims. One, drawing on the strong propensity for violence in his family, suggested that he had a genetic predisposition to extreme violence. During his trial he had requested funding to undergo genetic testing. The request for funding was denied. Here is a version of his explanation.

> [S]tagnant MOMA [Monoamine Oxidase A, an enzyme] activity among affected males resulted in the excretion of abnormally high amounts of the neurotransmitters serotonin, norepinephrine, dopamine, and epinephrine, all of which are normally broken down in the body using MOMA . . . [W]hen these neurotransmitters accumulate in abnormal amounts due to a defect on the MOMA gene, affected individuals will have trouble handling stressful situations, causing them to respond excessively and at times, violently. (Price-Huish 1997, 610)

Tanner pleaded guilty and was committed to Atascadero State Hospital for testing. While there it was discovered that, instead of the usual complement of one X chromosome and one Y, Tanner had two Y (or male sex-linked) chromosomes. He moved to change his plea to not guilty by reason of insanity. The motion was denied. Here is a version of this story:

> [E]xcess amounts of plasma testosterone, the hormone principally responsible for the development of the secondary male sex characteristics, exists in certain XYY individuals. If it can be shown that an extra Y chromosome causes this hormone to exist in abnormal amounts, then the hypersecretion of this hormone, which controls the degree of aggressive behavior, may be the vehicle that translates the XYY abnormality into anti social behavior. If the XYY defendant is driven toward aggressive responses, he may have difficulty in controlling his behavior.
>
> (Horan 1992, 1369–1370)

> In most of these patients intellectual capacity, sexual instincts, aggressive impulses and emotional responses all showed evidence of immaturity, defective development and inadequate control.
>
> (Coffey 1993, 362, internal quotes deleted)

Masslip was found to be sane and was convicted of second-degree murder. She moved for a new trial. The trial judge set aside the verdict, reduced the charge to involuntary manslaughter, and found her not guilty by reason of insanity. The cause of the insanity was postpartum psychosis. The State of California appealed. Here is a version of Masslip's story:

> A woman's biochemical makeup undergoes massive change and stress after childbirth and [that] can . . . lead to a temporary breakdown in the normal flow of brain chemicals that creates [a woman's] natural state of mental balance . . . During pregnancy, estrogen and progesterone increase a thousand fold . . . Following birth, these levels drop suddenly to normal or below normal. This rapid change in estrogen and progesterone levels has been compared to a drug addict experiencing sudden withdrawal. (Button 1989, 325, internal quotes deleted)

Santos plea bargained with the district attorney. The felony charges were dropped and she pleaded guilty to a misdemeanor. Santos had claimed, however, that her violence was attributable to premenstrual syndrome. Here is a version of this rendering: "Although to date the pathogenesis of this disorder remains speculative, the weight of evidence supports the premise that PMS is related to an aberration in the cyclic function of the hypothalamic-pituitary-ovarian axis" (Solomon 1995, 25, internal quotes deleted); "[the symptoms of PMS include] irritability, anger, confusion, depression, amnesia and uncontrollable impulses resulting in violence" (Carney and Williams 1983, 255).

Jones was found guilty and sentenced to death. One part of his appeal was that the trial court erred in having given insufficient weight to Jones's history of head injuries as a mitigating factor in sentencing, and, as in *Mobley*, refusing funding for neurologic testing. Here is a version of this story:

> Mechanisms of traumatic brain injury basically involve tissue compression, twisting and stretching that exceeds the normal capabilities of the tissue involved and may lead to cell death due to shearing forces, compression or bleeding . . . As the frontal lobes are generally the most affected, emotional disturbances and personality changes are commonly encountered leading to alterations in the individual's ability to make decisions, plan, focus, make selections and self-monitoring of their own performance. (Bitz and Bitz 1999, 232)

Here is a more detailed account of the mechanisms of behavior:

> An external stimulus is evaluated in the hypothalamus of the brain for fixed action responses such as visceral reactions and general arousal, the same stimulus also triggers data encoding in the cortex which depends on an interrelation between an emotional evaluation in the amygdala and cognitive evaluation in the cortex. The emotional feelings, thoughts, and images are interrelated with the acquired data to form the functional cognition of the cortex. This suggests that the amygdala is an essential area of contact and integration between cognitive and emotional motivations . . . The amygdala . . . is located within the frontal portion of the brain, the region associated with violence and criminality.
>
> (Bitz and Bitz 1999, 239–240)

Is it a simple matter to squeeze any of these renderings into the M'*Naughten* Rule or assess them with "the lemon squeezer" test?

Appeals courts respond in various ways to these nature stories. As we have seen, while judges may express deference to science in general, they commonly repudiate specific science stories. As with the repudiation of the psychodynamic mind, they may characterize the specific representations as too theoretical or speculative, as providing insufficient certainty with regard to the particular bodies and behaviors at issue. In the *Mobley* case the Georgia Supreme Court held that the "theory behind the request for funds will not [reach] a scientific stage of verifiable certainty in the near future and that Mobley could not show that such a stage will ever be reached" (*Mobley* v. *State*, 445 SE 2d 61, 1995). In *Tanner*, the California Court of Appeals decided that "the studies of XYY individuals undertaken to this time are few, they are rudimentary in scope and their results are at best inconclusive" (*People* v. *Tanner*, 91 Cal. Rptr. 656, 1970). In *Jones* the Arizona Supreme Court said, "[W]e agree . . . that the head trauma that defendant suffered as a child is a mitigating circumstance, but we also agree with the trial court's conclusion that this mitigation is not sufficient to call for leniency" (*State* v. *Jones*, 917 P 2d 200, 1996). Biological claims were accepted in *Masslip*, but not in *Comitz*. Because she pleaded guilty to a lesser charge, the PMS defense was not addressed by the judge in *Santos*. It has, though, been accepted in some English cases and in a recent Virginia case, *State* v. *Richter* (discussed in Hosp 1991). In this case a doctor, having been stopped by the state police for erratic driving, responded aggressively, yelling at the trooper, "You son of a bitch; you fucking can't do this to me; I'm a doctor. I hope you fucking get shot and come into my hospital so I can refuse to treat you" (quoted in Hosp 1991, 433). She also tried to kick him in the groin. The judge was persuaded that there was a

reasonable assumption that her outrageous behavior was not caused by drinking but by PMS.

We can see in these cases occasions when lawyers for criminal defendants attempt to bring representations of nature to bear on legal form (sanity/insanity); or representations of the body to bear on how law will deal with the body in question. If we look at it this way, we can see that judges may respond by keeping the body out (as in *Mobley*, *Tanner*, and *Jones*) or by letting it in (as in *Masslip* and *Richter*). In any case, defendants assert that theirs are exceptional bodies. As such they do not pose a per se challenge to the legal mind and its supporting body. Many legal commentators applaud keeping the body out. Repudiating these biological representations of violence is nothing less than a dismissal of junk science and a renunciation of determinism. Others, though, see in these kinds of case an increasing and increasingly unavoidable conflict between law and science. And they see this as creating trouble for the legal subject and for the law idea more generally.

The problem for law is that "the law is maintaining its own view of human behavior while scientists fill in an increasingly different reality" (Lelling 1993, 1529). "As science begins to explain the deeper secrets of nature," Lelling warns, "it becomes increasingly difficult to attribute a phenomenon to some ethereal, inscrutable ingredient and leave the matter at that" (1993, 1493–1494). Malcolm Gladwell, identifying the most unstable feature of the legal mind, says that neuroscience will "force a change in the way we think about criminality. Advances in the understanding of human behavior are necessarily corrosive of the idea of free will" (1997, 145–146). Perhaps clearest about the stakes for law is Rebecca Dresser, whose essay title, "Making up our Minds: Can Law Survive Cognitive Science?" sums up the problem.

> Much of our system of legal rules and responsibilities absolutely depends on the presumption that people have precise, content-identified mental states, that these states cause behavior, and that others can determine when a person has or had a mental state of a particular content . . . Cognitive science could herald the abandonment of mens rea and all the other subjective mental states determinations so crucial to the law.
>
> (1991, 35)

At least at the level of legal commentary, interpretations of law's present and projected responses to naturalizing representations of violence constitute a sort of politics of the brain as a form of the politics of nature. As Dresser makes clear, the politics of the brain may be inseparable from the politics of law.

Many arguments have been made for letting the body in, that is, for privileging scientific representations of the physical, corporeal nature of violence. Reider criticizes what she calls "the rationalist bias" according to which human distinctiveness is understood. This sees rationality

> as a distinctively human capacity requiring uniquely human components. By contrast, feelings and biological regulation are not peculiarly human phenomena; in fact, these are features that human beings share with a wide range of animal species. Prejudice of sorts has led to a historical reluctance to acknowledge that some of the lower level aspects of human biology may heavily influence the higher-level functions such as rationality. (1998, 330)

She calls explicitly for "a naturalized description of the physical processes of moral capacities . . . A more physically realistic account may reveal the necessity of viewing moral ascriptions along a sliding scale" (334). The point is most forcefully made by Ray Jeffery in "The Brain, the Law and the Medicalization of Crime" (1992):

> Criminal law is based on a primitive concept of revenge . . . Criminal law did not end violence; it only transferred it from the private sphere to the public sphere. I would make a speculative judgment that, in the evolution of the primate brain, the rational brain evolved alongside the emotional brain. As the rational brain grew in size and complexity it gained some control over the emotional brain. However, the rational brain never did gain complete control over the emotional brain; it only placed violence within the confines of rational conceptualizations, which justified punishment and violence in terms of such basic legal doctrines as mens rea, moral guilt, just retribution, and utilitarian deterrence. We still execute criminals, but we do so with great legal ceremony and dialogue. The brutality of the old revenge is retained, but it is hidden from view. Our prison systems and executions are as brutal as medieval punitive systems, but they are given respectability by the rational brain . . . The present prison system is not ethically defensible, even though it is put forth as a system derived from ethical principles. We need a new examination of the ethics of criminal law, one based on the scientific principles of behavior. (167–168)

For these proponents of incorporating more scientific or realistic accounts of human violence into law there is far more to be gained in doing so, and much to be lost in refusing to do so. Legal discourse would be more realistic, objective, progressive, in accord with other authoritative

discourses. It would also, they suggest, be fairer, truer to itself. Repudiating naturalistic renderings raises the specter of law collapsing into superstition, emotionalism, and, finally, the barbarity of mindless violence that Justice Marshall had feared.

But there are also powerful reasons for keeping nature at a distance, for keeping the body out, for reasserting the integrity of the legal mind and reinforcing the models of crime and punishment that it anchors. We have already encountered the anxieties pertaining to uncertainty or the indeterminacy of scientific representations, and of law being colonized by science. But even if science could give greater assurance as to the accuracy of its facts, there remains the fear of determinism and the collapse of the fundamental distinction. Again, as John Lawrence Hill says,

> The implications of these modern modes of materialist reductionism would appear to have devastating consequences for the traditional view of the self; in the most significant sense, on the level of ontology, the reductionist rejects the notion of the self, along with those of ideas, thoughts, desires and the entire panoply of mental entities, as remnants of folk psychology. (1997, 341–342)

Quoting the philosopher Lynn Rudder Baker that, if people "never can be said truly to want or believe, then surely they can never be said truly to act responsibly, or have a conception of justice, or know the difference between right and wrong," Dresser asks, "Would we indeed lose the normative moral framework in which law makes its home?" (1991, 34). Or, as Karl Jaspers once put it, "If I am nothing but nature, nothing but the product of knowable causality, it is not only incomprehensible that I know this nature and use my knowledge to intervene in it; it is absurd that I justify myself" (quoted in Dallmayr 1988, 145). Steven Morse sketches some more dystopic possibilities.

> [T]he criminal law might treat persons as part of the biophysical flotsam and jetsam of the universe and respond solely on the basis of the type and degree of dangerousness people threaten without regard to moral responsibility. In such a world, practices such as blame and punishment would have primarily instrumental value, useful for controlling the harm producing behavior of homo-sapiens, much like antibiotics are useful for controlling the dangerous propensities of bacteria . . . the necessity for just deserts presupposes a view of persons as potentially morally responsible, that is, as rational, uncompelled agents, rather that as merely bodies moving in space. (1994, 1589)

And there are other suggested consequences of naturalizing criminal law. Among these is the encouragement of cynicism and the delegitimation of law. Michael Moore argues that

> Acceptance of the causal theory of excuse may lead to an unfortunate cynicism about the moral basis of the criminal law. If one accepts the determinist thesis that all events, including all human behavior, are caused, and if one believes that causation excuses, then one must believe that moral responsibility is an illusion on which liability to criminal punishment can not be built. (1985, 1094)

Letting the materialist body and its brain into legal evaluations is seen to threaten the erasure of human distinctiveness as predicated on the radical ontological distinctiveness of mind. Because it threatens this, it puts at risk the intelligibility of the human subject and risks the evaporation of normativity – or, at least of any normativity that we would recognize. And there are still other difficulties, such as the shift from punishment based on responsibility and desert to a view of prevention based on physiology that would seem to be required. Michael Shapiro suggests that some people "will be happy if we never learn anything more about neurotransmitters and their effects on behavior" (1992, 192).

Letting nature (or too much nature, or the wrong sort of nature) in, it seems, might come at too high a price. But given the flood of scientific representations that problematize the legal mind and the forces working to incorporate them into legal discourse, how can the lines between law and science, *physis* and *nomos*, humans and nature be maintained so as to preserve the legal subject and the law idea? One strategy amounts to a simple dismissal. Criminologist Steven Morse says that, "even if the science employed to gather medical and psychological findings is reliable and valid, such findings would still be inaccurate proxies for moral and legal criteria for responsible action" (1996, 546). "Until the doctor comes and convinces us that our normative belief in human agency and responsibility is itself pathological, biological causation per se does not excuse" (535). A related strategy is to celebrate common sense and folk psychology over the discourses of neuroscience or psychiatry. Daniel Robinson suggests that the best tool for distributing legal violence is, really, one of the oldest, the wild beast test.

> The point is that the psychological defects and eccentricities that would clearly raise questions of competence and intent are either drawn from the domain in which jurors can enter empathically or are drawn from a domain so foreign as to require a guide or expert if the relevant signs are

> to be read right . . . Where the mental health professionals are on firmest footing is in diagnosing conditions so severe as to leave no doubt in any observer's mind: the legendary "wild beast." (1996, 252)

Of course, these moves would not persuade critics of the prevailing forms and models nor do they acknowledge the price of maintaining the wild beast.

CHAPTER FOURTEEN

CONTROLLING DREAMS: LAW AND THE INVOLUNTARY MEDICATION OF PRISONERS

INTRODUCTION: THE ROOTS OF DANGER

In chapter 13 we encountered people who claimed to have had troubles with nature – with their biochemistry or genetic inheritance – that resulted in their having troubles with law. In most cases, as we saw, the biological framings offered to judges by defense attorneys were refused. I suggested that some judges were apprehensive about the consequences for law of accepting these more naturalizing renderings of human violence. In the present chapter we look at situations that are similar to these in some respects but that occur within a different set of legal-cum-medical contexts. Here culpability of the legal subject is not being assessed; the subject is already incarcerated. The body is already under the control of the state. One dimension of the problem is determining whether there are physical and normative limits to that control.

Like some of the people who put forward biological defenses, Walter Harper was having troubles with nature (*Washington* v. *Harper*, 494 US 210, 1989). One culturally significant way of grasping the nature of these troubles is to say that he had "a dysregulation in certain brain regions of the dopamine system" (Julien 1996, 245). This dysregulation, in turn, might be causally related to "a low production of glutamic acid decarboxylase" or, perhaps, to "dopaminergic overactivity in the basal ganglia which could be secondary to dorsal lateral-prefontal cortical (DLPFC) GABA deficit and a corresponding alteration in the input to subcortical nuclei" or, maybe it is related to a "combined dysfunction of dopamine and N-methyl-D-asparate-glutamate receptors"

(247–248, internal quotes deleted). However the etiology of the troubles are understood, what this means is that Walter Harper is schizophrenic. Schizophrenia is a psychosis. And a psychosis is "a mental disorder so severe that it involves loss of contact with reality" (Perrine 1996, 220). The schizophrenic is out of touch with objective reality and lives within his or her subjective unreality. Schizophrenia is commonly characterized by reference to a suite of "positive" symptoms such as visual and auditory hallucinations, paranoia, bizarre behaviors, disorganized and irrational thinking and delusions, as well as "negative" symptoms such as apathy, emotional nonresponsiveness, and social withdrawal. In some cases it may be associated with violence. That is to say schizophrenia has profound – and profoundly disturbing – experiential manifestations. As one former schizophrenic reports, "No one can experience anything but abject terror as his or her mind disintegrates into madness. The panic state immediately preceding schizophrenia is the most appalling and devastating experience that any person can undergo – it is a disorganizing and transitory state, wholly incompatible with life" (Modrow 1992, 19). As the medical descriptions attest, these experiential and behavioral states are commonly understood as the effects of underlying neurochemical dysfunctions.

As luck would have it, while schizophrenia cannot be cured, it can sometimes be treated (Gelman 1999; Healy 2002). That is, there are means of intervening in the cascade of causes and consequences such that some of the worst symptoms can be alleviated for some, but not all, schizophrenics. The history of treatments for psychoses has included lobotomies, electroshock treatments, the inducement of insulin comas, and, for hundreds of thousands of people, institutional segregation. In the latter half of the twentieth century a number of antipsychotic or neuroleptic drugs were developed by pharmaceutical companies. These include Thorazine (SmithKline), Compazine (SmithKline), Prolixin (Apothecon), Vesperin (Squibb), Navane (Pfizer), Taractan (Roche), and Haldol (McNeil). These drugs – or psychotechnologies – have had a profound impact on the sociology and political economy of mental illness. Not the least of these impacts has been the dramatic deinstitutionalization of the mentally ill in the period immediately following their widespread use. Also, as I shall discuss more fully below, the effects of the drugs are widely seen as irrefutable validation of a biological model of mental illness and the consequent "triumph" of biological psychiatry over psychoanalytic models of mind.

Physically, the workings of antipsychotics are understood as related to their ability to block dopamine receptors on neurons. These pharmaceuticals make possible the material-technological intervention into the chemical processes of neurons, synapses, receptors, and pathways in a brain. As Robert Julien says, "The word *neuroleptic* means 'to take control of the neuron'" (1996, 249). But before they can take control, they have to get to the locations where they are to do their work; these medications have to be synthesized, distributed, and administered. They also have to be introduced into the schizophrenic's body. This may be done orally or through intramuscular injections. They have to travel through the circulatory system, pass through the blood–brain barrier, and then bind with the target receptors.

Some of these substances have had a profound effect in reducing psychotic symptoms for many schizophrenics. One way of making sense of this, according to some authorities, is to say that the effect is to "normalize" patients. Psychiatrists Thomas Guthiel and Paul Appelbaum, for example, claim that "Antipsychotics . . . reverse the symptoms of mental illnesses (i.e., psychoses); their aim is the eventual restoration of normal mentation" (1983, 79). Robert Julien describes some of the effects of Thorazine this way:

> Dopamine-secreting neurons located in the central mid-brain stem send axonal projections to those parts of the limbic system that regulate emotional expression as well as to the limbic forebrain areas, where thought and emotions are integrated . . . Indeed, an increased sensitivity of dopamine receptors in those areas may be responsible for the positive symptomology of schizophrenia. Thus chlorpromazine [Thorazine] decreases paranoia, fear, hostility, and agitation. It also reduces the intensity of schizophrenic delusions and hallucinations. In addition, chlorpromazine dramatically relieves the agitation, restlessness and hyperactivity associated with an acute schizophrenic attack. The delusions and hallucinations are particularly sensitive to treatment. (1996, 261)

But, as luck would also have it, these are not the only effects of these psychotechnological interventions. People who are given these medications commonly also develop what clinicians somewhat disingenuously call "side effects." They may, for example, experience, "a syndrome of the subjective feeling of anxiety accompanied by restlessness, pacing, constant rocking back and forth and other repetitive purposeless actions" (261). This is called akathesia. Or they may be affected by "involuntary muscle spasms and sustained abnormal, bizarre postures of the limbs, trunk, face, and tongue" (261). This syndrome is called dystonia.

Or they may develop a severe and irreversible condition involving "involuntary hyperkinetic movements, often of the face and tongue but also of the trunk and limbs, which can be severely disabling. More characteristic are sucking and smacking the lips, lateral jaw movements, and darting, pushing or twisting of the tongue. Choreiform movements of the extremities are frequent" (262). This is called tardive dyskinesia. It has been estimated that up to 50 percent of people medicated with "first generation" antipsychotic drugs developed tardive dyskinesia as a result. Tardive dyskinesia, akathesia, and dystonia, then, are iatrogenic or physician-caused illnesses. Here is how murderer-prisoner-author Jack Henry Abbott described his experience with Prolixin:

> These drugs . . . do not calm or sedate the nerves. They attack. They attack from so deep inside you, you cannot locate the source of the pain. The drugs turn your nerves in upon yourself . . . The pain *grinds* you into *fiber* . . . You ache with restlessness, so you feel you have to walk, to pace. And then as soon as you start pacing, the opposite occurs to you; you must *sit* and *rest*. Back and forth, up and down you go in pain you cannot locate; in such a wretched state you are overwhelmed.
>
> (1982, 42–43)

Another described his experiences like this:

> There is no other feeling like it. Nothing to relate it to, no experience anyone would normally go through in their life. It affects you mentally and physically and you feel suicidal. The physical effects are so bad you can't stand it. You get muscle spasms, predominantly in your legs, but also in all other parts of the body including your facial muscles . . . Your thoughts are broken, incoherent; you can't hold a train of thought for even a minute. You're talking about one subject and suddenly you're talking about another. You start to roll a cigarette, drop it, pick up a book . . . Your mind is like a slot machine, every wheel spinning a different thought . . . the thought of suicide keeps recurring in order to alleviate, once and for all, the tortuous effects of the drug.
>
> (Quoted in Opton 1974, 641)

So, it might seem as though schizophrenics like Walter Harper are faced with a choice of terrors: either live with the symptoms of schizophrenia or live with the potentially devastating effects of the treatment. Or, one might say, they have a choice between accepting their troubles with nature or accepting their troubles with technology. One might imagine that this would not be an easy choice. And, of course, it may be that being schizophrenic problematizes the very concept of "choosing."

But Walter Harper had other troubles as well. Not only was he schizophrenic, he was also in prison. In 1976 he was convicted of robbery and sent to the Washington State Penitentiary in Monroe. He was paroled in 1980 with the condition that he participate in psychiatric treatment. In 1981, while being hospitalized, he assaulted two nurses. His parole was revoked and he was sent back to prison. This time he was sent to the Special Offender Center (SOC) in Monroe. This is a unit for prisoners with behavioral or mental disorders. There Harper initially consented to receiving antipsychotic medications. However, after experiencing some of the other effects of the pharmaceuticals, he withdrew his consent and refused to take the drugs (*Washington* v. *Harper*, 494 US 210).

Harper's troubles now became the authorities' troubles. According to subsequent legal arguments there had been "numerous documented instances of Harper's unprovoked assaults on staff and other inmates [and] physical and verbal harassment of staff and inmates" (Brief of Petitioner, *Washington* v. *Harper*). Harper was dangerous. Not only was he out of touch, but sometimes he was out of control. Moreover, his violence – and their troubles – were understood as being directly related to his underlying biological disorder. That is, the dysregulation of his dopamine system was manifesting itself in the world as social violence. Under these conditions, one might imagine that the authorities had no choice but to disregard Harper's refusal and to medicate him forcibly, against his will. Whether or not the staff psychiatrists and administrators had a choice, Harper didn't.

So, imagine this scene in a room – or perhaps a cell. Four orderlies restrain Harper. They pin him down. He struggles, yells, curses. A syringe presses down on his flesh and the point punctures the skin. A thumb applies pressure to the syringe and the medication is released into Harper's body. It circulates through his bloodstream, pushed by his heart. A portion of it passes through the blood–brain barrier and molecules of the pharmaceutical bind with receptors on his synapse. After a while, calm returns to the room and order is restored.

MAKING SENSE OF WALTER

One approach to making sense of Harper's situation is to ask: who owns the body? Harper's body is the site of struggle and the object of contested control. As in some of the other contexts examined in this book, how one makes sense of the situation must rely on the understanding

of embodiment that is brought to the task. But the generic body is here encountered more specifically as the dysfunctional and criminal body. These contextual features might either complicate or simplify the job of making sense.

One important framing of Harper's body that is available, of course, is the liberal-humanist vision of embodiment that we have tracked in previous chapters. A central feature of this framing is that the body is other than and subservient to the mind. Mind is likewise understood as not only distinct from but irreducible to corporeality, physiology, or neurochemistry. So too, perhaps, is mental illness. The immaterial mind is the locus of selfhood, personhood, identity, and individuality. Mind refers one toward the domain of thoughts, beliefs, memory, consciousness, mental processes, and will. And these uniquely human features, in turn, ground conceptions of autonomy, freedom, and human dignity. As we have seen repeatedly, mind – and not body – is what makes us human (and not merely *Homo sapiens*). The body may be both a container *for* the self and the property *of* that self which inhabits it. However, precisely because of its intimate relationship with a unique – and uniquely human – *self*, the human body cannot be regarded as merely a material object among other material objects. Legal scholar Lawrence Tribe has described the human body as "the major locus of the separation between the individual and the world" (1988, 1330). As Tom Gerety has asked, "[I]f we don't control our bodies, what do we control? – and indeed who are we? . . . The body," he says, "is the necessary condition of both identity and autonomy" (1977, 266). And indeed, attorneys for Harper closed their brief to the US Supreme Court with the assertion that "The human body commands the greatest respect. It is the only thing in the world that is truly ours. When it is gone, we are gone" (Brief of Respondent, *Washington* v. *Harper*).

The appropriateness of the liberal–humanist body, however, may be of questionable value for making sense of Walter Harper. In the first place, he is in prison. The state already controls and occupies his body in fundamental ways. As an object in the world its movements may be radically constrained or compelled by state agents. The incarcerated body is also the immediate locus of punishment. As both an object in the penal environment and the container-instrument of the self, the body of an inmate is necessarily the site of contests and struggles. One might, however, reasonably distinguish between the *outer* body that exists as an institutional object and the *inner* body that exists beneath the surface of the skin. Even if the state may – or must – control the outer body it does

not follow that it may enter and control the inner body of the inmate. With respect to questions of bodily integrity American judges have long asserted that even in prison there exists "a sphere within which the individual may assert the primacy of his own will" against interference from the state (*Jacobson* v. *Massachusetts*, 197 US 11, 1905, 29). The skin, or what Gelman (1995) calls the dermal boundary, may reasonably be seen as a material barrier to external authority. The organs of legitimate violence may go this far and no further. In prison the material scope of an inmate's autonomy and authority may shrink to a minimum, but the minimum is not the vanishing point. "[P]risoners do have a reasonable expectation that the privacy of their bodies and their minds will not be physically invaded by the state" (Floyd 1990, 1267). As Gelman says, "The targets of biological alteration [which acts include forced injections] become objects of state action in an extraordinary way. The state relates to them not in their capacity as persons or moral agents, but rather because they are the carriers, or the locales, of impersonal biological processes" (1995, 1232–1233). State-mandated biological alterations are, from this point of view, inherently dehumanizing. One set of questions raised by the involuntary medication of prisoners is whether the dermal boundary is an absolute barrier that should be respected and whether the inmate has the final authority to make this decision.

The context of incarceration, though, is further complicated by the fact that Harper is mentally ill. He is not simply an offender, he is a Special Offender. Moreover, part of what makes him special is his body. Even if, generally or formally speaking, prisoners in America retain control over their inner bodies, it may not follow that those who are psychotic do. Some argue that mentally ill inmates – call them patients – are incapable of making these decisions, especially if what they are objecting to is called "treatment," and more especially still if that treatment is aimed at reducing the effects of their psychosis. In these contexts their refusal might not even be understood as a genuine refusal at all. Indeed, they may be understood as being enslaved *by* schizophrenia (insofar as the patient is seen as having an existence apart from her psychosis at all). Consequently, it may be the disease *itself* that is "refusing" and resisting the efforts of physicians to liberate the patient *from* the psychosis. For example, Guthiel puts the question explicitly: "[I]s that patient more free whose delusional refusal of medication is honored, freeing him or her from nonconsensual invasion of bodily integrity? Or is this a sham freedom, a 'freedom of psychosis,' that represents a greater slavery than having the refusal, under appropriate sanctions, overruled,

even at the cost of bodily invasion?" (1980, 327). "[A] psychosis," he says, "is itself involuntary mind control of the most extensive kind and itself represents the most severe 'intrusion' on the integrity of the human being" (327). Perhaps under these conditions the authorities have not only a right but a humanitarian *duty* to disregard the objections of the inmate. In any case, these extraordinary conditions reveal the potential limits of the liberal-humanist vision of (dis)embodied subjectivity.

Just as Harper and his body may be understood both as an object in an institutional environment and as the container of a (disordered and disorderly) self, so the institutional environment – the Special Offenders Center – is itself bifurcated, or perhaps hybridized. It is both a legal-penal space and a medical-clinical space. The authorities are both prison officials and physicians, punishers and healers. Walter Harper is simultaneously a legal subject being disciplined for a crime for which a court of law found him responsible *and* an object of biomedical classification undergoing observation, diagnosis, and treatment. His very thoughts, words, and actions are understood as manifestations of an underlying physical, neurochemical disorder. The space itself and the events that it makes meaningful may oscillate or shift like the figure and ground of the famous duck/rabbit drawing. Seen one way we are confronted with fundamental issues of human dignity and civil liberties. Seen another way selfhood and autonomy – to say nothing of rights – are at best irrelevant and, more likely, dangerous distractions.

In contrast to the liberal-humanist framing, argue supporters of involuntary medication, exceptional cases like this need to be understood primarily in terms of a more physicalist conception of embodiment. Here, context is all-important. The inmates' rationality and competence are questionable. In fact, the act of refusal may itself be the clearest evidence of irrationality. As the Washington State Attorney General argued before the US Supreme Court,

> The clinical psychiatric literature indicates . . . that medication refusal by psychotic inpatients is inextricably linked to the process of illness . . . A psychiatric clinical approach focuses on an individual's actual intent or meaning, which may well be different from what he says at any given point in time . . . factors other than a principled stand for individual autonomy – including anger, whim and psychotic reasoning – underlie most treatment refusals. (Brief of Petitioners, *Washington* v. *Harper*)

It is the psychosis itself that is saying "no," not the patient. It is the body that is refusing. The premise of these arguments supporting

overriding refusal is that schizophrenia and other psychoses are essentially neurochemical problems and psychotropic drugs such as Thorazine and Prolixin are simply material technologies developed to address the dangerous consequences of these medical problems. In principle, treating schizophrenia with neuroleptics is no different from building a dam for flood control, spraying insecticide for pest control, or using a spermicide for birth control. The struggle over Harper's body can easily be seen as an episode in the politics of nature. Supporters of forced injections emphasize these physiological, neurochemical, and pharmacological aspects of the situation in order to justify disregarding refusal and overpowering resistance. Supporters of refusal commonly argue that in overriding and overpowering an inmate state authorities are practicing dehumanization of the severest sort. Moreover, forced injections dehumanize subjects both in their assumptions and in their practical effects.

Supporters of refusal insist that something crucial is being disregarded by supporters of forced injections. The authorities are not merely invading and controlling the inmate's body but they are invading, controlling, and modifying the inmate's *mind*: the very locus of humanness and the foundation of human dignity. Moreover, they are doing so to further their own subjective ends. Federal district court judge Walinski claimed that "These drugs . . . deaden the patient's ability to think and their forced administration is an affront to basic concepts of human dignity" (*Davis* v. *Hubbard*, 506 F Supp. 915, 1980, 930). Legal scholar Jamie Floyd says, "Depriving an individual of the right to decide for himself whether to take drugs that will affect his brain deprives him of the most fundamental aspect of his own humanity" (Brief for Respondent, *Washington* v. *Harper*, 15). Or, as the *Davis* court put it,

> If a patient has no protected interest in his body, in how his body will be used and how his mind will work, in almost every sense of the word the patient ceases to be an individual and instead becomes a creature of the state. Only when a person is granted a certain sphere of autonomy does that person become an individual. (*Davis*, 933)

These ways of making sense of what happens in institutions emphasize that the forced injection of psychoactive substances into nonconsenting subjects fundamentally differs from, say, forced vaccination, surgery, or even rape. Controlling an inmate's mind – his thoughts, mental processes, desires, even the content of his dreams – is not incidental to the practice but is its express purpose. Penetrating the body, as significant

as this may be in its own terms, is merely a necessary step in occupying the mind. As with reproductive and genetic reductionism, the medical model of schizophrenia identifies the person wholly with the body, the disease, and its symptoms, with no remainder. It facilitates the disregard of voice and the dismissal of the experiential dimensions of medication.

The medical-pharmacological naturalization of the inmate is continuous with a long history of dehumanizing schizophrenics. In "The 'Schizophrenic' and the Liminal Persona in Modern Society" psychiatrist Robert Barrett discusses "the core [cultural] meanings" that historically have been attributed to schizophrenia. "Conventional theories of schizophrenia," he writes, "are based on two core ideas. One is the idea of a deficiency in that quintessential human quality, reason." Like animals and other figures of nature, the schizophrenic is here identified by absence and negativity. "[T]he second core idea . . . [is] that regression to a primitive, infantile level leads to an outpouring of drives, urges and emotions," or "a regression to the lowest and earliest evolutionary levels." In conventional medical theories "Schizophrenia is a deficiency in higher reason that permits the lowly primitive to burst forth" (1988, 466–467). The schizophrenic is stuck at the threshold of emergence into the order of humanity. We see the figure now on our side of the line, now on the other. He or she is a hybrid, or, to use Barrett's term, he or she is liminal. The boundaries of the concepts that make the schizophrenic meaningful shift – or can be shifted. They oscillate. "Someone categorized as 'schizophrenic,' may be simultaneously regarded as a person and not a person," writes Barrett (475). He asks a more practical question: "Where [is] the category 'schizophrenic' positioned by those people and institutions (psychiatric, legal, medical) with the responsibility to define what is, or is not a person?" Answering this question he asserts, "I would argue that it is located at the margin, at the outer edge of understandability, at the furthest limits of human interpretation, on the boundary between person and non-person. It is an important limit-case of the human condition" (474, internal quotes deleted). The flexible positioning of the figure of the schizophrenic parallels the flexible positioning of the SOC as primarily a legal space or primarily a space of science. And these two oscillations may be mutually dependent on one another.

The politics of schizophrenia, then, directly implicates the question of what it means to be human. A common way of making sense of people with schizophrenia is to say that "they are strange, they are enigmatic, they are alien, they are bizarre. They are unknowable . . . Their symptoms lie beyond the realm of human meaning, beyond the possibility of

human interpretation. They are, not to put too fine a word on it, 'un-understandable?'" (Barrett 1998, 469). And because "What is human lies within the realm of what is amenable to interpretation – what is understandable," then "the importance of schizophrenia is that it lies beyond the possibility of interpretation" (469, internal quotes deleted). Or perhaps it is more accurate to say that the schizophrenic is located beyond the limits of humanistic interpretation. But like the windings of DNA, the fusion of egg and sperm, the habitat requirements of salamanders and the instabilities of hillslopes, it is not beyond the limits of scientific understanding – and pharmacological engineering. This notion of the schizophrenic as existing beyond the bounds of interpretation will recur in legal treatments of the topic. For now it is perhaps enough to suggest that the schizophrenic *is* commonly interpreted in terms of wildness, disorder, negativity, necessity, animality, and forces of nature. The ease with which these naturalizing moves is made is an important theme in the renderings of those who support refusal. For example, Gelman writes: "Someone acts angrily or violently, for example, and the state responds with lobotomy or antipsychotic drugs, methods that work independently of mind, will and personality. Indeed, when biological alteration responds to an exercise of human will, the insult and affront to the person is worse: the state has refused to relate on a human level" (1995, 1233). Likewise, Modrow says "it is much easier and cheaper to treat schizophrenics like defective *objects* than it is to treat them like human beings" (1992, 228). The medical model, according to its critics, is nothing other than an updated version of the historical dehumanization of vulnerable people.

The potential stakes at issue in forced injections, though, are broader still. As terrifying as the dehumanization of individual people and of vulnerable groups may be, the fact that dehumanization is practiced and sanctioned by the government calls into question its commitment to the furtherance of fundamental social values. As one federal court declared, "[S]uch mind altering medication has the potential to allow the government to alter or control thinking and thereby destroy the independence of thought and speech *so crucial to a free society*" (*US* v. *Charters*, 829 F 2d 479, 1987, 492, emphasis added). Arizona State Supreme Court Justice Cameron said: "It is frightening to even think that the state may be able to forcibly administer dangerous, mind-altering drugs to a mentally competent person . . . Such a scenario is *shockingly repugnant to a free society*" (*Large* v. *State*, 714 P 2d, 1986, 411). Another judge claimed, "It is enough to observe that the power to control men's minds is wholly

inconsistent not only with the philosophy of the first amendment but with *virtually any concept of liberty*" (*Davis* v. *Hubbard*, 506 F Supp. 915, 1980, 933, internal quotes deleted, emphasis added). So the stakes are as high as they are broad. In authorizing nonconsensual administration of psychopharmaceuticals we put at risk our image of ourselves as constituting a free society, our conceptions of liberty, and our vision of law itself.

Against the alleged efforts to dehumanize inmates, critics assert the accuracy and primacy of the liberal-humanist model. Schizophrenia may be a disease but the disease does not wholly identify the self. Personhood is more than a collection of symptoms. John Modrow, a recovered schizophrenic, says that the medical model of schizophrenia "asserts that schizophrenics are so different from other people that they must be studied and treated as if they were alien creatures; that the actions, beliefs, and experiences of schizophrenics are not manifestations of their humanity, but of a mysterious and terrifying disease" (1992, 9). In contrast to this he claims: "[M]y hallucinations were an expression of my humanity and not a symptom of a disease" (154). Moreover, critics argue, schizophrenics are not entirely or necessarily irrational. Even someone who believes that John the Baptist is sending her secret messages may also believe that teeth brushing promotes dental hygiene, that toasters do not fly, and that, all things considered, the effects of schizophrenia are preferable to the effects of Prolixin. The act of refusal itself, far from being a mere symptom of physiological dysfunction, may be read as evidence for the presence of the irrepressible human spirit. Drawing on the work of psychiatric scholars, Harper's attorneys argued in their brief before the US Supreme Court that:

> non-compliant acts are … declarations of an inner core of self, indomitable and unconquered. To some degree they insist that the body, ravaged as it may be by disease or injury, is still personal and not a meaningless collection of fat, tissue, nervous system and bones that have been taken over by the illness, by the medical profession or by both.
>
> (Brief of Respondent, *Washington* v. *Harper*)

Schizophrenics are also by no means incapable of making decisions about marriage, employment, or other medical questions. They are not retarded and they are not incompetent. Context, then, is not or ought not to be determinative. Even if someone is incarcerated and mentally ill, societal commitment to the inviolability of the integrity of the self demands that the voice of the subject be respected. The point, again,

is that forced injections are not merely wrong or unjust, they are *dehumanizing*. Therefore, any underlying harm or injustice that may exist independently is intensified. And importantly, the dehumanization of inmates is not simply a discursive maneuver. To the extent that these ways of making sense of people and events are used to justify – or require – interventions, what follows from these interventions is best understood in terms of "mind control" – the erasure of self and the substitution of that self with another designed to accord with the desires of the authorities.

Critics also emphasize the realized potential of abuse in these situations. As Gelman writes, "In biological alteration cases, somebody's biological functioning comes to be regarded as a serious threat to someone else, or to the public . . . The result is that the state enjoys a relatively strong writ to intervene biologically in order to preserve order or to perform other 'police' functions while the individual's own biological choices are relatively restricted" (1995, 1298). "Ordinarily," he says, "governments are constituted to serve the people; with alteration, people are literally reconstituted to serve governments" (1235). A federal district court judge made precisely the same allegation in connection with forced injections with antipsychotics: "If a patient has no protected interest in his body, in how his body will be used, in how his mind will work, in almost every sense of the word the patient ceases to be an individual and instead becomes a creature of the state" (*Davis* v. *Hubbard*, 933). This judge examined these situations from a more socially realistic perspective and placed "care givers" in an extremely critical light. Quoting a noted psychiatrist he wrote:

> Many physicians, nurses, guardians, and family members who resent the behavior and are threatened by potential acts of violence fail to distinguish between manifestations of illness and reaction to frustrations . . . The medical staff gains a feeling of accomplishment from the patient's adherence to a prescribed regime, while the nursing personnel and relatives, who are in more direct contact with the patient, derive a spurious feeling of security when the doctor's orders are carried out. Thus the prescribing of drugs has in many cases become a ritual in which patients, family members, and physicians participate . . . Neuroleptics are often used for solving psychological, social, administrative, and other nonmedical problems. (926)

According to these critics, then, what happens to inmates in these situations cannot be comprehended apart from understandings of how power circulates under radically asymmetric conditions.

THE WIDER POLITICS OF KNOWING WALTER

The politics of nature is broader than that suggested by the rival naturalization and (re)humanization of the schizophrenic. The lines of dispute constituting this politics are many. They may be discerned between supporters of conventional psychiatry and proponents of antipsychiatry. For decades authors such as Thomas Szasz, R. D. Lang, Michel Foucault, and Peter Breggin have denounced both the scientistic pretensions of psychiatry and the disastrous consequences of the scientizing project. At the same time other ways of knowing the mind have been delegitimized by supporters of biological psychiatry. Science journalist John Horgan writes: "The history of modern psychiatry can be viewed as a contest between psychological therapies, notably psychoanalysis, and physiological ones, notably drugs. Many observers see psychiatrists' growing reliance on medication and other physiological remedies as a triumph of reason over irrationality" (1999, 105). The strategy seems to be to banish psychoanalytic approaches to mind from the precincts of science. Psychologist Hans Eysenck characterized Freud as "a genius not of science but of propaganda, not of rigorous proof but of persuasion, not of design of experiments but of literary art. His place is not, as he claimed, with Copernicus and Darwin but with Hans Christian Andersen and the Brothers Grimm, tellers of fairy tales" (as quoted by Torrey 1992, 218). The author of a recent comprehensive history of psychiatry states the matter quite bluntly. "If there is one central intellectual reality at the end of the twentieth century, it is that the biological approach to psychiatry – treating mental illness as a genetically influenced disorder of brain chemistry – has been a smashing success. Freud's ideas, which dominated the history of psychiatry for the past half century, are now vanishing like the last snows of winter" (Shorter 1997, vii).

The consequences of accepting these claims have not gone unnoticed and the charges have not gone unanswered. As one psychiatrist has written, "[B]iological psychiatry – presently the dominant force within the discipline of psychiatry – is dominated by a reductionist ideology that distorts and misrepresents much of its research . . . Unless challenged, contemporary culture will progressively regard *homo sapiens* as *homo biologicus* – something on the order of a highly evolved, intricately wired, and socially verbose fruit fly" (Pam 1995, 1–2). In response to the hegemony of the biological paradigm within the practice, critics claim that naturalizing the schizophrenic, and more specifically, identifying schizophrenia as a purely physiological disorder is simply a move to prop

up psychiatry's claim to be counted among the (natural, physical) sciences. As we saw in the preceding chapter, psychiatry has had a rather tenuous hold on the status of science and the cultural authority that that status confers on the practice and practitioners. Earlier attempts to naturalize the mind have been rather easily dismissed. Biologizing psychiatry and locating the source of mental disorders in the brain have been seen as a way of achieving the status and its perquisites. The more naturalized the mind – especially the abnormal mind – the more scientized the practices through which mind is regarded as an object of knowledge production. As former schizophrenic John Modrow alleges, "The medical model helps psychiatrists by assuring laymen and psychiatrists alike that psychiatrists are *legitimate* medical practitioners treating a *real* illness" (1992, 4).

The critics commonly make two key moves. The first is to denaturalize the condition of "schizophrenia" by relocating it within the realm of the social. The second is to descientize the project of knowing "the schizophrenic" and relocate the production and dissemination of this knowledge withing the realm of the political. As an example of the first tactic Thomas Szasz, one of the most prominent critics of psychiatric practice has written, "What people nowadays call mental illness, especially in a legal context, is not a fact, but a strategy; not a condition but a policy; in short, it is not a disease that the alleged patient has, but a decision which those who call him mentally ill make about how to act toward him, whether he likes it or not" (Szasz, quoted in Sullum 2000). Offering "A Social Critique of Biological Psychiatry," Ellen Borges claims that "Psychiatry redefines a great deal of normal human behavior as medically deviant by pathologizing people who are socially marginal in any way" (1995, 213) and that "Biological psychiatry tends to 'blame the body' for disturbed behavior rather than the family or society." If schizophrenia is misdescribed as trouble with nature, then it follows that biological psychiatry is mischaracterized as a science.

Exemplifying the second tactic Canadian attorney Don Weitz (www.antipsychiatry.org/weitz) asserts, "There are no scientifically established, independently proven facts in psychiatry. Psychiatry, in fact, has no laws or testable hypotheses and no coherent and comprehensive theory. Psychiatry conspicuously lacks scientific proof or evidence to support its news-media parroted claims of 'mental illness' or 'disorders.'" He goes on, "Without the use and threat of force, institutional psychiatry would die . . . Psychiatry gets its authority and power to force, imprison, involuntarily commit and treat individuals against their will

from the state . . . We must work to abolish psychiatry!" Biological psychiatry is not a science at all, it is a "pseudoscience." Pam claims that "biological psychiatry cannot fulfill its mission properly because in its current state it has more the accouterment of a scientific discipline than the substance" (1995, 8). While Ross, speaking from his own experience, reports: "I have participated in trials of neuroleptics, antidepressants, and anxiolytics and have published an original neuroanatomical and neurotransmitter model for the use of buspirone in tardive dyskinesia. Based on this experience, I conclude that psychiatrists are contract technicians in new drug development, not creative scientists" (1995, 117). And if the practice is not accurately described as science then it may be better understood as antiscience, that is, as politics.

Notably less incendiary, but speaking to the same general point, philosopher of science Martin Gardiner has complained "that strictly scientific approaches to the mind have not advanced our understanding of psychology's core topics: consciousness, the self, free will, and personality. These subjects 'seem particularly resistant to decomposition, elementarism, or other forms of reductionism'" (as quoted in Horgan 1999, 73). Horgan agrees, noting that, "If there is any feature of nature that has proved to be more than the sum of its parts it is human nature" (259). This is so, in part, because "The putative cornerstone of science is the ability to replicate experiments and thus results. But replicability poses a special challenge to mind-science because all human brains, and all mental illnesses, differ in significant ways" (35). Nevertheless, "Scientists," he claims, "will never accept that the mind cannot be tamed" (262). The questions that biological psychiatrists believe they have answered have, according to these critics, not even really been asked: What is mind? How does mind differ from matter? How do humans differ from nature? Who are we?

The more politically charged arguments, though, stress that the naturalization of mind is a necessary predicate for the (illicit) scientization of the practice of psychiatry. Supporters of biological psychiatry largely base their arguments on the claim that antipsychotics work – at least some of the time for at least some people. The critics' response is that, while some sciences such as chemistry, neuroscience, and pharmacology do produce substances, it is also the case that these substances, in turn, produce the scienticity of psychiatry. Or, one might say that multinational corporations such as Squibb, Pfizer, and McNeil not only produce commodities such as Thorazine, but they also produce the entrance ticket to scienticity that mainstream psychiatry craves. This is the real

commodity that is being purchased by "the mental health community." Peter Breggin writes, "Organized psychiatry has become wholly dependent for financial support on this unholy collaboration with the pharmaceutical industry. To deny the effectiveness of drugs or to admit their dangerousness would result in huge economic losses on every level from the individual psychiatrist who makes his or her living by prescribing medication, to the American Psychiatric Association which thrives on drug company largesse" (www.breggin.com/neuroleptics). Seen in this more critical light the struggle over Harper's body is best understood as a local occurrence of this broader, if more diffuse, political contest. On this view, the naturalization of mind and of schizophrenia is a necessary condition for the alignment of psychiatry with science. By injecting substances into Walter Harper's resisting body the authorities are performing the enduring themes of progress understood as the application of previously accrued knowledge to the control or domination of a dangerous and disorderly nature.

The body – *that* body – may be known, then, in multiple ways. It may be understood primarily as a physical system and as the object of scientific scrutiny. If neuroscience and psychopharmacology are "pure" sciences, then clinical psychiatry may best be viewed as a version of chemical engineering. Alternatively, the body may be understood in terms of the common dualistic structures of liberal-humanism as a unique container or singularly intimate possession of the self. Or, the body can be understood as it is experienced by that self. The so-called "side effects" can be experienced, interpreted, and described to others. Ultimately, though, context is all-important in determining which framing will prevail. But not because mental illness or imprisonment necessarily demonstrate the inappropriateness of either the liberal-humanist or the experiential framings but simply due to the asymmetries of power. The authorities, in situations like Harper's, have the home court advantage and the superior physical strength to subdue the inmate. Their framing simply *is* the official framing. And their desires are not to be lightly refused.

THE BODY AT THE LIMITS OF THE LAW

Given the disregard for inmates' refusals, the reported abuses, the level of skepticism concerning psychiatry and the medical-penal-commercial alliance, and, finally, given the emergence of a mental health bar in the context of other civil rights struggles in the 1960s and 1970s, the

strategic translation of troubles such as Walter Harper's into legal disputes was inevitable. As Cichon says, "It is not surprising [given abuses] that the institutionalized mental patients turned to courts for legal enforcement of a right to refuse the unwanted administration of drugs" (1992, 314). What Jennifer Nedelsky says of property rights applies to liberal rights – to liberty – more generally. Liberal rights talk, she says, is based on "a picture of human beings that envisions their freedom and security in terms of bounded spheres" (1990, 163). So, if the dermal boundary was an insufficient barrier to state penetration of an inmate's body and to the occupation of his mind, then perhaps it might be reinforced by the recognition or inscription of *rights* as boundaries and barriers. Beginning in the 1960s lawyers representing inmates of institutions attempted to make the dermal boundary legally meaningful in these situations. They asked judges to validate "the right to refuse," to reaffirm the personhood and repudiate the naturalization of inmates. Forced injection not only penetrated a person's skin, it also constituted an invasion of his or her rights. Because the authorities were state actors, then the struggle could easily be construed as one between "the state" and "the individual." Lawyers for the mentally ill and for prisoners invited judges to rectify constitutional violations.

Of course, the invitations were countered by other lawyers representing the state and its institutions. These lawyers either denied the existence of a right to refuse – and therefore the procedural standing to sue for its protection – or claimed that if the right did exist it could be properly overridden in contexts such as Harper's because of legitimate and compelling state interests. As we shall see, these claims and counterclaims about rights were grounded in contending renderings of bodies and minds, of nature and humanness. They also came to center on other questions concerning the limits of legal knowledge, and of legal means of truth seeking and authority vis-à-vis the methods of producing scientific knowledge. That is, in translating the dispute, the focus of argument shifted from one about the boundary between the outer and inner bodies to one about the boundary between law and science and whether this boundary might be understood as a barrier against the intrusion of law into the relatively autonomous domain of science.

The principal element of translation of these situations into the terms of legal discourse concerns the refusal itself as the exercise of a *right* and not just the expression of a preference. Seen as the exercise of a right, the refusal – the act of saying "no" – is presumptively to be respected

and accepted. If it is not respected, then the rights holder may seek to have the right protected and enforced. Advocates of the right to refuse claim that it is necessarily entailed by other fundamental rights that are protected under the US Constitution. Among the possible constitutional sources for the right to refuse one is focused primarily on the body and another primarily on the mind. Some see the right to refuse as being entailed by "the right to bodily integrity" understood as a liberty interest and therefore as protected by the Fifth Amendment of the US Constitution. According to Winick, a prominent proponent of the right to refuse, a common law right to bodily integrity or "the freedom from unwarranted personal contact," had been established at least by the thirteenth century, was expressed in the Magna Carta, was recognized by Blackstone and has been continuously reasserted by American courts (1997, 201). Winick locates the protection of these interests in ancient doctrines of trespass, and the tort of battery. Likewise, the Arizona Supreme Court noted that "Freedom from bodily restraint imposed by arbitrary government action has long been recognized as the core of liberty protected by due process." The court continued, "To the extent that medication is administered forcibly for the purpose of controlling behavior, it is a bodily restraint insubstantially different from the shackles of old" (*Large* v. *State*, 714 P 2d 399, 1986, 406). The refusal of psychotropic drugs rests on the same grounds as the right to resist any other bodily intrusion.

A second posited source for the right to refuse focuses on what distinguishes the forcible injection of psychoactive substances from corporeal invasions such as vaccines and routine surgery. This source is "freedom of thought" understood as a necessary corollary to First Amendment protections of free speech. Deploying a version of the nature/human distinction (in its absence/presence form), Winick says: "Mental faculties distinguish humans from other species that lack such unique cognitive and communicative capacities." Giving the dehumanization theme a more specifically legal gloss he quotes an earlier authority on the point that "Suppression of belief is thus an affront to the dignity of man, a negation of man's essential nature" (146). Winick goes on to spell out some of the connections in greater detail.

> Development of the mind and the processes of conscious thought . . . is essential to the identification and achievement of self-fulfillment goals. Indeed, these mental processes are central to the development of individual identity itself . . . Therefore, a constitutional scheme valuing individual self-fulfillment must protect a right to form thoughts and hold

> beliefs and opinions, indeed, must protect the right of each individual to develop his own unique personality . . . To achieve these values the First Amendment must protect not only outward manifestations of expression but also mental processes, those "inward activities" that are the essence of expression. (147)

Significantly, he cites the Supreme Court in *Wooley* v. *Mayhood* (430 US 705, 1977) to underwrite the primacy of freedom of mind and "the sphere of intellect and spirit which is the purpose of the First Amendment of our constitution to reserve from all control" (715). In addition to the Fifth and First Amendments, the right to refuse has also been derived from the right to privacy and, in prison contexts, to Eighth Amendment prohibitions on cruel and unusual punishments.

In many early right to refuse cases these ways of making legal sense of events in institutions like the SOC were dismissed by trial courts. Their reception by appellate courts, however, has been more mixed. By the 1980s many judges had begun to validate the constitutionally grounded right of prisoners to refuse coerced injections of psychoactive drugs. But translating the question into the language of rights and constitutional violation does not solve the problem so much as recast it in different terms. Specifically, a right to refuse having been acknowledged as a barrier against unwanted intrusions, the question still remains whether that right is absolute or whether it may be "balanced" against – and sometimes trumped by – legitimate state interests. If it is absolute – as it might presumptively be for nonprisoners or non-mentally ill persons – then the refusal should mark the end of the question. But if the right is to be balanced, then still other questions arise. For example, how does one tell when "balance" has been achieved? Who is to make the determination as to whether it has or hasn't? If the right to refuse exists, whatever its constitutional source, there may also exist conditions when the right may be overridden and the drugs administered over the inmate's objections. The practical questions, then, are: what are those conditions, and who is empowered to say whether in a given case those conditions are present? As the earlier discussion of schizophrenia suggests, the finding of "balance" may turn on visions of bodies and minds; humans and nature. But as translated into legal discourse these questions implicate the topic of – and are made sense according to claims about – due process. That is, the legal meaning of the dermal boundary and whether authorities may cross it is determined with reference to what sort of procedural safeguards are in place and whether they are constitutionally sufficient.

In practice, most advocates of the right to refuse acknowledge that the right is not absolute in contexts such as Harper's. So the *central* question is *who* is or ought to be empowered to decide these questions of balance. Inmates and their advocates assert that the trumping of a constitutional right must be a judicial decision. In order to override a right the authorities must make a convincing case to a judge. In answer to this, state defendants argue that ascertaining whether conditions exist for disregarding an inmate's refusal is not and ought not to be a judicial decision. Rather, it is a purely medical determination. So, the initial question we began with: "whose body is it?" (which, as we saw, is answered by relying on rival readings of the body and mind) gets transformed into a question about how to define and distinguish the spheres of medicine and law. Moreover, the struggle over the penetration of the dermal boundary – the flesh of a human's body – by the authorities gets recast as the authorities' own struggle to resist the invasion of science by law. But, of course, it is judges who are required to make the determination of this boundary, and therefore a determination of the limits of their own authority and of their competence to know. The arguments become arguments about the relative competencies and incompetencies of the competing cultural authorities and their divergent means of truth seeking. Phrased somewhat neutrally, Cichon writes that "professional discord . . . reflects the inherent tension between the law's respect for the values of self-determination and bodily integrity and the medical profession's concern for the treatment and care of the mentally ill" (1992, 288). Somewhat less neutrally, psychiatrist Guthiel warns: "In a number of areas the psychiatric profession is having to learn to deal with lawyers entering the clinical sphere . . . At best, litigation promotes needed reforms; at worst, the adversary mode of the lawyer's courtroom subverts the therapeutic alliance of the physician's office" (1980, 327).

AT WORK ON THE SCIENCE/LAW (BODY/MIND; NATURE/HUMAN) BOUNDARIES

As an initial matter it seems that the determination as to which cultural authority is best positioned to make the decision is closely connected to the prominence that judges give to the theme of "mind control." For example, as Judge Walinski stated in *Davis* v. *Hubbard* (506 F Supp. 915): "[T]he inmate's principal interest in the present case arises not from the State's attempts to punish thoughts but its attempts to use treatment as a means of controlling thought, either by inhibiting an inmate's ability

to think or by coercing acceptance of particular thoughts and beliefs" (933). If the threat of mind control is taken seriously then both the inmate's personal stakes and the threat to fundamental social values are brought into sharper focus. The very framing of "mind control" already situates the inmate as a distinctly human kind of being. The mind control theme is also related to a more skeptical attitude toward medical-penal authorities, a greater emphasis on the potential for abuse, and a clearer focus on the subjective desires of the authorities. In the case of *Rogers* v. *Okin* (478 F Supp. 1342, 1979) federal judge Tuaro wrote: "Whatever powers the Constitution has granted our government, involuntary mind control is not one of them, absent extraordinary circumstances. The fact that mind control takes place in a mental institution in the form of medically sound treatment of mental disease is not, itself, an extraordinary circumstance warranting an unsanctioned intrusion on the integrity of a human being" (1367). The court in *Davis* v. *Hubbard* (506 F Supp. 915, 1980) said: "Such widespread use of psychotropic drugs . . . is not . . . necessarily supported by any sound medical course of treatment. Put simply, the testimony at trial established that the prevalent use of psychotropic drugs is countertherapeutic and can be justified only for reasons other than treatment – namely, for the convenience of the staff and for punishment" (926). Locating the events – and the bodies – primarily within the legal-normative domain and only secondarily within the domain of medical science entails assigning primacy to specifically legal means of truth seeking. That is to say, answering these questions entails judicial engagement in self-portraiture. Thus, the Wisconsin Supreme Court (*State* ex. rel. *Jones* v. *Gerhardstein*, 416 NW 2d 883, 1987), in requiring an adversarial judicial hearing, warned of the danger of "having individuals routinely declared incompetent for the sake of mere convenience, control or expense . . . Constitutional guarantees," said the court, "may not be replaced by professional judgment, and their protection and enforcement cannot be considered to be judicial interference" (894). Dennis Cichon writes more expansively on the topic of judicial competence and the appropriateness of legal means of truth seeking, laying out what, in his view, may be gained or lost by locating decisionmaking within or beyond the sphere of law.

> Through the adversary process, the court is assisted by attorneys representing each side who are trained in cross-examination, at sorting motivational nuances, and operating within the context of conflicting facts, opinions, interests and professional principles . . . The ultimate

> determination of whether antipsychotic drugs should be forcibly administered is not based on a judge's personal diagnosis, but rather on a thorough and objective evaluation of the relevant facts, the often conflicting professional opinions, and the important medical and legal interests at stake. The fact that questions may be partially or even entirely medical in nature "does not justify dispensing with due process requirements . . ." . . . It is for the courts to determine whether a given level of medical certainty about the need to administer the drugs . . . warrants infringement of the patient's constitutional rights. That determination is no more left to medical discretion than the determination of probable cause under the Fourth Amendment is left to police discretion. (1992, 383)

He further asserts that "by leaving this evaluative function to institutional personnel, the court abdicated a critical judicial responsibility necessary for the protection of patient's constitutional rights" (383).

As to the question of competence – which is itself derivative of how we construe the object to be known, federal judge David Bazelon has written:

> Very few judges are psychiatrists. But equally, very few are economists, aeronautical engineers, atomic scientists, or marine biologists. For some reason, however, many people seem to accept judicial scrutiny of, say, the effect of a proposed dam on fish life, while they reject a similar scrutiny of the effect of psychiatric treatment on human lives . . . [I]t can hardly be that we are more concerned for the salmon than the schizophrenic. (1969, 743)

The issue of judicial competence to decide is inseparable from the subject's competence to decide. This question of inmate competence, then, is also an ingredient in setting the law/science boundary. The court in *Riese* v. *St. Mary's Hospital and Medical Center* (243 Cal. Rptr. 241, 1987) said: "Competence is not a clinical, medical or psychiatric concept. It does not derive from our understanding of health, sickness, treatment or persons as patients. Rather, it relates to the world of law, to society's interest in deciding whether an individual should have certain rights (and obligations) relating to person, property and relationships" (253). Again, drawing out the significance of the different means of truth seeking, Cichon says: "[L]egal competency evaluation is broader in focus [than medical] taking into account not only medical concerns, but the patient's personal interests in self-determination and bodily integrity. A treating physician is not adequately socialized in these legal values to effectively balance them with medical concerns" (1992, 386).

On the other hand, as we shall see, if the body is located primarily in the domain of natural objects, then judicial means of truth seeking may be no more relevant – or useful – than theological means. Indeed, lawyers and judges may be wildly out of their league in making these assessments.

SITUATING WALTER

Perhaps the best way of tracing how these situations unfold is to look more closely at what happened to Walter Harper and how he was sequentially positioned and repositioned within and beyond the realm of law.

The Special Offenders Center had a policy for dealing with situations like Harper: Policy 600.30. The central formal questions of the case of *Washington* v. *Harper* (494 US 210, 1990) concerned whether the rules and procedures spelled out in Policy 600.30 satisfied the due process requirements of the Fifth and Fourteenth Amendments. Policy 600.30 laid out procedures to be followed before a forced medication regimen could be initiated. First, the inmate has to have been categorized as "mentally ill" and as a danger to himself or others. Next a hearing is to take place before a committee consisting of a psychiatrist, a psychologist, and an associate superintendent of the SOC. The psychiatrist who ordered the medication cannot be part of this committee but may participate in subsequent reviews of this initial decision. The inmate must receive 24-hour notice of the hearing, may have his or her medication suspended during the hearing, and has the right to attend the hearing. The SOC may appoint a "lay advisor" to assist the inmate during the hearing but this advisor must "understand the psychiatric issues involved." On the other hand, legal counsel is not permitted. The inmate has a right to present evidence formally and to question the staff, but if the committee deems the questions irrelevant these rights may be suspended. The committee is also permitted to meet *before* the hearing to discuss the case. This suggests a sort of "prehearing" hearing during which the inmate may not be heard. After the formal hearing the inmate is taken out of the room while the committee deliberates. The inmate is then brought back into the room and informed of the decision. He or she then has the right to appeal the decision to the Superintendent within 24 hours. After forced medication begins the inmate has the right to a periodic review of the decision. Again, the psychiatrist

who ordered the drugging in the first place may participate in the review. Minutes of the hearing are to be kept and copies provided to the inmate (216).

Policy 600.30 certainly looks like law. It is a set of rules concerning rights generated by authorized state agents. The rules have a formal documentary existence. Moreover, they were promulgated partly in response to a 1980 Supreme Court decision, *Vitek* v. *Jones* (445 US 480, 1980). Most importantly they are about such core legal concerns as hearings, witnesses, evidence, rights, records, judgment, and appeal. On the other hand, for all its appearance as law Policy 600.30 has also been described as a sham. The superficial appearance of lawness masked a fundamental expression of antilaw that was designed to keep real law away from the proceedings or to protect the domain of the medical from being invaded by the forces of the juridical. Among the flaws noted by the Washington Supreme Court, for example, were that attorneys were not allowed to participate, that the proceedings were not adversarial, that the rules of evidence did not apply, and, most importantly, that those who were to reach judgment were not disinterested but were themselves parties to the dispute. They were judges of their own case.

My primary question is where and how the boundary between law and science is drawn in contexts involving involuntary injections. Given that rights are present and that their subordination to legitimate state interests is the explicit topic of judicial reflection, then it would seem that at least for some purposes the question of what happens to Walter Harper is necessarily within the domain of law. With respect to assessing Policy 600.30 the question might be refined or reframed as asking if the Policy even counts as law – or real law, or if it is an expression of false or mock law. If Policy 600.30 is sufficiently "lawlike" for the purposes of constitutional due process requirements, then the situations that arise in the Special Offenders Center are already firmly within the province of law. If Policy 600.30 is not sufficient, then perhaps this signals an absence of law.

Harper sued the State of Washington alleging that Policy 600.30 violated his constitutional due process rights (*Harper* v. *State*, 759 P 2d 358, 1988). His case was initially heard by a state superior judge who dismissed his complaint. He appealed this dismissal to the state supreme court which reversed and remanded. As an initial matter supreme court justice Brachtenbach recognized that "Harper had a protected liberty interest in refusing antipsychotic treatment." He then began to stake

out the controlling legal terrain by referencing an earlier state case, *In re Schuoler* (523 P 2d 1103, 1986), which upheld the right to refuse the involuntary administration of electroconvulsive therapy (ECT). "Like ECT," wrote Brachtenbach, "antipsychotic drugs therapy is a highly intrusive form of medical treatment . . . Antipsychotic drugs are by intention mind altering. They are meant to operate upon the thought processes" (361). Recognizing that "the benefits of antipsychotic drug treatments to acutely ill patients are well documented" (361), he also described in detail the symptoms of akathesia and tardive dyskinesia. Allowing for the profoundness of the stakes and the recognition of Harper's liberty interest, the question remained as to whether the procedures outlined in the policy were constitutionally adequate. Justice Brachtenbach held that they were not. Much of what was wrong in the SOC was that the policy was designed to exclude real law from the process.

In the first place, "the policy does not allow representation by counsel." Additionally, "the rules of evidence do not apply" and, except in extraordinary circumstances, the policy does not allow for judicial review of decisions (362). For these and other reasons Policy 600.30 is insufficiently lawlike to protect Harper's rights. Law has been illegitimately excluded from participating in the determination whether to overrule those rights. Against the state's contention that "no judicial hearing is required [and] . . . that a decision based on professional judgment adequately protects prisoners' rights to refuse antipsychotic treatment," the court decided that "It is precisely [t]he subtleties and nuances [read: indeterminacies and subjectivities] of psychiatric diagnosis that justify the requirement of adversarial hearings" (363, internal quotes deleted). Applying what the court said in *Schuoler*, Brachtenbach gave guidance to judges who would be called upon to decide if drugs would be administered. "A court asked to order . . . [antipsychotic drug treatment] for a nonconsenting patient must therefore consider the patient's desires before entering an order. The court should consider previous and current statements of the patient [and the] religious and moral values of the patient" (365). Law, that is, must listen to the subject. The Washington Supreme Court repositioned the subject in his body, repositioned the body and mind within the nomic domain of law, and positioned law as having presumptive primacy to determine its own scope. Before a prisoner-patient's refusal can be disregarded and his or her body penetrated and mind altered, "the prisoner must be present at [the] hearing and must be represented by counsel. Included in the requirement

of a judicial hearing are rights to present evidence, to cross examine, to remain silent and to view and copy all petitions and reports in the court's file" (365). Real law, the practice of lawyers and judges, cannot be excluded.

THE US SUPREME COURT LOOKS AT WALTER

The state appealed to the US Supreme Court. Writing for a majority to reverse the state court's ruling Justice Anthony Kennedy stated the issue simply and clearly. "The central question before us is whether a judicial hearing is required before the State may treat a medically ill prisoner with antipsychotic drugs against his will" (494 US 210, 1990, 213). His answer to this question was "no." Explicitly framing the situation in physicalist terms, Kennedy claimed that "the effect of these and similar drugs is to alter the chemical balance in the brain, the desired effect being that medication will assist the patient in organizing his or her thought process and regaining a rational state of mind" (214). This, of course, is a far cry from the concerns about "mind control," "thought control," and the "tinkering with mental processes" that other judges found so alarming. The underlying problem is simply one of chemical imbalance. The response to this physical problem is also, rather unproblematically, rendered as restorative, rejuvenating, and beneficent.

But it is not just any physical problem that is at issue. "The committee found that respondent was a danger to others *as a result* of a mental disease or disorder" (217). The existence of the disorder and its potential to cause harm provide enough [foundation] to support "the legitimacy and importance of the governmental interest presented here" (225). But Kennedy found that the decision of the state supreme court was "in no way responsive" to these interests and, therefore, "can be rejected out of hand" (226). In contrast, he found that "SOC Policy 600.30 is a rational means of furthering the State's legitimate objectives" and that "the Due Process Clause [of the US Constitution] permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will" (226–227). Moreover, not only is Policy 600.30 constitutionally adequate but, as we shall see, placing the power to determine when constitutional rights may be legitimately overridden in the hands of judges – as Harper had requested and as the state supreme court had ordered – would more likely cause more harm.

Here is how Justice Kennedy reasoned from claims about physicality to claims about the limits of law. First, he asserted that the "inmate's

mental disability is the root cause of the threat" (225). As we have already seen, the disability was the effect of a chemical imbalance. He then anchored knowledge of these physical disorders firmly within the sphere of medical judgment. "Under Policy 600.30, the decisionmaker is asked to review a medical treatment decision made by a medical professional. That review requires two medical inquiries: first, whether the inmate suffers from a 'mental disorder'; and second, whether, as a result of that disorder, he is dangerous to himself, others or their property" (232). He said that "The risks associated with the antipsychotic drugs are for the most part medical ones, best assessed by medical professionals" (233). Next, he questioned the relevance, competence, and knowledge base of legal professionals in dealing with these problems.

> We do not accept the notion that the shortcomings of the specialists can be avoided by shifting the decision from a trained specialist using the traditional tool of medical science to an untrained judge or administrative hearing officer after a judicial type hearing . . . Common human experience . . . suggests that the supposed protections of an adversary proceeding to determine the appropriateness of medical decisions for the . . . treatment of mental and emotional illness may well be more illusory than real. (232, internal quotes deleted)

In a number of passages he further justified the exclusion of judges. "It is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment" (236, internal quotes deleted). "Due process is not violated by use of informal, traditional medical investigative techniques . . . the mode and procedure of medical diagnostic procedures is not the business of judges" (232). Finally he identified what, for him, was a more pressing threat that the lower court ruling had exacerbated. "It is only by permitting persons connected with the institution to make these decisions that courts are able to avoid unnecessary intrusion into either medical or correctional judgments" (235, internal quotes deleted).

The problem, then, is essentially a problem with nature, with dysfunctional bodies, and the dangers that they cause. Solving the problem is the task of medical science and antipsychotics are among the most effective technologies. Any potential legal problems are adequately served by Policy 600.30 and any further legal interventions would be excessive and even dangerous insofar as they would constitute an "unnecessary intrusion." The question of when or under what conditions the inner body may be penetrated and the neurons occupied is answerable

only by physicians. The inmate's words cannot be trusted and it is simply "not the business of judges." Legal judgment and specifically legal means of truth seeking here reach their limits. And except for extraordinary situations – which do not include ordinary involuntary injections – inmates like Harper are located beyond legal protection.

Listening to Walter

Justice John Paul Stevens wrote a forceful dissenting opinion which was joined by Justices Marshall and Brennan. The crux of his argument was that the procedures spelled out in Policy 600.30 were not a manifestation of real law at all but amounted to "a mock trial before an institutionally biased tribunal" (237). The policy represents a sort of antilaw thinly disguised as law. And with law excluded we have, perhaps, a reversion to a situation in which might makes right. The problem was not that law was "intruding" but that real law was excluded. The problem could only be remedied by letting law in, by recognizing the issues involved as fundamentally and irreducibly legal ones, not simply and exclusively medical ones. According to Stevens, the majority had fixed the limits of law too narrowly by minimizing the stakes for Harper, underestimating the severity of the "side-effects," and thereby undervaluing his liberty interests and inflating the state's interests. "Every violation of a person's bodily integrity," he wrote, "is an invasion of his or her liberty. The invasion is particularly intrusive if it creates a substantial risk of permanent injury and premature death. Moreover, any such action is degrading if it overrides a competent person's choice to reject a specific form of medical treatment" (237). And touching on a theme that was most notable in Kennedy's assessment by its absence, Stevens continued, "And when the purpose of the forced drugging is to alter the will and mind of the subject, it constitutes a deprivation of liberty in the most literal and fundamental sense" (237–238). The exclusion of law is a function of the exclusion of concern for the subject and lack of engagement with the theme of "mind control." The constitutional theme of "freedom of mind" was given legal historical depth by relying on Justice Brandies's noted dissent in *US* v. *Olmstead* (277 US 438, 1928). There Brandies stated that "The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be left alone – the most comprehensive of rights and the rights most valued by civilized men" (*Washington* v. *Harper*, 238).

Significantly, Harper himself was offered as no less an authority than Brandies. Where Kennedy had suggested that the authorities had a clearer view of the inmate's true desires and intentions – and therefore that Harper's words were essentially meaningless – Stevens incorporated Harper's own words into his opinion. At his SOC hearing Harper had testified: "Well, all you want to do is medicate me and you've been medicating me . . . Haldol paral[y]zed my right side of my body . . . [Y]ou are burning me out of my life . . . [Y]ou are burning me out of my freedom" (239). Stevens also noted that the record of the hearing contained the entry: "Inmate Harper stated he would rather die th[a]n take medication" (239). Likewise, the presence of the subject was also facilitated by giving much greater prominence to the experiential dimensions of psychopharmaceuticals. On the issue of side effects Stevens criticized the majority's reliance on an Amicus brief submitted by the American Psychiatric Association to "discount the severity of these drugs" (239). He drew attention to the fact that the American Psychological Association had submitted a brief on behalf of Harper that made radically different claims about the seriousness of the side effects. Suggesting some of the experiential dimensions of being drugged, he wrote:

> Prolixin acts at all levels of the central nervous system as well as on multiple organ systems. It can induce catatonic-like states, alter electroencephalographic tracings, and cause swelling of the brain. Adverse reactions include drowsiness, excitement, restlessness, bizarre dreams, hypertension, nausea, vomiting, loss of appetite, salivation, dry mouth, perspiration, headache, constipation, blurred vision, impotency, eczema, jaundice, tremors and muscle spasms. (240)

Harper, and others similarly situated, are rendered by the dissenters as primarily experiencing subjects and not simply the expressions of underlying biochemical imbalances.

In addition to rehumanizing Harper, Stevens also depicted the authorities in a much harsher, more skeptical light. They are not representatives of the transcendental subject of science in struggle with an objectified and threatening nature, they are *social* subjects with their own desires and personal interests. Far from the restorative and therapeutic purposes assumed by the majority, Justice Stevens noted that the "mind-altering" substances may be injected into Harper's body not only – or at all – to "advance his medical interests" but solely for purposes of social control. Moreover, nothing in Policy 600.30 suggests otherwise. "[S]erving institutional concerns eviscerates the inmate's

substantive liberty interest in the integrity of his body and mind" (249). The potential for abuse is clearly present and, Stevens held, the record of Harper's experience with Policy 600.30 demonstrated the reality of abuse. And because the drugs are used as a tool for the management of antisocial behavior and not for "treatment," Stevens worried that "It is difficult to imagine what, if any, limits would restrain . . . prison administrators who believe that prison environments are, by definition . . . made up of persons with a demonstrated proclivity for antisocial, criminal and often violent, conduct" (247) from simply using psychopharmaceuticals as an everyday management tool against anyone deemed "dangerous." The authorities, he seemed to be suggesting, could become addicted to drugs as management tools.

> These decisionmakers have two disqualifying conflicts of interest. First, the panel members must review the work of treating physicians who are their colleagues and who, in turn, regularly review their decisions . . . Second, the panel members . . . must be concerned . . . with the most convenient means of controlling the mentally disturbed inmate. The mere fact that a decision is made by a doctor does not make it certain that professional judgment in fact was exercised . . . The structure of the SOC committee virtually ensures that it will not be. (251)

The structure, he emphasized, "disables the independent exercise of each decisionmaker's *professional* judgment." Given the fundamental nature rights, the severity of the invasion of those rights, and the potential and actual record of abuse, it was clear to Stevens that more protection was needed than what Policy 600.30 afforded. The authorities who would advance their own institutional and professional interests by forcibly drugging inmates would be the *last* people in whom to entrust the power to decide when to disregard the inmate's expression of refusal. "It is at least clear that any decision approving such drugs must be made by an impartial professional concerned not with institutional interests, but only with the individual's best interests. The critical defect in Policy 600.30 is the failure to have treatment decisions made or reviewed by an impartial person or tribunal" (250). What is missing – what had been excluded from the SOC hearings – was the real presence of law. The dissenters seem to give some credence to the claims of critics of biological psychiatry that it is mischaracterized as a science – as that term is conventionally understood. And if biological psychiatry is a pseudoscience, then perhaps Policy 600.30 is an expression of pseudolaw. It has more the accouterments of law than the substance. Its real purpose and

effect is to exclude real law from participation in events in the SOC. To that extent it may be an expression of a sort of antilaw. The authorities are left to be judges in their own cases.

> Policy 600.30 . . . does not allow the inmate to be represented by counsel at hearings . . . In addition, although the Policy gives an inmate a limitable right to present testimony through his own witnesses and to confront and cross-examine witnesses in the next paragraph it takes that right away for reasons that include, but are not limited to such things as irrelevance, lack of necessity, redundancy, possible reprisals, or other reasons relating to institutional interests of security, order, and rehabilitation. (256, internal quotes deleted)

Ultimately, he said, "the choice is not between medical experts on the one hand and judges on the other, the choice is between decisionmakers who are biased and those who are not." And because "Institutional control infects the decisionmakers and the entire process," Stevens would "affirm the decision of the Washington State Supreme Court requiring a judicial hearing, with its attendant procedural safeguards, as a remedy in this case" (257). The majority validated pseudolaw on the basis of deferring to pseudoscience, leaving Walter Harper – and others – seemingly at the mercy of brute force.

CONCLUDING REMARKS

As with other contexts and sites we have examined, *Washington* v. *Harper* provided an occasion for legal and judicial self-portraiture, an opportunity to fix the limits of the legal. The penetration of the inner body, the disregard of the subject's voice, the physical occupation of his brain, and, in the critics' view, the control of his mind were justified by claims about "professional judgment" and claims about the incompetence of judges to assess the relevant facts. The majority's determination of the limits of law can, I think, be rather easily assimilated to critics' stories about naturalization as dehumanization. Or, to phrase it differently, if we understand *Washington* v. *Harper* to be principally about how to determine the boundary between law and science, if we understand the majority's primary concern as reinforcing the autonomy of the latter against illegitimate invasions of the former, we might see that the boundary was determined by a reliance on a strongly physicalist or reductionist representation of "the schizophrenic" as a figure of nature. An obvious point here concerns the mutual dependence of the law–science boundary (that is, the limits of law) and renderings of the body vis-à-vis

the mind, of nature vis-à-vis humanness. As the dissent demonstrates, if one were different the other would be as well. The dissent refocused attention on the subject as a minded being and drew on experiential claims about the lived body. Justice Stevens linked these elements to a strongly skeptical view of the medical-science practices at issue and linked this skepticism to the argument about the presence of bogus law and the illicit exclusion of real law.

More specifically, claims about facts, bodies, and epistemic practices contributed to understandings of due process at the same time that due process – the scope of liberty, the assessment of balance – was used to make legal sense of experience, in particular, claims about suffering. Like the monkeys at issue in the animal experiment cases, any suffering that may occur is not "unnecessary." The very phrase "side effects" marginalizes suffering and renders it merely incidental. Justice Kennedy's argument centers on privileged forms of knowing bodies. Judges, he asserted, are simply ill-equipped to deal with the sort of problems that schizophrenia presents. But, as we've seen throughout this book, judges make assumptions about mental states on a routine basis. They rarely question their ability to do this and are liable to repudiate expert knowledge claims if these might clash with what are taken to be fundamental legal values. As we saw in the wrongful life cases, judges might even claim to know the desires of preconceived protolegal subjects. Perhaps inscribing the limits of law (legal competence, legal ways of determining truths, legal authority, and legal protection) and excluding subjects like Walter Harper from having access to law is relatively easy because subjects like Harper are already prefigured as tokens of nature by virtue of their criminality and disorderliness. Perhaps it is instructive here to recall Alford's discussion of evil:

> In evil . . . we cut another rather than ourselves. We may do it literally or figuratively, as in a cutting remark, but the goal is the same: to implant our dread within another, and so define its boundaries, its limits, containing the uncontainable in the form of another so we might live . . . we do evil so as to feel the boundaries for a little while, even false ones. In evil we scratch the surface of the other in order to mark the separation. At the same time we do the opposite, acting as if there were no boundaries, no limits. My access to your body is limited not even by the envelope of your skin which I slice open before you even feel the pain . . . your boundaries nothing more than the expression of my will.
> (1997, 101)

PART III

JUDGING NATURE

CHAPTER FIFTEEN

BEYOND "NATURE": THE MATERIAL LIFE OF THE LEGAL

With our examination of Walter Harper's struggles with the authorities over the invasion of his body and occupation of his mind we seem to have come a long way from the landslides in Malibu and mineral exploration in northern Minnesota with which this survey began. In a sense we have. The troubles surrounding mental illness and psychopharmacology and their relationship to constitutionally protected interests in bodily integrity, at first impression, have little to do with slope failure, civil engineering, and standards of negligence. On the other hand, these and the intervening sites in our trajectory are versions of each other – at least when viewed through the commonplace abstractions of nature talk. In each of these trouble cases we have seen the repetition of a stock set of organizing tropes and images and the deployment (and counterdeployment) of familiar distinctions. In each we have seen variations on a small set of themes in the practice of making sense of power and experience with "nature," its surrogates and conventional oppositions. In many of the contexts, similar fears and aspirations animate the engagements. In most, the renderings of nature and humanness are connected to physical interventions and to transformations in the material world. In the arguments about passions and scientific reasoning, infertility and extinction, violence and treatment, we encounter iterations of the same social, cultural, and political practices of line drawing. We have seen contending social actors make categorical assertions through which they pour meanings into the available inherited forms and endeavor to squeeze these meanings out into the world of things: into bodies, material relations, physical actions, and landscapes. Throughout we

have seen the play of contending strategies of naturalization, humanization, objectification, and subjectification. In all we have traced the discursive magic of "nature" and how nature stories work to underwrite or undermine notions of purity and integrity, the disgusting and the evil, the sacred and the strange, the repulsive and the attractive. We have also seen how inextricable nature talk is from overarching narratives of progress, development, civilization, and fate. This is perhaps clearest with respect to those stories that emanate from the cultural domain of science.

Along with the magic of nature we have explored the magic of law. In each of our contexts we have examined the tactical translation of troubles into the available forms of legal discourse and the role of different interpretive styles through which rival nature stories have been selectively incorporated or repudiated. We examined a range of cases in which these stories have been brought to bear on the interpretive deployment of the doctrinal categories of property, contract, tort, administrative law, criminal law, and constitutional law. In the social settings represented by what we call "cases," the objectives of antagonists were not simply to generate authoritative interpretations but to enlist the authority (and physical force) of the state in intervening in the unfolding of events in the material world. The practice of figuring or rendering nature and human, animal and human, body and mind one way rather than another were oriented toward reconfiguring the materialities that these figures refer to. One lesson that might be drawn from this concerns the practical utility of "nature." The stories, taken together, highlight how very useful "nature/" is for making sense and for assessing, criticizing, or justifying the workings of power in the world. Even if we might also be able to conclude that "nature/" is, in the end, unwieldy, unstable, or even incoherent, in any specific context it works. Sense is made – one way or another. The pieces fall into place along either side of the great divide. Entailments follow.

It may be that the job that nature is most useful for is saving people from the dread of meaninglessness. "Nature" makes at least some kinds of meaninglessness meaningful in particular ways. It contains, domesticates, gives a name to the meaninglessness of nonexistence, or violence, or perversion, or madness. It renders meaninglessness meaningful in ways that perhaps make it somewhat less threatening. Through the ritual deployment of nature stories social actors can perform rites of expulsion and purification. Nature makes the (potentially) unintelligible intelligible, the inexpressible expressible. The negative abyss of

meaninglessness can then, perhaps, be controlled or patrolled by rendering it as "the animal," "the body," "the wilderness," "the disgusting pervert," "the mother," "the evil psychopath," or "the schizophrenic." The beings and places thus rendered become the repositories of these meanings. Nature talk can thereby make the inaccessible accessible and nature talk combined with the force of law can make it appear to be manageable. Can we really imagine getting on without it? Regardless of one's position on many of the substantive issues examined in the previous chapters isn't it the case that nature talk is simply too attractive to repudiate?

In the preceding chapters I examined and interpreted episodes in the construction of "nature" per se and of more specific figures of nature. I emphasized the politics attending these contested constructions in terms of the play of rival ideologies or interests and in terms of alternative fears and desires. In the diverse contexts antagonists sought to translate nature stories into the available stock of legal forms. "The legal" is, of course, only one cultural setting among many in which visions of nature are produced and put into wider circulation. The specific cultural practices engaged in by attorneys and judges – the crafting of novel distinctions, the reiteration of routine arguments, or the extension of standardized tropes into novel situations – are continuous with the multitude of other voices given expression in this work. Jack Turner, Paul Gruchow, Irene Klaver, Gary Francione, Brian Mannix, EquAdept, the Horseman, E. O. Wilson, John Stuart Mill, Abby Lippman, Dorothy Nelkin, Jack Henry Abbott, and even Walter Harper himself all contributed to the swirl of nature talk. Fragments of these discourses can find their way into legal briefs and judicial opinions. In an important sense the bibliography that follows this chapter is as much a cast of characters as it is a list of "authorities." In their engagement with debates and issues these participants undertook to make, unmake, and remake the meanings out of which the material world is socially and legally constituted.

Here, perhaps, it might be best to acknowledge an important potential criticism of this book. The criticism is that in paying nearly exclusive attention to discourse, to framings, renderings, representations; to the pragmatics of category construction and revision – that is, in maintaining a nearly exclusive concern for words and meanings – all I have done is shuffle things around on the surface while leaving the basic structure of word/world, mind/matter, human/nature untouched. A critic could further contend that, to the extent that I have failed to

destabilize the ruling dichotomies, I have reinforced them, and in so doing reinforced the given world-picture. To some extent this is a fair criticism. I should note, however, that I did not set out to do more than I did do. I traced, described, and interpreted the deployment of descriptions, explanations, and assessments of "nature" in, around, and through legal discourse.

Still, I am left with unresolved doubts about the reach of such criticism. I am left, finally, with a sense of the *practical inescapability* of the sort of dualisms I have been examining, or, to be more precise, the impossibility of escaping their gravitational pull *through language*. The goal of some currents of contemporary social thought, it seems, has been to fashion conceptual and interpretive tools with which to learn how to think our way around the fundamental oppositions such as those with which I have been centrally concerned: human/nature, human/animal, subject/object, mind/body and so on (see Fuss 1989; Haraway 1991; Grosz 1994; Latour 1993). One strand of this current aims to push beyond discourse analysis and create richer understandings of materiality. Other strands deconstruct the distinctions and the oppositions and hierarchies that the ruling dichotomies tend to sustain. In the preceding chapters we have seen many illustrations in connection with nature per se and with wilderness, animals, bodies, and brains. In place of these dichotomies there are posited new conceptual entities such as "hybrids," "quasi-subjects," and other figures whose job it is to disable the kinds of thinking that tend to reinforce power. These are worthwhile endeavors. However, if the objective is to establish a final unassailable position from which the ruling oppositions are eliminated, these efforts are necessarily futile. To the extent that they are oriented toward *renaming* aspects of the material world or providing *conceptual* or *interpretive* resources through which materiality can be thought about differently, it seems that they must also be caught in the trap they would dismantle. The well-established difficulties and disutilities of dualistic thinking cannot easily be conjured away by employing and circulating new vocabularies. Even as we emphasize the nonidentity of "nature" with materiality, we affirm a core version of the basic distinction, and with it core elements of the conventional distinctiveness of human social being vis-à-vis the rest of the world ("nature"): language, meaning, consciousness, and mindedness. Nevertheless, underscoring the limits of discursivity, and asserting the unnaturalness of "nature" may go some way toward hastening the abandonment of the contingent conceptual *effects* of separation, opposition, hierarchy, and domination that deploying

the human/nature dualism commonly facilitates. With these might go the rigidity, naturalness, neutrality, and apparent stability that their unreflective use presupposes. And with these might go the stories about progress, development, regress, and emergence that, as we have seen, are commonly used to justify the infliction or denial of physical pain and emotional suffering. Somewhere down the line of the cultural transformations that these seem to entail we might imagine the coming to prominence of different stories about being in the world that could inform different ways of materially acting in the world.

A related criticism might be that I have also been using a rather conventional notion of law. I have given pride of place to those practices centered on formal state institutions and have focused almost exclusively on discourse, categories, rules, arguments, and formal judgments. This approach has not only left law where I found it, but precisely where its constitutive mythology wants it to be: firmly within the realm of the immaterial (albeit an immateriality dissociated from pure reason and more nearly identified with ideology). Again, this is, to some extent, a fair criticism. But while I have given most of my attention to the contending play of words and "nature stories" in and through law, it is also the case that many of the stories I examined came to law from "extralegal" political and ethical contexts. Still, it may be worth while to examine briefly what it could mean to consider the materiality of the legal.

HOW LAW MATTERS

An important set of resources for appreciating the materiality of law is Robert Cover's seminal article, "Violence and the Word" (1986) and the commentary it has generated (Sarat and Kearns 1992; Sarat 2001). Among the claims he advanced in that work is "that neither legal interpretation nor the violence it occasions may properly be understood apart from each other" (1601). Law, he said, is not just about word, it is about "the visible tie between word and deed" (1623). Violence implicates bodies on both ends of the relationship. Modern violence usually entails the use of technologies and other material-cultural artifacts. Violence is realized in complex sociomaterial circuits. In *Harper*, for example, there were legal-material realities that preexisted and provided the occasion for the moment of judgment. These were partially described by the facts of the cases. The cases themselves, though, are not merely descriptive. The description and narration of events and their framing

within the grid of legal discourse served to ground the performance of judgment and the *doing* of justice. As Elaine Scarry has argued in her discussion of legal violence, performative sentences, "rather than reflecting or representing existing features of the material world bring them into existence" (1992, 63). The various judges in these cases were not asked simply to describe or evaluate antecedent events but to proscribe the unfolding of consequent events in the material world. They were not only interpreting the spaces of prisons, clinics, laboratories, habitats, and bodies; they were asked to intervene, to participate in material practices as only these institutionally situated cultural performers can. They were asked to *do*. The various judges did different things but none could do nothing.

Cover also argued that the denial of this link between word and deed – the denial of law's violence – is a *constitutive* element of law and its self-presentation. This denial is itself, of course, another deed. He suggested that conventional views of law – or the domain of the legal – present it as being *bounded* by the physical. Law per se is centered on mind, on word. Again, in the prevailing mythology law, properly speaking, stops at the utterance: the verdict, the sentence, the decree. "It is so ordered." The "effects" of law, per se are therefore seen as extrinsic. They are externalized. They are apart from law "properly speaking." As Peter Schwenger writes, "[W]ords and things seem fated to an absolute difference" (2001, 100). The notion of *the materiality of law* allows us to examine this background assumption, to consider the idea that law does not stop at the utterance, but continues on through causal chains into the world of stuff. Actually, it was never anywhere else. The violence that law authorizes or blocks happens on bodies and elsewhere in the material world. This is not separable from law, nor are these simply "effects." Violence implicates the very realization of law. It is no less a precinct of Law's Empire than are reasoning, rights, rules, and rhetoric, perhaps especially when it is held in abeyance. In assuming that law refers primarily to the "domain" of reason, rules, or words, one tacitly performs two operations. First, one replicates the distinctions between mind and world; mind and body. Secondly, one frequently assumes the primacy of the first term over the second. But there is no "outside" of the material world. To speak only of the "effects" and "impacts" of the legal *on* the material world tends, I think, to position the legal apart from the material and sensual worlds and to reinforce the location of the legal as beyond the world, in the ethereal, immaterial realm of word, of mind, of reason. The dematerialization of the legal is a crucial boundary-making

event. As such, it may be implicated in the purification and legitimation of practices done in the name of law.

Cover's work provides a point of ingress to how we might learn to see the legal as material. The tie binding word to deed brings law to life in the world of things. Cover's focus is on the performance of legal violence on offending bodies. Scarry also focuses on performative speech acts. I want to expand on these ideas in ways that might be more germane to the themes of this book. One potential resource for this expansion comes from the work of John Law and Annemarie Mol (1995), and other practitioners of Actor Network Theory. Their approach to social analysis is rich with provocative aphorisms such as "when we look at the social, we are also looking at the production of materiality. And when we look at materials we are also witnessing the production of the social" (Law and Mol 1995, 274); "if you scratch the surface of what we tend to call the social," argues Law, "then you will find that it is materially heterogeneous" (1994, 139). Law says that "talk, bodies, texts, machines, architecture all of these and many more are implicated in the performance of the social" (2). He wants us to see that "materials embody, perform and instantiate modes of [social] ordering, together with the distributions and hierarchies that these tend to carry with them" (196). Might these notions be of any use to us in thinking about the legal?

As critical legal scholars have asserted for decades now, there is no principled way of untangling "the legal" from "the social." Going back to human bodies, John O'Neill has written that "In everyday life, we have – and must have – society in our bones" (1985, 24). That is to say, we have the legal in our bones – and in our muscles, organs, fluids, and so on. As we saw in chapter 11, feminist theorists of the body such as Elizabeth Grosz have made the case that the body is not a "natural" entity that stands apart from the social. "The body," she writes, "must be regarded as a site of social, political, cultural, and geographical inscriptions, production and constitution" (1994, 23). A highly significant quantum of what, in fact, has been inscribed is related to the notion that "The body . . . [is] a source of interference in, and a danger to, the operation of reason" (5). The point is also that ideas *about* disembodiment – including specifically legal ideas – are constitutive ingredients of how we *are* embodied.

So maybe we can make something of these ideas. What all of this adds up to for me, if I can capture it in a syllogism, is this: *if* the legal is constitutive of the social, *if* the social is irreducibly material – *in a*

nonreductionist sense – and *if* we carry the social in our very bodies, *then* there is no a priori way of dematerializing "the legal." Any effort to effect a dematerialization of law must be regarded with suspicion. It must, that is, at least be examined as a political maneuver, a purifying gesture. To the extent that the material world is *as* it is as it is constituted by the legal, so the legal is *what* it is as it participates in the process of constituting the material: reorganizing it, transforming it, penetrating it, preserving it. These processes include, but are by no means limited to, those directly operating on the corporeal. Moreover, as Cover suggested, the legal is *as* it is as it participates in projects that reinforce its own rhetorical dematerialization.

Let's go back to prison. If we want to discern the materiality of that aspect of "the social" that we identify as "the legal" we might, following Cover, focus initially on Walter Harper's body, on the bodies of the orderlies or attendants and the violence that brings these different bodies into physical relation. We might see here the material embodiment or performance of the legal. But we might also note the syringe and the pharmaceuticals, and take account of how the floors, walls, doors, locks, bars, and furniture might all be implicated in making the legal a visible, tangible presence in the world. As Paul Graves-Brown argues, "[M]ateriality itself is a nexus through which power relations operate" (2000, 5–6). Consider also how the legal is instantiated in the reports, records, and files, the purchasing orders and manuals through which hierarchy, the drive to order, and the very idea of "the legal" are continually materially performed and concretely instantiated. Then there are the reports of the cases themselves that have been disseminated and made available to government lawyers and critical scholars alike. These may purport to "represent" the events in a court of law but are themselves material artifacts through which law is present in the world. But does all of this materiality matter?

One way to think about it is to ask about the materiality of other social practices. What would it mean to consider the social domain of music apart from the materiality through which it is instantiated? Are fiddles and pipes, strings and reeds, concert halls and pubs, recording studios, CDs and CD players, sheet music – to say nothing of fingers, ears, sound waves, and brains – incidental to the social life of music? Or is science only tangentially associated with its instruments, locations, texts, and bodies? If not, then it is reasonable to ask if the performance of the legal is somehow fundamentally different in this regard. If it is, is it because, as Lord Coke long ago asserted, "[L]aw is the perfection

of pure reason" (1628/1979, 95)? I doubt it. Law, of course, is not the perfection of pure reason. However, it *is* highly significant that social actors may regard and present "the legal" *as if* it could be. And perfect reason is perfected in proportion to its distance from the urgencies or finitude of physicality: human bodies and human body parts and fluids; animal bodies and their parts; ecosystems and their constituent material processes and relationships. As Cheah and Grosz put it, "[L]aw as *nomos* has always been predicated as a function of the mind and therefore in a hierarchical opposition to materiality which law serves to order and govern" (1996, 3). And, perhaps, there may be something else distinctive about the domain of the specifically legal in this regard.

Like other practices law does have its particular artifacts: its documents and seals, its texts, handcuffs, badges, electric chairs, and gavels, the peculiar microspatialities of courtrooms and so on. But precisely because of the imperialism of the law vis-à-vis the social totality, *all* of the material world, all of the material artifacts of the cultural order of modernity, are the instruments through which "the legal" is realized in the world. The legal is "embodied, performed and instantiated" on all bodies, in all places, and at all times (Law 1994, 146). A fiddle is not just a musical instrument, it is also a legal instrument; a syringe is not only a scientific device, it is also a legal device; a clinic is not just a social location, it is also a legal location; amniocentesis is not only a medical event, it is also a legal event. Animals: this cow, that owl, those baboons, are legal things. And it is through their "thingness" that law lives in the world. Bill Brown has written, "Somewhere beyond or beneath the phenomena we see and touch there lurks some other life and law of things" (2001, 6). I want to suggest that perhaps the life of the legal may be more clearly discernible through recognition of its palpable, phenomenal, "lurking" presence in things and in circulation among things.

But the idea is not merely to gesture toward the materiality of law but also to appreciate the material *heterogeneity* of the legal. While the context of punishment may provide relatively clear illustrations of the materiality of law, it may impede recognition of the materiality of law in other contexts. I used violence primarily as a point of ingress from which we might *expand* the idea to cover materiality more generally, and thereby breach the protective barrier of law "properly speaking." We might begin to look at bodies apart from the circuits of penal violence and consider the regulation of criminal bodies, sexual bodies, reproducing bodies, and ill bodies; of nonhuman bodies and forms of

embodiment. We might want to describe how elements of the legal circulate through nonhuman bodies: in laboratories, in zoos, on farms, and in wild habitats, in the critical habitats of endangered species and the less than critical habitats of less than endangered species. From here we might work our way back to the legal landscapes of wilderness and back again to those landscapes that bear the more explicit marks of civilization, progress, and development that property inscribes onto lived-in landscapes. As Austin Sarat has written in a very different context, "law is all over" (1990). With respect to the material heterogeneity of the legal, the situations explored in this book raise questions like: How are some bodies rendered suitable candidates for penetration and others candidates for protection? How are some segments of the material world made suitable candidates for development and others candidates for wasting or preservation?

One might reasonably ask why this suggested material rethinking of the legal would be worth the effort, especially if it is understood as having the effect of emptying the law idea of its specific content and coherence. Part of an answer is that the act of thinking through the materiality of law could contribute to the eventual abolition of the inherited world-picture of subjects and objects, minds and bodies, humans and animals, humans and nature that, in combination with assumptions about radical otherness and antagonism, have provided the conceptual underpinnings of the darker aspects of modernity. If "the social" and "the discursive" are materialized in this sense, then seeing law in more material terms can advance the same goals: the destabilization of the taken-for-grantedness that hinders efforts to reimagine and reconstitute the world. More narrowly, because the inherited mythologies of law are themselves anchored in the basic distinction, because law is conventionally identified with the immaterialities of mind, reason, and word *as against* body and world, and because the law idea plays such an important part in sustaining the ruling narratives of emergence and separation, of progress as increasing distanciation, then materializing law can provide a corrective from which different questions might be asked about what in the world law does. Learning to see the activities of the legal in the relationships among things might open up lines of inquiry and assessment concerning the doings of law in a world of things. That is, it might facilitate the generation of new questions, if not about the nature of law then about how law matters.

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