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Introduction

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CHAPTER 1 - BORROWING BAKHTIN: SOCIOLEGAL STUDIES IN A NEW KEY

Chronotopes of Law develops a new framework for analyzing the spatio-temporal workings of law and other forms of governance. In this chapter, Mariana Valverde introduces us to the work of Mikhail Bakhtin, and how the chronotope has relevance for sociolegal studies today.

Mariana Valverde is Professor at the University of Toronto’s Centre for Criminology and Sociolegal Studies, Canada.

CHAPTER 2 - THE KAREN IN BURMA: CONFLICT AND DISPLACEMENT

This chapter from Governing Refugees looks at the displacement of Karen refugees in Burma, and the ethnic politics of the country, to gain an understanding of the political and historical context that has led to the current situation, and provide a background to further discussion of the production of order beyond the state, justice as a contested site, and the influence of transnational human rights discourses on local justice practice.

Kirsten McConnachie is Joyce Pearce Junior Research Fellow at Lady Margaret Hall and the Refugee Studies Centre, University of Oxford, UK.

CHAPTER 3 - INDIGENOUS PEOPLES’ RIGHTS AND THE LAW IN LATIN AMERICA

Over the past two decades, legal thought and practice in Latin America have changed dramatically with profound effects for indigenous peoples. This chapter looks at how legal innovations at international, continental and national levels have ensured the recognition of indigenous peoples, and converted them into the subjects of rights.

Rachel Sieder is Senior Research Professor at the Center for Research and Graduate Studies in Social Anthropology (CIESAS) in Mexico City, Mexico.

César Rodríguez-Garavito is Associate Professor of Law and founding Director of the Program on Global Justice and Human Rights at the University of the Andes, Colombia.
CHAPTER 4 - TERRORISTS AND PIRATES: GLOBAL POLICE AND HUMANITAS AFFLICTA

Drawing on history, international law, literature and politics, this book offers an original genealogy of the ‘pirate myth’ in the Western political imagination. This chapter analyses the ways in which the figure of the pirate continues to haunt our present, and considers the role it plays in the rhetorical and juridical construction of new ‘enemies of the human race’, and changes to the fundamental norms of international law that have been introduced in order to protect humanity from their threatening presence.

Amedeo Policante is Assistant Professor of Political Theory and International Relations at the University of Nottingham, UK.

CHAPTER 5 - ANTHROPOCENTRISM AND PRIVATE PROPERTY

The dominant rights-based interpretation of private property and the idea of human dominion over nature means that nature is merely the matter of a human property relationship. In this book, Peter D. Burdon argues that the anthropocentric institution of private property needs to be re-conceived. This chapter introduces private property as a legal-philosophical concept, and presents it as a cultural artefact shaped by economic, religious and philosophical ideas.

Peter D. Burdon is based at Adelaide Law School, the University of Adelaide, Australia.

CHAPTER 6 - KALDOWYNERYI

This work is the first to assess the legality and impact of colonisation from the viewpoint of Aboriginal law, rather than from that of the dominant Western legal tradition, and this chapter introduces the concept of Raw Law, which, unlike the colonial legal system imposed upon Aboriginal people, is lived through stories and song.

Irene Watson is a Professor of Law at the University of South Australia, Australia.
Borrowing Bakhtin: Sociolegal studies in a new key
This book argues that studies of law and governance can be reinvigorated by drawing on a number of quite heterogeneous analytical tools that do not have a single provenance or a single political or normative aim but instead work well in combination. The most important single source of the tools presented here is the work of Mikhail Bakhtin, from whose work I borrow/adapt the notions of intertextuality, dialogism, and, last but not least, the ‘chronotope’. Borrowing these notions increases our ability to generate dynamic analyses – rather than static models – and, simultaneously, can help to over come the disciplinary divide between the spatial analyses of legal geography and the insights into legal temporality developed by anthropologists and historiographers.

What Bakhtin’s ideas can do for sociolegal studies, and how I propose to supplement and modify what he wrote, will be explained in this introductory chapter. And since the chronotope is the Bakhtinian term that has the most relevance for sociolegal studies today, the final pages of this chapter will demonstrate through concrete analyses what adopting Bakhtin’s neologism (chronotope) can do. The first example of an analysis of legal processes that can be usefully regarded as a chronotope concerns the court – which I will show should not be understood merely as a space, but more specifically as a spatiotemporality. The second example is one to which I will return in subsequent chapters but here has its first appearance: the North American planning law category of ‘singlefamily detached’.

Chapter 2 will then turn to more explicitly sociolegal sources of ideas, tools, and examples, either positive or negative; it reads some what like a critical review of the literature(s), and may therefore be of more interest to scholars than to students who have not yet come across the works in question. The existing literatures – including Bakhtin's work – do not, however, pay enough attention to the workings of jurisdiction, which even sociolegal scholars often reduce to geographic scale. Chapter 3 therefore explores the relationship between the tools developed in Chapters 1 and 2 to understand scale effects (temporal as well as spatial) and the complex and generally unnoticed machinery of jurisdiction.

Chapters 4–6 then sharpen the tools laid out in the first three chapters in a concrete manner. For any thinker who takes up a pragmatic rather than a systematic approach, the proof is always in the pudding. That is why I felt that instead of publishing a single, abstractly pitched article, I should take the time to write a book containing at least a few concrete analyses – which I refuse to call ‘case studies’, for reasons that will become clear in due course but that, for now, can be said to arise from the fact that from the gene a logical perspective used here (Valverde 2010), existing governance
mechanisms are never 'examples' or 'case studies' that shed light on the 'higher' truths supposedly crystallized in general theoretical concepts. On the contrary: ideas are means to the end of understanding our world as concretely as is possible given that, as Nietzsche argued, our minds can only partially capture constant change and local contingency. To refer to a very different, non-Nietzschean source of the notion of concrete analysis of a concrete situation, Marx once said that for Hegel apples and bananas were but mere examples of 'the Fruit'; and so too, for many sociologists as well as for lawyers, life is but a collection of instances of concepts, a way of thinking that I argue is outdated and often pernicious. One reason why I have become fond of Bakhtin’s work is that in his work analytical terms (e.g. ‘chronotope’) are not precious conceptual jewels to be polished and displayed, but rather tools whose purpose is to help us understand how works of literature (and works of every day embodied speech) are put together, and with what effects. Which brings us to the first substantive section of this chapter.

The status of Bakhtin’s terms

When someone suggests that a particular field of study, in this case sociolegal studies, adopt a new approach or even a new idea, there should be – though in fact there rarely is – a preliminary collective discussion about the status of that approach or idea. Concepts such as Ulrich Beck’s risk society (Beck 1992) or Giorgio Agamben’s ‘homo sacer’ (Agamben 1998), just to name two out of a multitude of currently fashionable terms, become popular as other, usually more empirically oriented scholars find them useful as labels to describe and/or explain a particular process under study. As applications of theoretical terms proliferate, scholars then begin to argue about whether concept X or concept Y is more appropriate to describe a specific phenomenon (e.g. ‘This is an instance of biopolitics, not of governmentality’). They – or rather we – also go on to argue about the correct interpretation, the correct content, of X and Y (e.g. ‘What Agamben really meant in this book was A, not B as claimed by Prof. Jones’).

The first of these common intellectual moves is classification; the second is ascertaining the ‘true’ or authentic content of concepts. Both of these moves are, of course, necessary and useful. Classification is essential to human thought, from a child’s first efforts to classify colours and animals to the most sophisticated science. And some scholarly discussion about what influential thinkers meant by a particular term is unavoidable. However, channeling the vast majority of theoretical debate into these two formats, as is routinely done out of mere habit, has the effect of precluding other types of inquiry. In particular, both of the formats for theoretical debate high-lighted here (classification and definition) sweep under the rug a deeper issue that concerns neither the precise, static meaning of a particular idea nor the suitability of particular applications, but rather the status of the idea in question.
By referring to the *status* of an idea (and here I use 'idea' quite loosely, including everyday notions as well as scientific concepts that articulate with others to form a system), I mean to highlight the effects not so much of particular ideas but of a framework's, or a literature's, conceptual architecture. The architecture of each thinker's particular set of interrelated concepts is generally shared with other theorists. While there is often much originality in the content of a particular thinker's thought, there is little originality at the level of conceptual architectural styles. That is, new ideas are produced with regularity; but the probability that a single thinker can invent a whole new genre of theory is as remote as the probability that a particular writer has invented a new literary genre, or an individual architect a whole new built-form style.

The history of high theory is often written as a succession of autonomous heroic thinkers whose philosophies are self-contained, original systems generated by a kind of mental parthenogenesis. This way of thinking about theoretical production suppresses both the influence of predecessors and the effects of horizontal coexistence, collaboration, and agonistic conflict. Harold Bloom famously documented the constitutive effects of the 'anxiety of influence' on literary creators' efforts to be original (Bloom 1975). Others, not least Bakhtin, have shown that both speech and writing are much more dialogically constituted than the 'great man' theory would allow, with this phenomenon not being limited to actual dialogue with one's contemporaries (Holquist 1981). Much of the interactive constitution of one's thinking is hidden from view; none of us can claim to really know where we first learned to speak or think in a particular way. Thus, practices such as scholarly citation and academic in-person arguments are but the tip of a very large iceberg; no matter how brilliant the speaker or writer, intellectual debts extend much farther than either the speaker or the audience can see. And of course, rejecting existing views is as constitutive as the act of adopting and validating.

Now, to be fair, one cannot completely rule out the possibility that even after the 'anxiety of influence' and other dialogical effects are taken into account, a few thinkers (Aristotle, Kant, Hegel, and Nietzsche come to mind) could be said to have invented a whole new intellectual architectural style, not just designed a new conceptual cathedral. But even if one admits that an author can perhaps create a new style, the vast majority of theoretical work, even if innovative as to content, is highly unlikely to be original as to architecture. And for present purposes, the two styles of conceptual architecture I want to contrast are: (1) world-scale theory and (2) pragmatically oriented assemblages of ideas (see Li 2007).

Examples of world-scale theory are plentiful in sociology and theoretical geography: Niklas Luhmann's systems theory is one example from the recent past, with Althusser's structuralist Marxist framework being an example from an earlier generation.
World-scale theories are necessarily static, even if what they claim to explain is change (and since the emergence of evolutionism in nineteenth-century Europe, generating models that domesticate and explain change has been the central preoccupation of theorists in all fields). World-scale theories are what Bakhtin would call monological, being written from the traditional philosopher’s standpoint that Donna Haraway famously called ‘the God’s eye view’ (Haraway 1991: 183–201).

Foucault’s approach, by contrast, is a good example of a pragmatically oriented assemblage of ideas. The fact that Foucault never provided fixed definitions of terms such as ‘sovereignty’ and ‘discipline’, preferring instead to give examples and descriptions that were not wholly consistent since they came from different contexts, is an important clue about the status of his framework. For Foucault, who largely followed Nietzsche’s struggle-based philosophy (in which philosophy’s tools are themselves flexible and in constant struggle), the meaning of key terms depends to a large extent on which particular struggle or conflict Foucault is analyzing in a given text. Thus, the ‘sovereignty’ that appears as a relatively simplistic and static mode of power in Discipline and Punish (a work devoted to highlighting discipline) appears, by contrast, as highly mobile and innovative in the much earlier historical context of the emergence of state sovereignty out of older feudal political ideas (see Valverde 2010). Students are often dismayed by Foucault’s persistent refusal to provide static definitions for his key terms; but such definitions would have under mined the project of sharpening intellectual tools, not to render them static and precise but rather to allow us to better capture the way in which ideas, as weapons in both historical and more micro-level struggles, are constantly shifting in meaning and effectiveness as they are used for different aims.¹

It would be foolish to try to be definite about the status of Bakhtin’s terms, given the weighty political constraints that prevented him from publishing most of his work and which obscured the authorship of much of the work that was subsequently published – especially for someone who does not know either the Russian language or the Russian and classical European literature that gave Bakhtin most of his raw material. But from what is available in English and can be understood by someone who is not a literary scholar, it is apparent that his work – like that of most scholars in the humanities – does not seek to operationalize a world-scale theory. Instead, it seeks to experiment with terms and modes of analysis in an open-ended manner, exemplifying, in the text’s own logic and form, the very open-endedness of the ‘dialogism’ that is also the object of his analysis (cf. Todorov 1984).

In the rest of this chapter, I will show that explaining the key Bakhtinian terms developed in this chapter (intertextuality, dialogism, and chronotope) simultaneously demonstrates the usefulness of Bakhtin’s assemblage-like conceptual architecture for
studies of law and governance ‘in action’. That is, whether or not legal and sociolegal scholars are persuaded that all or most of Bakhtin’s key terms are useful for our purposes, I hope to persuade my readers that work on law and governance would benefit from abandoning once and for all the formats of world-scale theory. To put it differently: it is the conceptual architecture of Bakhtin’s work on intertextuality, dialogism, and chronotopes that I argue is most important and useful, not so much the content of specific neologisms. Let us thus turn to the first Bakhtinian term that I am arguing we should adapt for our use, intertextuality.

**Intertextuality**

Bakhtin’s work was innovative in breaking with the structuralist, Saussurian interest in documenting the static structural relations that constitute not only the meaning of specific words but also the parameters of speech. Instead, Bakhtin suggested that language be regarded as always already social, as always already dialogical. Bakhtin’s relational approach, importantly, is not a sociological reductionism. He does privilege the utterance, the actual speech act, rather than the deep structures of language; but he was no sociolinguist. For Bakhtin, texts and speech acts are always in constitutive relationships with one another, and, simultaneously, with their producers and with their changing audiences. ‘Intertextuality’ is not Bakhtin’s own word (as I understand it from those who read Russian). But Bakhtin’s thoughts on how meaning is produced in the always situated and never completely determined relationships that texts and people have with one another were later synthesized under the hugely influential term ‘intertextuality’, apparently invented by Julia Kristeva in her commentary on Bakhtin (Todorov 1984: 60).

Intertextuality is an idea of great importance to legal studies, although this has not been recognized very widely. Bakhtin is not cited in Boa Santos’ influential article ‘Law: A Map of Misreading’ (Santos 1987), in which he developed the notion of ‘interlegality’; but, whatever the specific motives behind Santos’ neologism, the way he uses the term ‘interlegality’ is very much in keeping with Bakhtin’s approach. As will be explained in the next chapter, Santos uses ‘interlegality’ to encourage sociolegal scholars to move beyond structural views and instead try to understand legal power dynamically and relationally, paying close attention to the ways in which different legal orders, both formal and informal, and both past and present, constitute each other’s practical meaning. And as it happens, Bakhtin scholar Tzvetan Todorov remarks that law is mentioned by Bakhtin as a field that is particularly intertextual, more so than other fields of knowledge, for instance the natural sciences (Todorov 1984: 63). In the essay ‘Discourse in the Novel’, Bakhtin remarks that legal sites are excellent places in which to examine how one type of utterance (say, witness testimony) is subject to authentication and verification by another type of utterance (say, cross-examination, or
judicial summing up). He then writes: ‘All this calls for further study. Juridical (and ethical) techniques have been developed for dealing with the discourse of another (after it has been uttered), for establishing authenticity, for determining degrees of veracity and so forth (for example, the process of notarizing and other such techniques)’ (Bakhtin 1981: 350).

The processing of utterances through law, in other words, is seen by Bakhtin as more overtly intertextual than other types of encounters between different types of discourse. Scientific discourse, for example, Bakhtin says in a passage that seems to foreshadow Bruno Latour’s analysis of the differences between science and law (Latour 2010: 198–243), seeks to validate its own discourse by recourse not to another discourse but to nature itself, to ‘the facts’ (ibid.: 351). But unlike in scientific writing, or for that matter in literature or in ordinary life, legal discourse, and judicial discourse in particular, readily admits that it is in the business of generating words that have the special status of assigning value and meaning to utterances that are not themselves judicial/legal. Going beyond Bakhtin’s own analysis, we can add that legal systems are noted for developing highly complex formal written rules to standardize the evaluation and judging of one discourse with the tools of another (e.g. assessing the credibility of witnesses or the authenticity of a contract). Given Bakhtin’s admittedly brief comments on the potential that legal and especially judicial discourse holds for those interested in intertextual dynamics, it is surprising that Bakhtin’s work on intertextuality is rarely used or even cited by sociolegal scholars.

In his authoritative study, Todorov further remarks that the key Bakhtinian term that he translates as ‘translinguistics’ (the Russian word metalinguistik) denotes the socially rooted, pragmatic logic of language-in-use (Eco 1976) that Bakhtin pioneered, as against the rigid, static models of the structure of language in general that were in vogue at the time: ‘The term in current usage that would correspond to Bakhtin’s aim is probably pragmatics, and one could say without exaggeration that Bakhtin is the modern founder of this discipline’ (Todorov 1984: 24, emphasis in original). I would not agree that pragmatics is a discipline (Valverde 2003b); but I do agree that because Bakhtin’s thought consists mainly of tools that were chosen because they were useful for a particular purpose – tools that, to use Tania Li’s formulation, were pragmatically assembled (Li 2007) –, if one borrows one of Bakhtin’s terms, this move does not bring in its wake nearly as much theoretical baggage as would be the case if one tried to borrow single concepts from systematic thinkers such as Kant, Hegel, Marx, or Durkheim. If a concept has been developed as an addition to a pragmatically oriented assemblage of loosely related tools to help us understand, both dynamically and relationally, how meaning is produced and/or how power relations are put together, it will be easier to transport that concept into a different but also pragmatically oriented assemblage – the framework for sociolegal studies developed in this book, in our case
than would be the case if one were to take a notion that is firmly embedded in a grand, systematic theory. Sources of methodological and theoretical inspiration that are unrelated to one another but that share a general pragmatic conceptual architecture can be more easily combined than is the case with clearly defined concepts that are integral parts of a world-scale theoretical model.

Thus, the argument of this chapter is not that Bakhtin gives us the one true theory that tells us how meaning is constituted and how time and space coexist and interact in legal mechanisms. Indeed, one of the reasons for privileging Bakhtin is that Bakhtin is not interested in the kind of mega-scale theory that, if proved to be correct, eliminates and invalidates other theories. Specifically, in the term ‘chronotope’, which synthesizes spatial and temporal scales, Bakhtin offers not a theory of time and space or of what some call ‘space time’, but rather, at most, a theory of communication that can be adapted for a variety of uses, including for legal studies purposes. To reiterate: what Bakhtin offers is not a coherent and static system that competes with other systems (Marxism, autopoiesis, etc.) but rather a set of loosely connected concepts and insights that his lengthy analyses of literary works demonstrates can shed new light on how acts of communication take place. Bakhtin’s approach is hence suited to being adapted for new uses in a flexible manner for legal studies purposes, with ‘interlegality’ being one such adaptation.

Dialogism/heteroglossia

Bakhtin’s wide-ranging studies of ancient and modern literature led him to conclude that some genres, most notably the modern novel, not only reveal but also revel in the multiplicity of perspectives, narratives, and modes of speech that exist around us, a multiplicity that he calls ‘heteroglossia’. Heteroglossia is a general feature of the social world, but it is not reflected in all genres. Some genres suppress heteroglossia. For example, the epic (a grand-scale narrative, often interpellating a unified people) consists of a one-voice story told by a single, all-knowing narrator: ‘the epic world knows only a single and unified world view, obligatory and indubitably true for heroes as well as for authors and audiences’ (Bakhtin 1981: 35). By contrast, the novel not only portrays the world as heteroglossic but that it is actually based, as a genre, on the idea that there is no one single point of view. It does not merely depict multiplicity; it performs heteroglossia, as we would now say. A novelist gives his or her audience a whole cast of characters with distinct, individual voices, thus offering that audience a wide variety of perspectives and mini-languages.

In contrast to the more monotone style of genres such as the epic, novels include a wide variety of communication formats. These include: realistic dialogue; descriptions of landscapes and of people’s interior landscapes from either the narrator’s or other characters’ points of view; the inner dialogue of a character; authorial top-down
judgements; letters among the characters; and so on. Authorial speech, the speeches of narrators, inserted genres, the speech of characters are merely those fundamental compositional unities with whose help heteroglossia can enter the novel; each of them permits a multiplicity of social voices and a wide variety of their links and interrelationships (always more or less dialogized): Thus, ‘this movement of the theme through different languages and speech types, its dispersion into the rivulets and droplets of social heteroglossia, its dialogization – this is the basic distinguishing feature of the stylistics of the novel’ (Bakhtin 1981: 263). And elsewhere he comments that the prototypical novelist (with Dostoyevsky being Bakhtin’s favourite source of examples) ‘injects social heteroglossia into the body of the novel and leaves it to the orchestration of its meaning, frequently giving up altogether any pure and unmediated authorial discourse’ (Bakhtin, cited in Todorov 1984: 77).

Bakhtin is not saying that heteroglossia did not exist in, say, the Greece of Homer; he is merely stating that the novel, as a genre, excels at both portraying and encouraging social and linguistic diversity, that is, heteroglossia. (Incidentally, sometimes the term ‘polyphony’ is used in a more or less synonymous sense in the English translations. It is not clear, to a non-Russian speaker, whether there is in Bakhtin’s own writing any significant difference between the terms translated by the neo-Latin word polyphony and the one translated by the neo-Greek term heteroglossia; but for present purposes, the very general term ‘heteroglossia’ is sufficient.)

What about the related term ‘dialogism’? By that term, Bakhtin conveys the idea that dialogue is not a purely sociological phenomenon, as already indicated in the comments on intertextuality. Dialogism also includes the fact that as one talks or writes, one is responding, knowingly but mostly not, to the indefinitely large number of texts and speakers that have already used the same words, entities, both real-life and ghostly, with whom one is necessarily in dialogue (see Todorov 1984: x). The term ‘dialogism’ thus covers more than the terrain covered by social interactionism: it also includes the endless and unrecorded chains of interactions among previous utterances and texts within which any one speech act is but a mere link – that ubiquitous phenomenon that later came to be called ‘intertextuality’. Todorov, incidentally, argues that ‘dialogism’ is a some what narrower term that can be taken as an instance of the universal phenomenon of heteroglossia or intertextuality; but his interpretation may be a little too rigorous, a little too fixed, especially if one is reading Bakhtin for social science purposes rather than for literary analysis purposes (Todorov 1984: 60). Dialogism could just as easily be taken as the primordial condition of human communication: the biblical Adam did not exist in a heteroglossic universe (yet), but he certainly was constituted in and through a dialogical relationship with God. For what it is worth, the Bible shows heteroglossia as a later phenomenon, made visible at the time of the Tower of Babel.
Be that as it may, dialogism, like intertextuality, is hardly a modern invention: but the
genre of the novel consciously breaks with older, some what more monologic literary
styles, and brings the dialogism of speech to centre stage as well as making it
aesthetically pleasing. In other words, instead of repressing multiplicity and conflict, as
many literary genres and some types of speech do, the novel acknowledges and even
promotes social and historical dialogism. The novelistic literary techniques associated
with dialogism and heteroglossia imply that reading novels not only teaches readers
about life but also allows them to imaginatively participate in social life; however, it
does so without imposing a single way of being in the social world, since readers
always have a range of characters and mini-languages with which they can identify.

Before going on to the term that is highlighted in this book, chronotope, it is
appropriate to comment briefly on the potential relevance of Bakhtin's notions of
dialogism and heteroglossia for sociolegal studies. It is clear – although to my
knowledge this has not yet been noticed – that these terms have an obvious affinity
with the law and society movement's longstanding effort to de-centre the hegemonic,
authoritative speech of formal state law. Accordingly, later chapters of this book
occasionally use 'dialogism' and 'heteroglossia' to illuminate some relational and
pluralistic aspects of legal power and legal knowledges. For now, however, suffice it to
say that from classic legal pluralism, to post colonial scholars' analyses of overlapping
normative systems, through regulation scholars' work on nested systems of rules and
norms, a wide array of sub-literatures within law and society show that, just as certain
literary genres tried but eventually failed to suppress dialogism, so too in respect to
political and legal struggles, monologism is a perpetually failing operation (see, for
example, Lawson 2011; Smith 2003).

**Chronotope**

The term 'chronotope' was apparently inspired by early twentieth-century relativity
theory, which broke with the Newtonian habit of regarding time and space as separate
and objectively real dimensions of the world in favour of a dynamic and indeed
'relativistic' model of 'space time' (Bakhtin 1981: 84). Now, considering questions of time
and space together rather than separately is not what made Bakhtin's 'chronotope' an
original and radical idea. As we will see in Chapter 2, any number of anthropologists,
geographers, and theorists of history readily admit that to isolate the temporal from the
spatial dimensions of human existence is problematic. What makes Bakhtin's
chronotope an important innovation whose implications we have yet to understand is
that, unlike legal geographers, anthropologists, and historians, who by and large either
ignore one dimension or else carry out an analysis of temporality and then add an
analysis of spatialization or vice versa, Bakhtin devised a notion – the chronotope – for
the precise purpose of analyzing how the temporal and the spatial dimensions of life
and governance affect each other.\textsuperscript{2} How exactly the term could be used for sociolegal studies requires translation, however, because Bakhtin's main goal was to understand the specificity of literary genres, not sociolegal mechanisms or governance logics.

Bakhtin's essay 'Forms of Time and Chronotope in the Novel' appears at first sight to aim at an interpretation of how the modern novel differs from earlier literary forms. However, it actually pursues a much loftier objective: namely, a new method for ascertaining what makes each genre what it is. In addressing the age-old literary theory question of genre specificity, Bakhtin chooses to focus precisely on space and time, but with these two dimensions of human life and human perception taken together and taken relationally, rather than separately. The 'chronotope', Bakhtin states, is 'the intrinsic connectedness of spatial and temporal relationships that are artistically expressed in literature... \textit{Time, as it were, thickens, takes on flesh, becomes artistically visible; likewise, space becomes charged and responsive to the movements of time, plot, and history}' (Bakhtin 1981: 84, emphasis added).

'Time' and 'space' are thus not taken as separate dimensions to be considered one after the other, as is done in sociolegal case studies that provide historical context in one section and an analysis of spatial governance in another section. The specificity of a particular literary genre – a particular, collectively produced and culturally established way of telling stories and capturing human relations – lies precisely in the way in which, in each genre, time 'thickens' and becomes spatialized in distinct ways, while 'space becomes charged and responsive to the movements of time, plot, and history'. The particular shape of this process is specific to each of the genres that are available within the same culture or across historical and geographical boundaries.

As one of his inspirations, Bakhtin references the 'Transcendental Aesthetic' section of the \textit{Critique of Pure Reason} (Kant [1781] 1965), which is discussed in Chapter 2, in the paragraph following the one just cited. However, Bakhtin notes that he is transposing Kant's transcendental aesthetic into a phenomenal key, since for him – Bakhtin – time and space are 'forms of the most immediate reality' (Bakhtin 1981: 85, n2) and not transcendental \textit{a priori} conditions for the possibility of perception. The debt to Kant is not large, however, since Kant treated space and time separately, in keeping with the Newtonian approach then in vogue, rather than considering the two as mutually constitutive, as was done by Einstein and subsequent physicists.

Analyzing the progression of Western proto-novelistic genres since the Greek romance, Bakhtin shows that each genre constructs time and space in characteristic ways. This is an insight which legal historians and legal anthropologists could easily produce without reading Bakhtin. But more profoundly and innovatively, he demonstrates that particular spatiotemporal modes constitute the 'essence' of each genre, each major mode of cultural expression. When a genre routinely uses Fate to move the plot along,
for instance, a certain semi-sacred spatiotemporality is at work, one that contrasts with the profane, disenchanted, human-actor centred spatiotemporality of the modern novel, in which events are always the effects (though often unintended effects) of individuals’ choices. The logic of the ancient Greek romance is not merely temporal, however. The specific temporality of fate is intertwined with a spatialization that, as Bakhtin describes it, appears to have much in common (rather surprisingly) with the ‘abstract space’ that writers from Mary Poovey to James Scott have identified as a modern creation (Poovey 1995; Scott 1998). Providing several examples of the peculiarly static, featureless geographic settings of classic Greek romance, Bakhtin points out that in this genre heroes are shown as travelling from Egypt to Greece and to the Near East without encountering any real geographic or cultural differences, as if the spaces through which they travel were essentially alike. This abstract spatialization is intertwined, by means of the ‘chronotope’ that constitutes the ancient Greek romance, with an also abstract, or perhaps merely static, sense of time. Bakhtin points out that the final reunion of star-crossed lovers characteristic of Greek romance (and Shakespearian comedies, one might add) erases time twice. First, the lovers do not visibly age despite the lengthy and arduous adventures they undergo; and, secondly, the world to which they return also turns out to have remained static while they were undergoing lengthy trials and mishaps. Therefore, even when the heroes move through space and time, these movements have no deep significance, and do not bring about any substantial change. This absence of spatial and temporal change stands in marked contrast to modern novels (and not only the Bildungsroman subgenre), in which displacement across time and space is presented as fundamentally altering – often for the better but some times for the worse – the characters; or at least the protagonist’s, inner self.

The ancient Greek romance takes pride of place in Bakhtin's essay, since it is a forerunner of the European modern novel. However, classic Sophoclean tragedy too can be seen as existing in and constituted by the same kind of abstract chronotope, with this chronotope having an impact on the content of the justice and/or revenge being sought by the characters (including the gods, of course). As Stuart Elden insightfully points out, in Sophocles’ plays, the various cities and areas of countryside mentioned are abstract, not concrete, spaces – as if a generic city, a generic palace and a generic city-controlled rural area (Elden 2013: ch. 1) are the sites of the tragedies, rather than actual, concrete places. Thebes and Troy were no doubt quite different in their glory days; but the differences are not formative for Sophocles’ characters, and do not result in different notions of justice. Time, too, is oddly static in the classic tragedy, as the sins of the fathers continue to exercise causality through their offspring long after the said fathers are dead – as the fate of Oedipus’s daughter Antigone, discussed in Chapter 4, shows.
A key contention in this book is that, like literary genres, different legal processes are shaped and given meaning by particular space times. Applying Bakhtin’s ideas to the legal realm is not wholly without basis in Bakhtin’s own thought, since – to the dismay of purer literary critics such as Todorov (1984: 81) – Bakhtin de-centres literature, and indeed writing, by emphasizing that literary discourse is only one of many forms of human communication, and legal discourse is one of his many extra-literary examples. Bakhtin carefully defines genre in an explicitly non-literary manner: ‘A genre is the set of means for a collective orientation in reality, aiming for completion’ (Bakhtin, quoted in Todorov 1984: 83).

In so far as law also is (among other things) a system of communication, Bakhtin’s ideas can be applied in that field without major distortions. How would this appropriation, this sociolegal dialogue with Bakhtin himself work? One opposite example is that if we consider a basic modern legal format (the penal code) as a genre in the Bakhtinian sense, we see that penal codes are written in a manner that homogenizes the space time of the state – or, more accurately, a manner that tends towards homogenizing political spacetime and in so doing boosting the unity of the state. Modern penal codes create crimes that are absolute prohibitions applying to all persons, or at least non-insane adults, at all times, without considering the social status of the person or the time, space, and context of the event. This logic is in sharp contrast with earlier, highly status-differentiated forms of law. The uniformity of modern penal codes (which of course exists only in ‘law in the books’) is markedly different from the logic of other areas of law and regulation.

To bring into relief the specificity of the chronotope of the modern penal code, it is useful to note that most non-criminal systems of legal rules apply only to people in particular relationships (e.g. employers, landlords, parents, spouses, vehicle drivers, etc.), thus differentiating the citizenry. The way in which modern penal codes homogenize spacetime also comes into focus when the classic Beccaria-style penal code is contrasted with local police-style regulations, which to a large extent consist of nothing but time- and space-specific rules governing such intersubjective and situated problems as trash disposal, driving, parking, and so forth. A good example of the latter format or genre of law are parks bylaws that make it illegal to sleep in parks but only at night, and that internally differentiate the space of the park to separate playing sports from walking dogs and so on. (Land use law also differentiates local space, often in an almost maniacal, obsessive manner; but it does not provide as good a contrast with the genre of the penal code as parks regulations because temporality is relegated to the back ground, with the apparently atemporal knowledge format of the map being a key tool.)

That the logic of modern criminal codes is well suited to supporting and upholding
state sovereignty is well known; but the spatiotemporal dimensions of coercive penal codes have received less attention, and within that especially the temporal aspects. Stuart Elden's erudite and detailed genealogy of modern 'territory' demonstrates that it was only with the rise of theories and practices of state sovereignty in early modern Europe that territory, as we know it, emerged as a central mode of spatialization (Elden 2013). But a Bakhtinian analysis would go on to explore the temporal logic of the kind of state power, including penal power, that is exercised over the piece of land that has been 'territorialized'. Penal codes, a Bakhtinian analysis would suggest, not only secure a spatially defined territory, but also act as a temporal hinge, one that performs the crucial role of connecting the past with the future, retribution with prevention. While retribution for past misdeeds is the main temporal logic of criminal prosecution and criminal punishment from the judicial standpoint, from the standpoint of the sovereign, penal codes are not merely retributive, since they are written, and to some extent enforced, in such a way as to not only punish past offences but simultaneously secure the future. In other words, from the strictly judicial point of view the important temporal dimension is the past, or rather the very particular past that is constructed by 'who done it' inquiries, judicial and otherwise (Foucault 2014; Valverde forthcoming). From the sovereign point of view, however, establishing the true facts about blame for past acts is not the real point. The primary concern from the point of view of the modern state is to use such opportunities as might be provided by judicial inquiries into past offences to secure the state into the future. Generally, then, excluding temporalization from the analysis of the relation ship between political/legal power and territory, as Elden does in his magisterial account, impoverishes the account of legal-political governance.

To move to a very different legal sub-field, another area of law that might benefit from a chronotopic analysis is land-use law. It is well known among those familiar with the rise of urban planning that local law governing conflicts in regard to what eventually came to be called 'land uses' under went a significant chronotopic shift in the early twentieth century (Valverde 2011). Nineteenth-century nuisance law deployed and constituted a spatiotemporality of concrete and relational particularity that was explicitly dialogical: an activity or a land use only became a nuisance at the time at which a certain type of person or land use appeared next door, and nuisance offences were only prosecuted if there were complaints (although a municipality could act as the complainant, in the case of public nuisances, and such actions paved the way for the far less dialogical logic of professional urban planning).

By contrast, twentieth-century planning law looks almost completely to the future, not the past, and it seeks to govern not the one place where a conflict has happened but rather the whole of a territory — doing so, further more, proactively, by means of a general future-oriented policy usually embodied both in various sets of numbers and
in an official plan and an official zoning map. (These maps, not coincidentally, are unusual among maps in that they seek to map future development more than present reality; currently existing buildings and activities that do not meet the standards set for the future are either ignored in the official maps or marked as 'legal non-conforming uses', a label that subordinates the present to the future.) For twentieth-century planning law, the dialogical and situated relations between two actual neighbours exist only as opportunities to either enforce or not enforce or modify the overall plan (Valverde 2011).

In keeping with Bakhtin’s observation that chronotopes are not always internally consistent, it should be noted that even the most future-oriented and modernist of municipal official plans leave room for a contradictory chronotope: the backward-looking, nostalgic spatiotemporalization best embodied in the notion (and the legal doctrine) of ‘the character of the neighbourhood.’ The coexistence of these two contradictory chronotopes is explained by the operation of scalar mechanisms. That is, the conflict between the future-oriented modernist discourse of growth and improvement and the nostalgic temporalization enshrined in the doctrine that zoning variances are to be granted only if ‘in keeping with the character of the neighbourhood’ is managed, quite impersonally and without a need for political debate, through an implicit, back grounded scalar distinction. The modernist, future-seeking logic of economic growth is tethered to the scale of city-wide or region-wide plans, while the logic of nostalgic preservation and ‘heritage conservation’ is in turn confined to the scale of micro-neighbourhoods, a scale that often covers no more than a single building or block. As will be shown in detail in Chapters 2 and 3, scalar differentiation is the key to understanding how these conflicting logics can coexist: projects with contradictory spatiotemporal logics would not find it easy to coexist if they were carried out at the same scale. ‘Heritage conservation’ has become a powerful chronotope in urban design circles. Because this chronotope is embodied strictly in small-scale projects that produce tiny ‘heritage’ enclaves (for example, fancy coffee shops with sand blasted brick walls displaying the odd relic of nineteenth-century industrial iron), it does not directly threaten the much better resourced chronotope of city-wide and regional innovation and economic growth, the chronotope embodied in large suburban developments, gigantic shopping malls, high-tech ‘hubs’, and very tall downtown condo buildings.

Before going on – in the final sections of the chapter – to provide more detailed examples of legal chronotopes, it is important to acknowledge that the sociolegal adaptation of Bakhtin’s work on chronotopes need not be under taken completely from scratch. There are some passages in Bakhtin’s long essay on chronotopes, in particular, that already go part of the way towards a sociolegal interpretation. These will be discussed here because, unlike the general idea of the chronotope, they have not – to
my knowledge – been explored by sociol egal scholars.

**The agora: first example of a 'real-life chronotope'**

As what he calls a 'real-life chronotope,' Bakhtin notes (unfortunately just in passing) that the agora's spatiotemporality was essential to the Greek sense of a free (male, free-citizen) self engaged in becoming wise and learning to practice freedom. Bakhtin's point is that what we would call personality, character, or for that matter freedom, only acquired meaning and reality as it was made visible and seen by others in the specific space time that was the agora. That the ancient Greek (male, privileged) self often associated with the birth of freedom itself was constituted in publicly visible interactions that took place under open skies in the public square (rather than in the interiority of, say, Descartes' famous one-person cabin with a warm stove) is a fact that need not be elaborated here. But understanding why Bakhtin thinks that the agora is a chronotope rather than merely a space helps us to understand how chronotope analysis sheds light on phenomena often swept under the rug by legal geography.

What Bakhtin does not say, but is implied, is that the political speeches, criminal trials, and market transactions that formed the substance of 'the agora' were as limited by temporal markers as by the more apparent spatial markers that are still visible in Greek town ruins across the Mediterranean. An encomium speech, for instance, would not function as an encomium if delivered in the middle of the night, or at the wrong time – as Derrida notes, from a very different perspective, in his discussions of embodied practices of friendship and their relation to justice (Derrida 1997, 2006).

Like other places of economic and social exchange, then and now, the agora was defined by formal and informal temporal rules as well as by legal spatializations. The spatiotemporal regulations that have constituted markets and other socio-economic spaces since the agora (for instance, the complex medieval rules allowing markets in specific spacetimes) have not been immortalized in high culture in the same way as their rhetorical counterparts (the eulogy, the encomium, the call to military sacrifice). Nevertheless, such spatiotemporal regulations continue to shape what is meant by a valid transaction. Contemporary techniques that constitute markets temporally include the stock market's crucial performative, namely the opening bell, as well as the techniques used by electronic financial systems for stopping trade on some stocks in the wake of temporally unusual trading patterns.

Therefore, if we try to build on Bakhtin's passing comment about the agora as a 'real-life' chronotope, we can see that it is very productive to understand the venue that was the agora as the chronotope that simultaneously enabled the earliest formulations of Western-style citizenship, Western-style market transactions, and Western-style narratives of honour and civic virtue, with simultaneity being the most important
element for purposes of our analysis.

**The ancient Roman patrician family household**

‘Another real-life chronotope’, Bakhtin writes, is that which grounds the genres of Roman autobiography, biography, and memoir (Bakhtin 1981: 137). These classical Roman genres privilege a space – an interior space, the legal-physical-social space of the family household. Bakhtin does not comment on how Roman law both constitutes and is shaped by this particular type of indoor space and household, because he is only concerned with understanding how the family household is the place in which a certain literary and social entity – the essential, personal character of the great man whose biography or autobiography is being written – is put together. He therefore only remarks that the Roman patrician household is a chronotope in which ‘historical reality is deprived of any determining influence on character’ (ibid.: 141), since events in someone’s life are never formative, being only occasions on which the inborn, unchanging character of that great person can be displayed (Plutarch’s *Lives* is Bakhtin’s main text here).

However, given the huge influence of Roman law on subsequent European legal systems, especially in private law, future scholars may well benefit from considering how the chronotopes that made up Roman sociolegal culture might have shaped legal developments many centuries later. The ‘paterfamilias’, to name only one classic Roman sociolegal figure, would be from a Bakhtinian point of view not a sociological ideal type but rather a stock character in a narrative with a distinct spatiotemporality. In so far as the paterfamilias has exercised a huge influence not only on family law but also on public law – for example, in the law on ‘the police power of the state’, which as Markus Dubber has influentially argued is based on an analogy between the household and the state (Dubber 2005) – examining the features of the chronotope of the Roman patrician household could prove fruitful for those interested in the genealogy of terms and doctrines in current law.

Since the publication in English of Bakhtin’s work (and works that may or may not have been written or co-written by Bakhtin but were published under co-authors’ names, for political reasons), a vast number of studies have used Bakhtin’s ideas in new ways; but Bakhtin’s influence has been felt almost exclusively in the humanities. Studies of legal and other types of governance carried out with social science tools, however, could also benefit from experimenting with Bakhtin’s ideas. By way of illustrating the benefits of such a move, I will now proceed to analyse two examples of legal chronotopes: first, the courtroom, or more accurately the court of law; and secondly, the ‘single-family-detached’ entity that is constituted in and supported by planning law. These examples, I hope, will serve to put some sociolegal flesh on the bones of the borrowed term ‘chronotope’, before we go on to canvass other relevant literatures in
Chapter 2 and the issue of jurisdiction’s relationship to spatiotemporal scales in Chapter 3.

**The courtroom as a chronotope**

A legally important venue that is usefully considered as a chronotope is the court. The spatial differentiation of court buildings and courtrooms has of course been discussed by many sociolegal scholars and legal historians, mainly with a view to showing how certain notions of the majesty of law are given architectural form. But the law’s majesty is also produced and furthered by means of temporal manoeuvres, and this dimension is generally excluded from analyses of legal architecture. The court is not merely a room; and it is not a court simply because of its architecture and furniture. The spacetime in question is only a court of law at certain times. At other times, it is merely a room in a public building. Working courtrooms are temporally specific in part because, like other state institutions, they only effect and perform state power during certain publicly announced opening times and during ‘business’ days; but, more specific to law, courtrooms are also temporally specific because the space only becomes a court of law at a highly particular time within that business day, a point in time that is only indirectly governed by the standardized clock time that determines when public servants are working.

The specific majesty of law’s time begins not at the publicly advertised time but only at the far less predictable time when the judge enters the room and the clerk says ‘All rise’ (or ‘the court is now in session’). The courtroom is usually open earlier, and lawyers talking with one another or accused people snatching a few words with families in the public gallery might well populate the space and engage in dialogues with legal significance (for example, a plea bargain might be put together in this pre-law but post-opening time). But if the judge’s official entrance is delayed from the official time of 10 am until 10:15, then 10:15 becomes the time zero of law, not the time at which the door was opened or the time at which whispered conversations began among lawyers.³

In addition, the official time of courtroom law is not continuous, unlike clock time. When the judge orders a recess or declares a lunch break, the time of law stops and has to be re-started later. The spacetime of the archetypal ‘court of law’ thus shares many commonalities with the spatiotemporality of sports matches. A football game might be scheduled to start at 8 pm; but the relevant time is determined by the referee, not the publicly visible clock, and it is only when the referee blows his whistle that the space (the football pitch, say) becomes a working, effective football pitch. Furthermore, just as the referee uses his sovereign power over the specific chronotope that is the sports match to signal breaks and decide on the exception (from adding extra minutes to calling off the game due to bad weather or unruly fans), so too the judge’s power to
stop and re-start the time of law, as if he or she had a legal stop watch, both presupposes and performs a particular kind of sovereignty. The judge’s sovereignty, in spatiotemporal terms, is greater than the judge’s official legal power. One can read textbooks and find out which judges can claim jurisdiction over which cases and what different judges can do by way of exercising power over the parties and over lower-level judges: but all judges, no matter how lowly in the hierarchy, have a spatiotemporally specific sovereignty that covers all aspects of ‘the court of law’, and not just legally relevant events. Even a lowly magistrate, for example, can throw spectators out for talking too loudly, and can send a lawyer home to change into more appropriate shoes. Such decrees, which have no effects on the substance of law, emanate from the spatiotemporal sovereignty conferred on the judge by the chronotope of ‘the court of law’.

The way in which a specific temporality (the judge-centric discontinuous time that is relevant for purposes of a legal transcript) acts on and through the physical space of the courtroom to create the legal chronotope that is the court of law perfectly exemplifies Bakhtin’s point about how time ‘thickens’ space, cited above. The judge’s sovereign power to start and stop the legal game is what makes the courtroom space a court of law. In turn, the interior design of the courtroom as a space is constitutive of judicial time, the official time of law: if lawyers run into the judge in courtroom coffee shops or other spaces, the spatial location of those speech interactions has the effect of excluding those bits of time from the official written record of the progress of the trial through time.

Of course, sociolegal scholars know that law is not limited to formal proceedings in formally designated times and places; but a plea bargain concocted in the men’s room of a court building is not law until it is re-narrated in the official space during a time that is official court time (that is, not during a lunch break). To summarize: the space of legal speech acts to draw boundaries around law’s official time; and, in the same way, temporal markers (e.g. the judge’s or clerk’s pronouncement that the court is now in session) also redefines, instantly, the space in which the remark is made. Seeing the courtroom as a chronotope, therefore, amounts to more than adding an analysis of the temporal logic of trials or hearings to existing analyses of court design and architecture. The term ‘chronotope’ encourages us to explore how different legal times create or shape legal spaces, and vice versa: how the spatial location and spatial dynamics of legal processes in turn shape law’s times – how spatial dynamics thicken time, to use Bakhtin’s evocative phrase.

Furthermore, it is possible – although I would not want to press this point too far – that paying attention to the way in which time and space interact to constitute the courtroom helps to shed light on the dynamics of what is called ‘justice’. Just as the
The chronotope of the agora is constitutive of Greek-style citizenship, Greek-style commerce, and Greek-style justice, at the same time and through the same processes, so too the spatiotemporality of the court of law (or better, the spatiotemporality that is the court of law) is constitutive of what is called justice, as Linda Mulcahy has carefully demonstrated, though in an analysis limited to spatial organization (Mulcahy 2012). In the Middle Ages, justice was produced outdoors, often on the steps of the local cathedral or other major church. And while images of justice being rendered outdoors and in particular, for symbolic as well as practical reasons, under trees can still be found (as Mulcahy’s brief discussion of post-apartheid South Africa shows [Mulcahy 2012: 6]), today the public, and not just official legal actors, would not regard judgments rendered on church steps or under a tree as equivalent to ‘having one’s day in court’, even if the substance of the judgment accorded with local norms. A proper legal ruling has to be issued in a specific, consecrated indoor space at a particular time. Exceptions to these rules about time and space are very occasionally made, for example in Australian semi-outdoor settings meant to accommodate Aboriginal sensibilities. But the fact that such venues are provided as explicit, culturally specific exceptions only underlines the hegemony of the ‘normal’ courtroom chronotope.

Barbara Yngvesson’s influential study of the work performed by small-town court clerks in the USA similarly highlights the spatialization of the pre-legal or paralegal work done by clerks through the evocative image of ‘the courthouse steps’ (Yngvesson 1988). Her study also demonstrates that this liminal, threshold space (which may not be physically on the steps, since this liminal gatekeeping work can be done in hallways or on the pavement) is also temporally specific: it takes place in the non-official, pre-game temporality that the clerk dominates. The clerk’s distinctive spacetime thus shapes the content of law in so far as a significant proportion of justice-seekers are discouraged, in the specific chronotope controlled by the clerk, from pursuing formal justice. In screening cases, the clerk renders instant para-judgments that do not quite have the force of law but which are taken by most people as final. Thus, the clerk’s spacetime (or more broadly the spacetime of legal gatekeeping, which can be controlled by any number of different person ages besides clerks, such as paralegals or community agency workers) is closely connected to but is chronotopically distinct from the spacetime of the court of law, of the formal justice that is rendered visible and actionable in court transcripts. In other words, the marked differences (especially in regard to due process) between the quasi- or pre-law of gatekeeping on the one hand and formal justice on the other can be seen as produced by the partly collaborative and partly conflictual relationships that both link and separate these two distinct chronotopes.
The property-owning nuclear family and the legal chronotope of 'single-family detached'

The second example of a legal chronotope is drawn from the legal field in which I have done most of my empirical work in recent years, namely local urban law. Studying how North American cities use their legal tools, historically (Valverde 2011) and in the present (Valverde 2012), reveals that one of the key chronotopes of local law – and one not found at other scales, in the more exalted jurisdictions of criminal law and constitutional law – is that which literally houses the privileged subject of Euro-American urban citizenship: the home-owning nuclear family household. The exclusion of homeless people and street people in general from citizenship in all its dimensions has received much attention among sociolegal scholars in the global North as well as the South. But what has received far less attention is that while homelessness certainly acts to create political and not just social exclusion, having a private place to eat and sleep does not guarantee true citizenship and belonging. Tenants; young single people living with their parents or with roommates; low-income seniors living in rooming houses or retirement ‘homes’; families temporarily sharing a dwelling with another family for economic reasons; boarders and lodgers; couch-surfers; those who illegally occupy residences or build shacks on land they do not own – there are numerous groups, and not only in global South cities, whose exclusion from legal as well as symbolic citizenship at the local level is effected in large part by the legal-cultural privileging of a particular form of domestic life. Current political discourse involving the term ‘taxpayer’ (now used to designate a group previously known as citizens or voters) reinforces this exclusionary logic. In real life, quite contrary to the ideological articulation of property with citizenship that goes back to John Locke, tenants often pay local property taxes at a particularly high rate, because rental apartment buildings, legally classified as businesses, are generally taxed at a higher rate than owner-occupied dwellings. But both the older category of ‘ratepayer’ and the more contemporary discourse of ‘taxpayers’ not so subtly interpellate property owners (business owners and homeowners) as the only citizens of our cities.

Leaving for another occasion the topic of business ownership as a mode of citizenship, it is well known, at least within critical urban geography and planning, that local law has a set of legal tools of diverse provenance (most visible in North American zoning law) that constitute in law the paradigmatic domestic life form of the home-owning, morally respectable nuclear family. However, such critiques rarely explain that law’s control over social life can never be total, not only because of what is called ‘resistance’ but also because of law’s contradictory internal dynamics, which can be made visible by focusing on scale and jurisdiction. Zoning ordinances, for instance, clearly prop up the culturally and politically privileged home-owning nuclear family: ‘single-family
detached’ is the top, least restricted land use in every North American zoning scheme, as anthropologist Constance Perin noted long ago (Perin 1979). Perin was certainly correct in emphasizing the constitutive role played by local law; however, the fit between the socio-economic-cultural-sexual unit that is the nuclear family (a social chronotope) and the legal entity known as ‘single-family detached’ is by no means perfect. While residential suburbs with detached homes are marketed to owner-occupiers, and a large number of legal and financial tools (e.g. federally guaranteed mortgages and accessible 25-year bank loans) have facilitated home-owning as opposed to renting, in the US especially but in other countries as well, the property rights of owners who may want to rent out their homes and the property rights of those who want to sell to non-family households can be partially limited, but never fully trumped, by local regulation.

The conflict between the property rights of the ‘person’, enshrined in the legal chronotope of the free, rights-bearing individual, and, on the other hand, the normalizing and classifying logic of local rules applying to spaces, activities, and land uses, but not persons, can certainly be managed – and the profession of planning is from this point of view nothing but the professionalization of the management of this eternal conflict – but it cannot be eliminated.

The usefulness of chronotopic analysis emerges very clearly if we inquire into governance problems arising from the lack of perfect fit between a boilerplate legal container (‘single-family detached’) and the social-sexual-emotional-financial content that is normatively assumed to naturally occupy the container (the nuclear family). This conflict is swept under the carpet, hidden from view, by the operation of a strongly moralized temporal framework that normalizes (Western) human life, one that is best embodied in the sociological cliché of ‘the’ life course. Mainstream sociology of the family, the source of the life course idea, works as a Bakhtinian literary genre. Individual sociologists generate speech acts and scholarly articles that assume and thus reproduce the basic chronotope of ‘the life course’ – one that is then found further afield, in feminist scholarship on such issues as the plight of older divorced women. In general, it can be said that sociologists of kinship and family relations pay close attention to one type of temporalization (the stages of ‘the’ life course), to the detriment not only of spatial normalization but also of the workings of other forms of temporalization (historical shifts, for example).

A Bakhtinian lens can help to bring into sharper focus the intertwining of spatial and temporal norms that takes place as the hegemonic narrative of stages of the life course converges and mixes with the differentiated spatializations found in both planning law and in real estate discourse. The highly normalizing generic narrative that results from this convergence goes as follows: rented apartments are the natural habitat of those
who are young and single (with this being classified as a preparatory stage in the life course), while single-family detached homes appear as the proper spatial domain of and container for the spatiotemporal status known as 'married with children'. On their part, the in-between life-course categories of just-married and 'empty nesters' are supposed to be spatially contained in transitional real estate categories, namely, condominiums and townhouse developments.

The cultural narrative by which building forms and types of property relations are associated with distinct stages in 'the' life course is strongly supported by municipal legal rules; but dialectical reversals are always hovering in the background, since the same narrative is also undermined, at least on occasion, by law's own rules – rules from other fields of law, such as human rights law. While developers, even in this age of familial and household diversity, continue to build suburbs in which all houses have the number of bedrooms associated with a normative number of children, human rights and equality-driven legal mechanisms prohibit municipalities from reserving certain residential neighbourhoods for actual families. A single man cannot be prohibited, by local law, from buying the standard North American three-bedroom house: the spacetime of 'singlefamily detached' is therefore not hard wired to the spacetime of the nuclear family. For the same legal reasons, multi-generational households cannot be completely banned either, although such households (often associated with the spectre of the Orient) can be and are targeted by micro-local prohibitions on building additions and basement apartments. So too, the wholly arbitrary local rules about how many unrelated people can legally live in a single-family home (four or five, in most North American jurisdictions) highlight the persistent contradictions between the spatiotemporal logic of one legal process – local zoning – and the logics of other state and federal equal rights and privacy laws.

In conclusion, while clever rules can be designed that discourage any group of people other than actual nuclear families with a relatively small number of children from living in the prime residential areas designated as 'single-family detached', the legal chronotope 'single-family detached', powerful as it is, is constantly under cut by competing legal chronotopes. Studying local regulatory practices reveals a quiet process that brings together 'home' (a hybrid of a building, some highly temporalized financial arrangements, local legal rules about the size of yards, etc., and myriad cultural tropes) with 'family' (another hybrid of people, objects, norms, and myths), and then wraps that super-hybrid assemblage in layers of architectural, financial, aesthetic, and legal rules – but with the operation of both legal and social family-related chronotopes being subject to any number of bumps and counter-currents.

Spatial normalization has long been critiqued by the progressive planners and feminist urban geographers who have documented the history and the ideology of the 'white
picket fence’ suburban home. But in keeping with the general tendency not to examine temporality other than in the narrow form of historical background, few have noted that the archetypal home-owning, lawn-mowing family is constituted not only spatially but also through specific temporalizations. The daily, weekly, and seasonal rhythms that make up anthropologists’ kinship systems play the same constitutive role for middle-class white North Americans as the moon’s phases, the temporal markers of adulthood, and the yearly sacred feasts do for more ‘exotic’ peoples. The normalized cyclical temporalities in question include: the daily routine of breadwinners going to work and children going and returning home from school; the weekly family outings to sports events or Sunday extended family dinners; the occasional but predictable neighbourhood gatherings at which men play a key role, often by cooking outdoors; the yearly cycle of neighbourhood-based children’s sports activities; the generational cycle of kids growing up and going away to college; and of course the all-important yearly extended-family holiday celebrations, such as Thanksgiving and Christmas, or Passover for Jewish families. And while it may seem at first sight that familial mini-chronotopes (e.g. the annual Christmas dinner) are wholly cultural rather than legal, most jurisdictions have laws and regulations that presuppose and reproduce certain familial chronotopes and not others. These include not only official state holiday days but also an array of sub-state regulatory practices, from school calendars to store opening times and public transportation schedules.

Unfortunately, there are very few studies that document the multiple legal strategies that have been used to attempt to stuff the social chronotope of the domesticity of the ‘married with children’ cultural chronotope into the legal chronotope of ‘single-family detached’; Perin’s 1979 study remains the classic source for this. Bakhtin’s ideas, however, offer a number of new analytical resources for sociolegal scholars wanting to pursue critical analyses of the various chronotopes of residential land uses, analyses that go beyond the better understood dynamics of spatial normalization and begin to explore how ‘time thickens space’.

The two examples given here (the court of law and the ‘single-family detached’ category) are provided tentatively, in the hope that other scholars will be inspired to carry out proper, detailed analyses of these and other legal chronotopes. Entities that have been generally studied as spaces by critical legal scholars ought be usefully considered chronotopes if we accept that, as is the case for particle physics, temporality cannot be measured or analyzed as if it were independent of spatial considerations, and vice versa.

And to make matters even more complex, chronotopic analysis demands not only that we consider how temporalization affects spatialization and vice versa, but also, how heterogeneous and even contradictory chronotopes coexist not only in a single literary
(or legal) text but even within a single utterance. The final section of this chapter will therefore explicate Bakhtin's notion of 'hybridity', which has thus far received no attention from sociolegal scholars despite its obvious affinity with legal pluralism.

**Hybridization: toward a fluid and pluralistic chronotopic analysis**

Today as in the past, much of our education consists not in gaining the skills needed to under take innovative concrete and dynamic analyses but rather in learning how to classify and categorize, like entomologists. Therefore, the term 'legal chronotope', in so far as it becomes popular, is likely to be taken up in studies that classify actually existing legal processes as belonging either to X or to Y chronotope, just as literary scholars classify each particular work as a either a sci-fi novel or police procedural. While a classificatory sociolegal adaptation of Bakhtin might produce some interesting results, it would never the less amount to an impoverished interpretation. Bakhtin's chronotopes are analytically distinct; but they do not amount to classificatory labels, and before we conclude the chapter it is important to discuss why it is that chronotopic analysis does not amount to a classification exercise.

First of all, each genre, or a particular work written as a contribution to a specific genre, is not necessarily internally cohesive. There can be multiple minichronotopes, as it were, within a particular work. Exploring, in a way that is very reminiscent of legal pluralism, the internal pluralism of literary works, Bakhtin remarks that the figure of the clown or the court jester, which appears in an array of different genres, acts as a kind of mini-chronotope of its own. This figure is produced by, and it enacts, distinct spatiotemporal governance processes that differ from and sometimes clash with those that constitute the main plot of the work in question and the main, serious characters (Bakhtin 1981: 158–159). Prefiguring the much longer analysis of the carnival provided in Bakhtin's work on Rabelais (Bakhtin 1968), Bakhtin states, in the chronotope essay, that the figure of the fool/court jester allows and even encourages a critical response; but it does so in a format that allows the criticism – most notably, the criticism of the monarch who is often portrayed as the court jester's sovereign as well as employer – to be disavowed (ibid.: 162–163). Marked by very distinct clothing, demeanour, and speech patterns, the figure of the fool, as soon as it appears, signals to the audience a wholesale change in spatiotemporality, with the subversive logic of the fool/jester chronotope being clearly limited, in advance, to the short times during which this figure is on stage. The appearance of that stock character on the page or on the stage instantly conveys to the audience what kind of dialogical response is expected, with the critical or debunking moment ending as quickly as it started as the jester or fool exits. The mini-chronotope of the clown/jester erupts and disrupts but the disruption is from the start destined to be contained, primarily by being spatiotemporally confined.

In the brief passage on the jester/fool figure, Bakhtin implies that it is dangerous to
treat each work of literature (or each ‘real- life chronotope’) as internally cohesive; elements can be inserted that carry in their wake logics that are quite at odds with that of the main plot. (Shakespeare’s tragedies are great examples of the rich and often open-ended dialogic possibilities created by the insertion of fools and knaves into an other wise heroic and/or tragic tale.) This point has great significance for any adaptation of Bakhtin’s work for legal studies. The assemblages that I have argued can be usefully read as legal chronotopes are also often shot through and even undermined by eruptions, as it were, of conflicting chronotopes. Many examples of such an eruption process can be found in a classic piece of feminist legal analysis from the 1980s: Fran Olsen’s detailed study of how left-feminist legal projects often amount to nothing but trying to govern the family as if were a market, and/or conversely, trying to govern the market as if it were a family (Olsen 1983). Criminalizing marital rape, as has been done in many jurisdictions from the 1980s onward, is an example of the eruption of one kind of legal chronotope (centred on the free autonomous person whose consent is formally required for all transactions) in the middle of a different chronotope.

A closely related point, developed not in the chronotopes essay but in the same what earlier long essay entitled ‘Discourse in the Novel’, is that the hybridity and heterogeneity that one sees in works of literature that use multiple chronotopes exists not only at the scale of the work but also at the scale of the individual ‘utterance’ or speech act. ‘What is hybridization? It is a mixture of two social languages within the arena of an utterance, between two different linguistic consciousnesses, separated from one another by an epoch, by social differentiation or by some other fact’ (Bakhtin 1981: 358). Hybridity at the micro scale is particularly important in explaining how languages evolve over time. ‘We may even say that language and languages change historically primarily by means of hybridization, by means of a mixing of various “languages” co-existing within the boundaries of a single dialect, a single national language...’ (ibid.: 359). Bakhtin would thus ridicule the ongoing efforts of academies in France and in other francophone jurisdictions (e.g. Québec) to keep English words out of the French language; but he would also pay close attention to the role of new generations in renovating the languages they inherit, instead of taking up the more familiar role of scholarly elder denouncing young people’s lack of literacy in their received languages.

Hybridization, Bakhtin goes on, can be intentional, as when a scholar writing an academic tome inserts an anecdote from personal experience; or it can be unintentional and diffusely collective. Clearly, both intentional and unintentional hybridization are important features of legal discourse. Examples of intentional legal hybridization would include the seepage of bureaucratic European Union terms into the domestic law of each member state, and, going back in time, the mixing of ‘law French’ with common-law terminology. Unintentional hybridization, in turn, is most apparent in the popular use, in English, of terms such as ‘junta’, ‘coup d’état’, ‘jihad’, etc.;
it is also visible in the use of terms taken from systems of private law to describe legal processes – the most famous example perhaps being the emergence of ‘three-strikes’ laws in the USA, laws that relied not on social science evidence but rather on the powerful chronotope of baseball as their underpinning.

Bakhtin’s comments on the format/genre of the famous Spanish early novel Don Quixote are particularly suited to illustrating the key conclusion arising from his analyses of ‘hybridization’, namely, that each chronotope, while analytically distinct, does not function as a unified entity with solid borders. Bakhtin comments that Cervantes’ key move, his genius, was to hybridize two different, indeed conflicting chronotopes: the miraculous logic of medieval chivalric romance on the one hand, and the ‘road trip as life’s journey’ chronotope on the other, best exemplified, in Cervantes’ own time, in the picaresque novel (Bakhtin 1981: 164–165). The chivalric romance in turn drew much of its spatiotemporality, Bakhtin says, from the ancient Greek romance; but it augmented the power of the older notion of Fate by recourse to the specifically Christian idea of the miraculous occurrence (ibid.: 151). In literary works associated with chivalry, it is not just that miracles happen (as they do in the New Testament); more radically, time itself is elastic and miraculous, with days or even years passing in a single moment. Space, too, is completely elastic (some what like Einstein’s cosmic space), with journeys across Europe or across the Mediterranean appearing to take but a single hour.

Cervantes’ main work, as is well known, features an ambiguous character, Don Quixote, who is so addicted to reading chivalric romances that he mistakes windmills for giants, but whose chivalric actions are undercut at every turn by the workings of more realist and modern chronotopes. A story about inaccessible perfectly fair ladies and evil giants that would on its own be a medieval romance is thus ironically undermined by Cervantes’ accounts of social encounters that take place along a realistically portrayed road. These encounters, Bakhtin argues, reflect the new, post-medieval, more socially fluid and mobile world that could now (in the seventeenth century) be found within a domestic jurisdiction, that is, without travelling across the seas as the heroes of Greek romances and epics did. Thus, while the road-trip-as-self-discovery-journey chronotope existed in ancient Greece (as Oedipus’s fateful wandering in search of the truth about himself shows), when inserted into the ironized story of a wandering knight, the road chronotope has the power to demonstrate ‘the sociohistorical heterogeneity of one’s own country’ (Bakhtin 1981: 245) – a heterogeneity that is distinctly modern. The heroes of ancient Greek romances were depicted as travelling around the Mediterranean but never encountering real difference: ‘what happens in Babylon could just as well happen in Egypt or in Byzantium’ (ibid.: 100). By contrast, ‘Don Quixote sets out on the road in order that he might encounter all of Spain on that road – from galley-slaves to dukes’ (ibid.: 244).
The road chronotope is used in a similar way in the countless Hollywood road movies that Bakhtin might have enjoyed, if he had been able to see them. There, the diverse spaces and the array of characters are valued precisely for their difference, for the unpredictable ways in which they reveal the wonderful, open-ended ‘heterogeneity of one’s own country’. The heterogeneity encountered along the way then catalyzes changes in the main protagonists.

Most importantly for our purposes, the archetypal road of road movies and contemporary road trips is not merely a space, but is rather a chronotope: ‘Time as it were, fuses together with space and flows in it (forming the road); this is the source of the rich metaphorical expansion’ of ‘the road’ as a literary and indeed popular trope (Bakhtin 1981: 244). While ancient Greek audiences, when told a character was travelling, expected trials and ordeals that would allow characters to exhibit their unchanging essence, today, the very mention of a road signals to the audience that a transformative journey is about to take place – by means of a chronotope in which ‘[t]ime, as it were, fuses together with space and flows in it’.

Bakhtin therefore shows us that while chronotopes, legal and otherwise, constitute our world before we even begin speaking or writing, we nevertheless always have opportunities to re-assemble existing chronotopes in novel ways. Hybridization, the motor force of changes in communication, and therefore in social relations, can be created not only in a consciously designed literary work but even in an unplanned single utterance. Gilles Deleuze, and contemporary thinkers such as Elizabeth Grosz who are influenced by Deleuze, have from their own perspective reminded us of the crucial ways in which temporalization enables creativity (Grosz 2005); but Bakhtin’s analysis is arguably more useful for legal studies. One reason is that chronotopic analysis does not privilege either space or time, but focuses instead on their interaction, which enables analyses that are not biased a priori. A second reason is that the vast majority of the hybridization processes that one can discern in various legal complexes are not produced by the creative efforts of individual authors or autonomous ethical subjects but rather by the mostly collective and largely unplanned workings of legal processes. A lawyer, a judge, or a plaintiff using a term in a novel manner is unlikely to have done so out of a well-designed creative plan to reform language in general or law in general. Innovations often (probably most often) arise from tactical decisions to borrow a term that intuitively seems to work for one’s pragmatic purpose (as I have shown in regard to the collective authorship of the legal term ‘sexual orientation’ [Valverde 2003a: chapters 4 and 5]).

Conclusion

It is by no means novel to observe that legal processes and legal knowledges are fundamentally spatialized and temporalized. Nevertheless, sociolegal scholars, like
social theorists generally, have tended to treat questions of space separately from those of time even when both are considered. The separation of time from space in scholarly analysis is not so much a matter of individual preferences, I argue, but rather the product of the implicit conventions and institutional habits that constitute the different genres of academic discourse. While scholars associated with geography tend to fall into spatial determinism, or else add a historical layer of analysis to the more thorough study of spatialization, those whose reading habits and institutional locations lean toward philosophy have paid far more attention to temporality than to space. This can be seen in Elizabeth Grosz’s otherwise highly sophisticated analyses of the governance of bodies and sexualities, which is not inattentive to spatial questions, but which privileges temporality because she relies on Bergson’s notion that temporality is the key to evolution and gives this a political twist. Emphasizing the temporal open-endedness of radical politics, Grosz (2005) largely ignores the politics of space.

Thus, a Bakhtinian approach not only enables new insights about governance, but also, at the reflexive level, challenges the taken-for-granted divisions of intellectual labour that are produced by the kind of normalization of academic work that goes on not only through ‘disciplinarization’ but also in interdisciplinary fields such as legal anthropology and legal geography. Learning from or being inspired by Bakhtin’s important work on the way in which time and space interact and shape one another can greatly help us to produce concrete analyses in an open-ended manner, remembering that our first commitment is not promoting the prestige or the theoretical rigour of our chosen disciplines or fields – much less our chosen neologisms – but rather understanding the world we live in.

Notes

1. My own interpretation of Foucault’s method has his work converging to an indeterminate extent with the ideas about thought, speech, and meaning developed by William James and other pragmatists, who in my view shared more with Nietzsche than is apparent at first sight. The question of whether today’s Foucaultian sociolegal scholars ought to read less continental philosophy and more William James would be a digression here, however, so I am leaving it for another occasion.

2. There is a chapter on Bakhtin in the influential anthology Thinking Space (Crang and Thrift 2000), but, in keeping with the geographical bias of the work, this contribution illuminates how Bakhtin’s dialogical imagination could be used to understand space, with the chronotope receiving only passing mention (Holloway and Kneale 2000).

3. I owe this insight to Karrie Sandford’s not yet published ethnography of high-volume courts in Toronto.
4. This happened to someone I know.

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The Karen in Burma: Conflict and displacement
To understand the experiences of Karen refugees, it is necessary to understand their displacement in political and historical context. This chapter provides an introduction to Burma's ethnic politics, and an overview of the Karen experience of missionization, colonization and nationalist revolution. The final sections explain the context of conflict and displacement in Southeast Burma, introducing the refugee camps on the Thai–Burma border.

Recent political liberalization in Burma has given rise to hopes that the country will transition to democratic governance and that refugees may be able to return home in safety. This is a dramatic change after several decades of militarism. Burma gained independence from Britain in 1948 but liberal governance was short-lived: a military coup deposed the democratic government in 1962 and a series of military juntas controlled the nation for the next fifty years, first under the leadership of Ne Win (1962–1988), followed by the State Law and Order Restoration Council (1988–1997) and the State Peace and Development Council (SPDC) (1997–2010). Beneath the name changes, military rule continued unabated, as did repression, censorship, arbitrary detention and a litany of other human rights violations. Mass protests challenging military rule were brutally suppressed in 1988 and again in 2007.

In 2003, the then-ruling SPDC announced that it was implementing a seven-stage ‘Roadmap to Democracy’, where the final stage was to ‘build a modern, developed and democratic nation’.¹ National and international scepticism only had cause to deepen as the various stages along the roadmap were passed: the creation of a National Convention to draft the Constitution (which was entirely dominated by military actors); the resulting Constitution (which guaranteed a continued role for the military in governance); a national referendum to approve that Constitution (which took place days after the devastating landfall of Cyclone Nargis, yet still contrived to secure a ‘yes’ vote from more than 92 per cent of Burmese citizens); and general elections which returned 129 of 168 available seats to the military-backed USDP (amid reports of fraud, ballot-stuffing and vote-rigging).

The penultimate step on this roadmap was reached in 2010, when a national legislative assembly was convened and ostensibly replaced the military regime with a civilian government. At this stage there was little to indicate a genuine handover of power would occur – but then the process began to diverge from expectations. In November 2010 the leader of the National League for Democracy, Aung San Suu Kyi, was released from house arrest. In September 2011, construction was halted on the Chinese-funded Myitsone Dam, a ‘development’ project in northern Kachin State which would have displaced tens of thousands of people. In October 2011, more than a
hundred political prisoners were released in the first of a series of amnesty processes. In April 2012, by-elections were held in which the National League for Democracy won forty-three of the forty-four seats it contested, and in May 2012 those representatives (including Daw Aung San Suu Kyi) took up their seats in Parliament. General elections have been scheduled for 2015, with a pledge that these will be free and fair.

The international response was swift and decisive. The European Union lifted sanctions, vast sums of development aid were pledged and world leaders flocked to visit Burma. However, while the political changes to date are undoubtedly important, their true reach remains unclear. Certainly they must be understood in the context of a nation with enormous social problems and deep divisions. Economic development, democratization and demilitarization will all be necessary to lasting political change but the most compelling challenge to the dominant narrative of liberalizing transition – and the most profound gap in much international analysis – is the position of Burma’s ethnic nationalities.

**Burma’s ethnic politics**

Burma is the original ‘plural society’, a phrase coined by Furnivall (1939: 446) to describe its mosaic of ethnic diversity and the difficulties of building a cohesive nation from such disparate fragments. Eight ethnic ‘nationalities’ are recognized (Burman, Arakanese, Chin, Shan, Kachin, Karenni, Karen, Mon) and many more sub-groups. Precise population figures are impossible as the last national census was conducted in 1983, but the ethnic Burman population is estimated to comprise approximately two-thirds of a total country population of approximately fifty million (Steinberg 2010: xiv).3

Ethnic diversity has posed a governance challenge throughout Burma’s history. Superficial territorial cohesion was imposed by the British colonial occupation but collapsed even before independence. In 1947, an agreement was reached between the incoming government and representatives of the Chin, Kachin and Shan peoples to grant those nationalities administrative autonomy within an overarching Union of Burma. This, the Panglong Agreement, was not reflected in the 1948 Constitution, which provided only a limited right of secession to Shan and Karenni states and gave no recognition to ethnic nationalities which had not participated in the talks, including the Karen and the Mon. Later, the 1974 Constitution imposed even more direct authority over the ethnic territories, dividing Burma into fourteen administrative regions: seven divisions in the centre of the nation where the dominant ethnic group is Burman, surrounded by seven ethnic states where the majority population is a non-Burman ethnic nationality. The distinction between ‘division’ and ‘state’ has little practical significance as political authority is claimed equally across all territory.4

In short, while Burma’s border territories and ethnic nationalities were brought within
the Union of Burma at the onset of national independence, failure to grant political autonomy to ethnic groups was and remains the primary cause of conflict between these groups and the Burmese ruling regime. Uprisings against the Burmese Government began before British withdrawal and have continued ever since. The first ethnic group to take up arms was the Karen National Union (KNU), in 1949. Many more followed: Lintner (1999: 480–95) identifies sixty-one non-Burman armed groups as operating at various times between 1948 and 1998. Some of these groups fell away in the natural attrition of changing political climates while others reached ceasefire agreements with the ruling regime (see Kramer 2009). Since 2010, the Burmese Government has embarked on negotiations with the remaining non-ceasefire groups, including the KNU/Karen National Liberation Army (KNLA), Shan State Army-South and the Chin National Front (though in the same period, the Kachin Independence Army returned to active conflict after a sixteen-year ceasefire which operated from 1994–2010). A provisional ceasefire was signed between the KNU and the Burmese Government in January 2012. At the time of writing (August 2013) negotiations for a lasting peace agreement were on-going.

Who are the Karen?

The term ’Karen’ suggests a discrete ethnic category but the several million Karen people in Burma and Thailand form a population with diverse linguistic, religious, political and territorial backgrounds (Hinton 1983; Harriden 2002; Delang 2003). It is thus more accurate to consider ’Karen’ as an umbrella term for multiple sub-groups, including Sgaw, Pwo, Bwe and others (and, drawn at its broadest, potentially also including the Karenni and Pa-O, two groups which have their own ethnic self-determination movements). Estimates of the Karen population in Burma vary greatly, with Burmese military leaders asserting three million and Karen nationalists claiming a figure more than twice as high. The two most widely spoken Karen languages are Sgaw (predominantly spoken by Christian and highland Karen) and Pwo (predominantly spoken by lowland/delta Buddhist Karen).

Karen live in all parts of Burma, with sizeable centres in the Southeastern border areas of Karen State and Tenasserim division and in the lowland territories of the Irrawaddy Delta. There is also an indigenous Karen population in Thailand. Due to the difficulties of researching inside Burma, most recent ethnographic work on Karen society has been conducted among Karen communities living in Thailand (Lehman 1979; Andersen 1979, 1981; Keyes 1979; Rajah 1986, 2002; Delang 2003; Hayami 2004), in refugee camps (Lang 2002; Tangseefa 2006, 2007; Horstmann 2011a, 2011b) or in insurgency areas (Cusano 2001; South et al. 2010; South 2012a). Much less is known about the ’other’ Karen populations inside Burma, who in fact constitute the majority Karen population (Thawnghmung 2008, 2011b).
Karen nationalism propounds a message of Karen unity and a single Karen family. It has been argued that this message shoe-horns untenable linguistic and religious complexity into a narrow ideal of ‘Karenness’ (Harriden 2002; Kuroiwa and Verkuyten 2008). Undoubtedly the constituency of Karen people is wider than the propaganda of political nationalism often acknowledges. However, despite the substantial differences, it is also the case that ‘very large numbers of people do subscribe to a distinct Karen identity’ (South 2008: 15). Recognizing that Karen identity has a real existence and meaning does not imply that it is a fixed or static category. Historically, and presently, Karen people have interacted with other ethnic groups through trade, employment and intermarriage. The depth of these interactions is apparent in the use of multiple identities. For example, Thai-speaking Karen may choose to ‘pass’ as Thai in many interactions, using a Thai name and speaking Thai language, yet will use a Karen name and Karen language when with other Karen people. Such processes of situational and strategic deployment of ethnic identity have a long history in this region (Moerman 1965).

As a pre-literate society until the arrival of Christian missionaries in the early 1800s, there are few historical records of Karen societies prior to that time. Unlike other ethnic groups such as the Shan or Mon, the Karen historically held no great wealth or power and appear to have existed on the peripheries of other kingdoms rather than holding centres of power in their own right (Aung-Thwin and Aung-Thwin 2012: 48–9). Karen oral histories describe a nomadic past of persecution and displacement following a ‘river of running sand’. This was interpreted by Baptist missionaries in the nineteenth century as a reference to the Gobi desert, indicating a migration pathway through Mongolia and China to present-day Burma. A second theory that emerged during this period was that the Karen people were a ‘lost tribe of Israel’ and that their migration had begun in the Holy Lands, a version believed by many of the refugees in Thailand.

In the pre-colonial era, non-Burman ethnic groups (including the Karen) had substantial autonomy but existed within tributary relationships of patronage and taxation, a model of rural village governance that is common throughout Southeast Asia. Scott (2009) has argued that the Karen and other ethnic groups in the mountain massifs of this region made a deliberate choice to reject the central state (and its voracious demands for tributes, labour and other resources) in favour of autonomous self-government. While the facts interpreted by Scott in reaching this conclusion – that many Karen lived in remote highland regions, maintained autonomous village management systems and languages and largely avoided prolonged contact with agencies of the central state – could be interpreted as simple survival tactics rather than a ‘distinctive positioning’ (ibid: 8) or strategic adaptation, perhaps the real proximate cause is irrelevant. Whether the Karen actively rejected the nation-state or whether their isolation was a historical and territorial accident, it is apparent that they were successful in maintaining
autonomous governance long beyond most other societies. As Scott (ibid: 26) recognizes, this may have important implications for resilience and coping strategies:

Noting how the Karen are spread throughout many ecological and political zones, Renard believes that the remarkable suppleness of their social structures, their oral histories, kinship patterns, subsistence techniques, cuisine and architecture is adapted for travel and change. If necessary, most Karen groups can turn on a dime. It is a quality that has great adaptive advantages and has served them well.

Scott’s analysis is historical, but in remote areas of Southeast Burma village level local autonomy survives to the present day. A Karen Human Rights Group (2008: 33) report states that ‘villagers generally see land rights as something to be determined and resolved locally rather than distributed or verified by some distant and foreign (including centralized state) power’ while Heppner (2006: 18) has described village level governance as intimately related to the success of coping and resistance strategies of displaced people in Karen State (see also South et al. 2010). It has also been extremely important for the refugee camps, as is examined further in Chapters 4 and 6.

**Christian missions and colonization**

Christian missionaries began to arrive in Burma in the early 1800s, with the English Baptist mission beginning in 1807 and the first American Baptist missionaries arriving in 1813. Their efforts met with little enthusiasm among the predominantly Buddhist population in central Burma but the response was very different among non-Burman populations, particularly the Karen. After the first ‘Karen convert’, Ko Thah Byu, began to evangelize, mass baptisms were conducted of hundreds or even thousands of Karen at a time (Mason 1847; Smeaton 1887). The extraordinary reception for Christianity among the Karen is usually explained in relation to symmetry between the Christian message and a Karen myth which told of a ‘golden book’ of knowledge that had been lost and would be returned to the Karen by the ‘white elder brother’. When white missionaries arrived preaching the importance of the holy bible, this was received as the promised return of the golden book.6

Christianity never became the majority religion among the Karen in Burma but it has had a powerful and lasting influence nonetheless. As in many other contexts, missionaries enhanced literacy by developing a Karen script (adapted from the Burmese alphabet) and establishing schools. The missionary influence remains apparent today as although the majority of the Karen population are Buddhist or Animist, the political and military leadership of the Karen nationalist movement is overwhelmingly Christian and the majority of literate Karen are Christian. There is also a strong Christian influence in the refugee camps, where churches serve variously as a social hub and
focal point, a source of education and entertainment and, at times, a mechanism of social control (Horstmann 2011b). These functions are broadly similar for Buddhist monasteries, Muslim mosques and Christian churches but the dominance of Christianity is clearly visible, leading to an environment in which as one of my interviewees commented, ‘many Buddhists are becoming Christian but no Christians are becoming Buddhist.’

Among those I spoke with who had converted to Christianity, several had done so in order to marry a Christian spouse, others to conform to the practice of their fellow students or friends and neighbours, while one man said that he simply ‘liked their songs’. This may suggest that religious conversion owes less to theology than to the existence of a critical mass – the majority of the population are Christian, which encourages others to convert in order to share the same activities, entertainments (and, perhaps, opportunities). The tradition of mass baptisms also continues: in January 2010 at Mae Ra Ma Luang camp, 456 people were baptized in a single event. The Karen Baptist Committee apparently recognizes the importance of the refugee camps as a site of religious conversion, with the adoption of a chapter from Genesis as a motto: ‘You intended to harm us, but God intended it for good, to accomplish what is now being done, the saving of many lives.’

Soon after the Baptist missions first arrived in Burma colonization began. The process took place over a series of three Anglo-Burmese wars, from 1824–1926 (when the first colonial administrators came to Burma and Tenasserim was annexed), 1852–1853 (when lower Burma was annexed) and 1885–1886 (when the last King of Burma, Thibaw Min, was exiled to India and Upper Burma was annexed (Myint-U 2007). Colonization had important consequences for the Karen and their relationships to government. The British colonial approach was to ensure the reach of the state throughout a national territory but there were manifest difficulties in extending government to the malarial, mountainous eastern border region. Administrators were content to avoid the attempt, choosing instead to see the area as ‘perfectly worthless in itself […] almost impracticable, even for an elephant’ (quoted in Ghosh 2005: 174).

Diarchic rule was implemented, distinguishing Burma proper (under direct rule, with local governance structures abolished) and the borderland frontier areas (under indirect rule, permitting village-level governance structures to remain in place). Indirect rule did not immunize the Karen from colonial influence but it did permit continuity in local governance that was blocked in the heartland of the nation (Safman 2007: 55; Taylor 2009: 80–3). The Karen in Southeast Burma were less tightly controlled by colonial authority than the Burman majority but despite this (or perhaps because of it) they were also more supportive of colonial rule. Following the familiar strategy of ‘divide and rule’, Karen and other ethnic nationalities were favoured in the British
administration and heavily promoted in the civil service, police and military structures. An educated Karen middle class emerged that was loyal to the British administration and played an essential role in suppressing Burman resistance to colonization, such as during the rebellion led by Saya San between 1930 and 1932, when up to 20,000 rebels were killed or captured (Lintner 1999: 52). These governing processes have had a lasting impact on the ‘Union of Burma’ and particularly on relationships between the Burman majority and minority ethnic groups.

**The birth of Karen nationalism**

The new Karen middle class – centred in educated Christians from Rangoon and the Delta area – became the catalyst for a new Karen nationalist movement (Gravers 1999: 24–30; South 2008: 13–16). A Karen National Association (KNA) was formed in 1881 as an organization of political fellowship. Under its direction several nationalist symbols were adopted that remain in use today, including a Karen flag, a national anthem and ‘Karen New Year’ as a national day of celebration. The chairman of the KNA, San C. Po (2001 [1928]: 81), had romantic visions of Karen independence but at this stage it was conceived as a distant ambition to be achieved through political and nonviolent means: “Karen country”, how inspiring it sounds! What thoughts, what manly feeling, what wonderful visions of the future the words conjure forth in the mind of a Karen!

It was only in the aftermath of the Second World War that the struggle for Karen independence began in earnest. During the war, the Karen fought on the side of the British in the belief that the British would later help secure an independent Karen nation. Terrible reprisals were inflicted on Karen villages by Japanese and Burmese forces but British withdrawal from Burma took place with no effort to secure special accommodation for the Karen. The KNU was formed in 1947 and took up arms in 1949, first through the Karen National Defence Organization, later known as the Karen People's Liberation Army and subsequently (and currently) as the Karen National Liberation Army. The demands of the Karen nationalist movement were defined in 1950 by then-KNU leader Saw Ba U Gyi in four principles which remain the touchstone of Karen nationalism today:

1. For us, surrender is out of the question.
2. Recognition of the Karen State must be completed.
3. We shall retain our arms.
4. We shall determine our own destiny.

The KNU claim for self-determination rests on an argument of the sustained experience of ethnic discrimination and oppression, and a fundamental sense of ethnic difference:

> Originally, Karen and Burman belong to two different racial origins (Mongolian
and Tibeto-Burman), religions, philosophies (Animism and Buddhism), social customs and literatures. They belong to two different civilizations which are based mainly on conflict ideas and conceptions. Their aspect on life and of life are different. [...] To yoke together two such nations under a single state, one in numerical minority and the other as a majority, must lead to growing discontent and final destruction of any fabric that may be built up for the Government of such a state.

(Po Chit 1947: 1)

It has been argued that this Karen sense of ethnic difference is a product of the colonial encounter (Renard 1990: 106; Cheesman 2002: 203). However, it is also apparent that ethnic identities were not entirely an invention of colonization. Perhaps it is more accurate to say that while colonial-era governance did not create a sense of difference and separation, it institutionalized it, and in doing so both hardened ethnic identities and made them more consequential. Unlike many postcolonial revolutionary movements, the KNU did not reject and oppose its former colonial oppressor. On the contrary, while Burmese nationalists clearly sought to break from the colonial order and defined themselves in distinction from it, Karen nationalists sought continuity with the colonial order and defined themselves in relation to it (Gravers 1999: 78–9).11

**Insurgency**

Formed in 1947 and still in existence today, the KNU is sometimes described as the world’s longest running self-determination movement. In the early years of insurgency the KNU was strong in popular support, manpower and weaponry and its members were confident that their demands would be met within a few years at most (Lintner 1999: 96). However, for the next sixty years the revolution followed an almost consistently declining trajectory.

The recent history of the KNU was dominated by the figure of General Bo Mya, president of the KNU from 1976 until 2000 (South 2008: 39–41; Thawngmung 2011b: 112). As a Seventh-day Adventist, fervent Karen nationalist and equally fervent anti-communist, Bo Mya’s personal convictions had a significant impact on the direction of the KNU. His anti-communist stance aligned with the preferences of both Thailand and the United States and attracted considerable financial support for the KNU (Smith 1991: 296–300). Bo Mya was equally influential for his opportunism and entrepreneurialism. During the 1980s and early 1990s, the KNU controlled substantial portions of the Thailand–Burma border and money flooded in from cross-border traffic in timber and black market goods (Bryant 1997). In this period, though the possibility of defeating the Burmese army by military force was remote, the KNLA was a powerful guerrilla force and the two sides were locked in stalemate.

The KNU also developed a political administration within Karen areas of Eastern
Burma. At the outset of the revolution, the KNU named their proposed Karen State ‘Kawthoolei’ and divided the territory into seven administrative districts (each of which corresponds to a KNLA Brigade area) and further divided into townships. A civil service was established to administer the territory, with departments including Health, Education, Finance, Defence, Transport, Communications, Mining, Agriculture, Forestry, Information and Justice (Thawngmung 2008: 26; Falla 1991). While never reaching a fully functioning parallel state, schools and clinics, courts and prisons were created within the ‘liberated areas’ which established the KNU as the de facto government. While never reaching a fully functioning parallel state, schools and clinics, courts and prisons were created within the ‘liberated areas’ which established the KNU as the de facto government. Community organizations were also formed to advance nationalist objectives and serve the Karen population, including the Karen Youth Organization, Karen Women’s Organization and the Karen Baptist Convention.

This KNU state-building project was impeded by a growing imbalance of power between Karen insurgency forces and the Burmese Government. In 2007, the International Institute for Strategic Studies calculated that more than 40 per cent of the Burmese national budget was spent on defence and military expenditure (with a mere 0.4 per cent spent on health and 0.5 per cent on education). The number of troops in the national military doubled between 1988 and 2007, from 180,000 to 395,000. Against this vast force, KNU/KNLA troop size has been estimated at between 3,000 and 5,000 (Keenan 2012b: 1; South 2008: 56). KNLA troops were not only vastly out-numbered but were also woefully under-equipped: soldiers were furnished with WWII-era rifles and insufficient ammunition and fought without pay, on inadequate food rations and in some cases even without shoes.

Politically the KNU/KNLA was further weakened by counter-insurgency tactics which isolated the movement from other ethnic insurgencies and divided it internally. A series of damaging factional splits were likely fostered to some degree by the Burmese military regime but also reflected genuine discontent with KNU/KNLA leadership failures and the escalating violence and suffering within Karen State (see South 2008: 57–68; Smith 1999). The most damaging of these was the formation of the Democratic Karen Buddhist Army (DKBA, later renamed the Democratic Karen Benevolent Army), which allied with the Burmese military to overthrow the ethnic insurgency headquarters at Manerplaw in February 1995. Manerplaw was considered a ‘liberated area’ and was home to a coalition of insurgency forces. Its overthrow sent thousands of people fleeing to refugee camps in Thailand and was a critical blow for the KNU.

The DKBA split was led by disaffected Buddhist Karen, ostensibly in protest at the dominance of Christianity within the KNU but also bound up in discontent with poor leadership, corruption and the affluent, secure lifestyles of KNU leadership (many of whom were living in large houses in Thailand, where their children attended school and university) in contrast to the poverty and insecurity of the military rank and file.
The DKBA defection marked the beginning of a series of damaging defeats for the KNU. By 2012, the organization had lost control of almost all its territory inside Burma, almost all its sources of cross-border income and much of its leverage with the Burmese Government. Health care and education provision inside Burma was drastically cut back or led by internationally funded groups such as the Free Burma Rangers, the Backpack Health Worker Team and the Karen Teacher Working Group.

A number of reasons can be posited for the decline of the KNU. A large measure of responsibility must be placed with poor leadership and a failure to seize political opportunities when they surfaced. Failure to manage internal dissent created fertile ground for splits and factionalism, while a failure to build strong alliances with other ethnic insurgencies allowed the SPDC to broker ceasefire deals and consolidate its forces against a smaller number of opponents. Finally, the KNU suffered from changing political alliances as Thailand developed increasingly profitable political and economic relationships with the Burmese regime.

The long history of conflict has shaped political governance in Burma’s ethnic areas, with several authorities seeking political power and control over land, resources and populations and establishing an ‘emerging political complex’ involving ‘various government and nongovernment actors in ongoing contestation, negotiation, discord, cooperation and/or complicity over the nature and composition of political authority’ (Callahan 2007: 49; Oh 2013). Actors in this ‘emerging political complex’ include the Burmese regime and its army, the KNU and other non-state political and military factions, logging companies, the Thai Government, humanitarian organizations operating cross-border relief programmes and ‘indigenous’ civil society organizations. This environment of multi-layered political power is not unique to Karen areas but is also evident in other ethnic borderlands, including Kachin State, Karen State and Mon State (Callahan 2007; Grundy-Warr and Dean 2003; Dudley 2003; South 2003). The extent of power each group possesses shifts according to variables such as the intensity and location of conflict, the character and political sympathies of key individuals, and the national politics of the Burmese and Thai Governments. This environment requires constant vigilance from all actors in reacting to the changing circumstances, and as such might be read as indicating political skills of analysis, accommodation and compromise as well as underlying instability (Callahan 2007: 49).

This climate of competing sovereignties has prompted some observers to challenge representations of the KNU as the ‘sole legitimate representative’ of the Karen, noting that it is primarily associated with Southeast Burma (and therefore with a minority of the Karen population) and even in that region shares governing authority with a variety of other armed groups, civil society organizations, religious representatives and local village leaders, and evokes a range of responses from civilians, from loyal allegiance to
active resistance (Thawnghmung 2011a; South et al 2010: 15–17). However, while the KNU is not the only non-state actor in Southeast Burma and is certainly not the voice of all Karen people, it continues to be the most significant political and military power in Karen State. The continued importance of the KNU not only for Karen State but to Burma’s national politics is confirmed by its on-going peace negotiations with the Burmese Government and its membership in the United Nationalities Federal Council (a coalition of political and military representatives from Burma’s various ethnic nationalities).

Of course it is impossible to definitively assess the popular legitimacy of the KNU without a free and fair electoral process. However, surveys and reports from Eastern Burma suggest that it is considered to be less predatory than other armed non-state actors and certainly less so than the Burma Army (see also Callahan 2007: 36; Thawnghmung 2011a: 78–9; South et al. 2010: 16; South 2012a: 200–1). The relationship between an armed group and community may be one of broadly symbiotic partnership, as has been the case in some areas of Northern Ireland in terms of a relationship between a local population and the Irish Republican Army (e.g. McEvoy 2001; Sluka 1989). Alternatively, the relationship might be more clearly one of oppression, such as paramilitary policing operations in parts of rural Colombia (Taussig 2003). The relationship between the KNU/KNLA and the wider Karen population appears to sit somewhere between these two extremes, enjoying very high legitimacy in some geographical areas and among some constituencies but also at times committing acts of oppression, including extortion and forced military recruitment (Thawnghmung 2011b: 120–1).

Displacement

In the sixty years of the Karen insurgency, there have been only five rounds of peace negotiations (Keenan 2012a).15 A ceasefire was signed in January 2012 but no final agreement had been reached by mid-2013. It is not clear what would comprise an acceptable settlement for the KNU leadership. A proposal put forward in January 2012 focuses primarily on the protection and welfare of villagers in Karen State and does not mention demands for political autonomy or recognition.16

If the current negotiations do result in a formal settlement, it will mark the end of one of the world’s most protracted conflicts. As in all modern conflicts, the primary victims of this conflict have been the civilian population. During the 1960s, 1970s and into the 1980s Burmese forces employed a counter-insurgency policy known as ‘Four Cuts’, so-named for its objectives of cutting links between insurgent organizations and sources of food, funds, intelligence and recruits (Smith 1991: 258–62). The Four Cuts policy was notorious for its cruelty but the violence inflicted by Burmese troops in Karen state continued to escalate from the mid-1990s. The catalogue of human rights
violations has been extensive and extreme including forced labour, forced relocation, extortion, arbitrary detention, torture, killings and sexual violence (UN General Assembly 2011). Villagers have been forced to serve as human minesweepers or compelled to porter heavy loads until they collapse. Rape of women from ethnic nationalities has been widespread (KWO 2004, 2007; Woman’s League of Chinland 2007; Apple and Martin 2003). Nearly 4,000 villages were destroyed in Southeast Burma between 1996 and 2011 (TBC 2012: 2).

Burma Army troops have been responsible for the greatest number of human rights violations against civilians but rural farmers and villagers are also called upon to give food and other support to KNLA soldiers and to breakaway groups such as the DKBA, Karen Peace Force and Tha Ka Sa Pa (Thawngmung 2011a: 78). For rural villagers trapped between multiple warring forces the conflict has affected every aspect of daily life, crippling education, social development, income generation and health. One consequence of the protracted violence and insecurity has been massive displacement. In 2012, The Border Consortium estimated that at least 400,000 people in Southeast Burma were internally displaced (2012: 2). For many, displacement has been a repeated, even regular, occurrence. In interviews with thirty-six internally displaced people (IDPs) in Karen State, South (2008: 85) found that they had collectively experienced more than 1,000 displacement incidents, with five people reporting more than 100 acts of displacement each.

Displacement conditions are extremely dangerous, with a high risk of sickness or death due to lack of access to health care, malaria from sleeping without shelter, or as a consequence of childbirth. Human rights organizations have documented the courage and resilience shown by rural villagers in developing coping strategies to manage displacement and resist leaving their land permanently (KHRG 2008; Malseed 2008; Heppner 2006; Burma Ethnic Research Group 1998). Village leaders and villagers have resisted the demands of the Burma Army and other forces with strategies including ‘negotiation, bribery, lying, outright refusal, confrontation, various forms of discreet false compliance, jokes and counter-narratives and temporary evasion’ (KHRG 2008: 6). In some of these efforts, internally displaced populations were quasi-organized in their resistance and employed a range of tactics to evade and subvert control. However, ‘coping’ for many also entailed acquiescing to the demands of the military, perhaps attempting to negotiate a more manageable situation but often simply bowing to demands for food, labour or other resources (Cusano 2001: 160; South 2012b: 188).

Throughout the 1970s and early 1980s, the Burmese military in Karen State followed a pattern of dry-season offensives and wet-season retreats, and villagers under attack echoed this movement; crossing into Thailand to escape a military offensive, and returning when the troops departed. In 1984, for the first time, Burma Army troops did
not retreat when the rains came and the villagers were trapped in Thailand, leading to
the creation of the first ‘temporary shelters’. Over subsequent decades the refugee
population grew, peaking at approximately 150,000 and remaining relatively constant
at that number until the international resettlement programme began. A much larger
population – upwards of one million people from Burma, of all ethnic groups – live in
Thailand as undocumented migrants, though it has been estimated that up to half of
these people would likely qualify for refugee status (Vung siriphisal et al. 2011: 12). The
jobs available to migrants are often unpleasant and dangerous, such as in factories,
sweatshops, brothels, construction, illegal logging or intensive farming. They are also
exploitatively underpaid (with migrants paid less than a third of the salary a Thai
casual worker could expect) and vulnerable to arrest at any point (Human Rights Watch
2012: 1–9).

Registered refugees represent less than 10 per cent of Burmese nationals living in
Thailand but they have received by far the largest proportion of aid and assistance. The
camps also provide an environment of relative security which is absent for both IDPs in
Southeast Burma and undocumented migrants in Thailand. Flight to a refugee camp is
often the culmination of many years of intermittent displacement and may occur only
after something happens to make previous coping strategies less viable, such as the
death of a family member, crop failure or serious illness (Cusano 2001: 160). Becoming
a refugee can therefore be an active choice (albeit one with few alternatives) for which
there is a level of preparation, psychologically and sometimes economically. It is not
uncommon that one or two members of a family will come to the camps while others
remain behind in Burma. This embeds the refugee camps in continuing cross-border
relationships, despite official restrictions on freedom of movement.

When the first refugees began to arrive in the early 1980s, the Royal Thai Government
perceived it as a temporary problem and a relatively minor one compared to the influx
of Indochinese refugees that was occurring at the same time. There was even a
political value in hosting Karen refugees, as a valuable ‘buffer’ between Thailand and
its historical enemy, Burma. Thus, for the first decade or more of the camps’ existence,
the Royal Thai Government played a minimal role. Refugees from Burma were allowed
to self-settle and to organize their own communities around existing village structures.
There was a relatively high degree of autonomy and freedom, with opportunities to
forage for food outside camp boundaries and to pursue (limited) income generation
opportunities in neighbouring Thai villages (Bowles 1998; Lang 2002). During this
period the Royal Thai Government denied access to the United Nations High
Commissioner for Refugees, instead requesting a consortium of donors that had been
serving Indochinese refugees to also provide services to refugees on the Thai–Burma
border. This entity, now known as The Border Consortium, continues to play the
primary role in service delivery to and advocacy for refugees.
In the context of the buffer strategy, the Royal Thai Government provided direct and indirect support to the Karen insurgency, including permitting KNU leaders and their families to live in the refugee camps without interference (Lang 2002: 141–2). However, by 1995, declining KNU territory meant that the buffer was no longer effective – as was dramatically proven by a series of military attacks on the camps by Burma Army and DKBA forces between 1995 and 1998 (ibid: 155–8). In January 1997, three camps were attacked simultaneously and set on fire, destroying thousands of houses and leaving many homeless. The Royal Thai Government responded with camp consolidations, the stationing of Thai soldiers in every camp, prohibition on movement outside of the camp and tighter controls on new arrivals crossing the border (Bowles 1998). As economic ties continued to strengthen between Thailand and Burma, any political capital that the refugees had once represented was lost.

By 2004, Thai policy towards refugees from Burma had deteriorated to such an extent that Human Rights Watch released a highly critical report, calling on the Thai Government to ratify the 1951 Refugee Convention and its associated Protocol, to stop deportation of refugees, to put in place proper screening and status determination processes for asylum seekers, to permit media access to the refugee camps and to provide adequate health care, shelter and educational opportunities for refugees. More recent reports remain critical of Thailand’s treatment of Burmese refugees and migrants, pointing to labour exploitation, refoulement and deportation, and profiteering (Human Rights Documentation Unit 2008; Human Rights Watch 2012). Refugee registration is ostensibly regulated by ‘Provincial Admission Boards’. These ‘PAB’ have not operated since 2006 and the vast majority of people who have come to the refugee camps since that time have been unable to obtain formal registration. As only registered refugees are eligible for international resettlement the ratio of registered/unregistered refugees in the camps has been transformed in recent years.

The UNHCR has been permitted to exercise a protection mandate in the refugee camps since 1998. One of its roles in this capacity (as in every refugee situation) is to seek a durable solution for refugees. UNHCR recognizes three durable solutions for refugee situations: local integration, third-country resettlement and voluntary repatriation. In Thailand, local integration was rejected by the Royal Thai Government and repatriation was precluded by continuing conflict and human rights violations inside Burma. Resettlement was initially resisted by the Thai Government as a probable ‘pull factor’, but was eventually agreed to. Between 2005 and 2012, more than 100,000 refugees were resettled from camps in Thailand to countries including the United States, Australia, England, Norway, Sweden and Finland (IOM 2012).

Resettlement is increasingly perceived as a desirable durable solution in protracted refugee situations, offering an alternative to life in limbo in a camp and presenting
potential opportunities for employment, education and mobility (UNHCR 2003b). However, resettlement also presents significant challenges, for those who leave and for those who remain behind (see further Chapter 3). For those who leave, resettlement offers a route out of the camp – but at a cost which cannot be fully understood before departure.21 In 2008, the director of TBC found that refugees resettled to the United States faced many challenges of language and a lack of institutional literacy in accessing welfare and entitlements (TBC 2008a). A study several years later found that life was becoming easier for some but overall resettlement had proved a ‘mixed blessing’ (Kenny and Lockwood-Kenny 2011).

Strong community organizations had developed to plug the gaps in service provision, with one resettlement agency quoted as saying that even shortly after arrival in the US, ‘the Karen had the best community support systems they had ever seen among refugee groups’ (TBC 2008a: 4). This suggests that the mechanisms of community organization which the Karen have developed over decades of conflict, displacement and encampment are resilient enough to reform in industrialized society. It may also suggest something even more profound about the governance heritage of the Karen refugee societies: that a history of living without effective state service provision has enhanced their capacity to adapt to American (or Norwegian, or Australian) society, precisely because they are accustomed to self-sufficiency and to working outside state structures.22

Notes

1. As announced by then-Prime Minister Khin Nyunt on 30 August 2003, the Roadmap to Democracy had seven stages: (1) to reconvene the National Convention to draft a national Constitution; (2) step-by-step implementation of the process necessary for the emergence of a genuine and disciplined democratic system; (3) draft a new Constitution based on the principles laid out by the National Convention; (4) adopt the Constitution via a national referendum; (5) hold free and fair elections to constitute a national legislative assembly based in accordance with the new Constitution; (6) convene the new national legislative assembly; and (7) build a modern, developed and democratic nation.

2. In 1989, when the military regime changed the country name from ‘Burma’ to ‘Myanmar’, it also changed the name of the Karen (to Kayin), Karenni (to Kayah) and Arakanese (to Rakhine).

3. Noting that the figures are unreliable, Steinberg (2010: xiv) cites 1983 census figures in establishing the Burman population as 69%, and a range of national population estimates from 47 to 58 million.

4. To use the example of the Karen, though an administrative district of ‘Karen State’ is recognized by the Burmese regime the ethnic insurgency movement has been
fighting for something different, a politically autonomous 'Karen State'.

5. At the outset of the revolution, the struggle was for a fully independent Karen State. This has more recently been replaced by a willingness to settle for political autonomy within a federal structure.

6. This story is still told among the Karen. Interestingly, it was told to me in several variations; sometimes with emphasis on the Karen brother’s foolishness in losing or failing to recognize the value of the book but on another telling it emphasized deceit by the White brother (i.e. that he ‘stole’ the book and did not tell his Karen brother). This echoes Hayami’s (2004) finding that Karen folktales are changed to accommodate the circumstances in which they are told, perhaps to chime with current themes or events, or to make a particular point to the listener.

7. In Mae La Oon, seven religious groups are members of the camp ‘Religious Union’: four Christian denominations (Baptist, Anglican, Roman Catholic, Seventh-day Adventist), Buddhist, Animist and ‘White Elephant’, a religious cult based around the worship of white elephants. In terms of population numbers, it is estimated that close to three-quarters of camp residents in Mae La Oon are Christian, while 24% are Buddhist and 3% are Animist (UNHCR/ILO 2007: 64).


9. As used in, e.g. the 2010 Karen Baptist Committee calendar.

10. Unfortunately for Burma's ethnic nationalities these territories have recently come to be very valuable indeed, with ‘development’ projects including timber logging, hydropower damming and a massive gas pipeline. The latter two projects in particular have resulted in many human rights violations and extensive displacement (Earthrights International 2011).

11. Karen villages in Southeast Burma suffered deeply during the Second World War for their support of British forces but the British military is remembered today with respect, even with affection. I met two middle-aged Karen men called ‘Wingate’ (evidently named for Orde Wingate, commander of the Chindit forces in Burma during the latter half of the war) and was told the story of ‘Grandfather Longlegs’ on many occasions (‘Grandfather Longlegs’ being a nickname for a British army major who surrendered himself from hiding to stop reprisals against Karen villagers).

12. The effectiveness of this administration is disputed. Thawnghmung (2008: 56) quotes Alan Smith in describing the KNU government as ‘a warlord administration with an on-paper administrative structure’.

13. The KNU’s failings have been replicated by other revolutionary movements in Burma. The Chairman of the Shan Restoration Council, Lt-General Yawd Serk (2010) has identified six key failures of the Burmese ethnic insurgencies: failure to unite across ethnic nationalities; failure to agree on concrete policy objectives (e.g. federalism versus full independence); failure to focus on defeating the enemy and
instead becoming distracted by self-interest and the management of internal splits; lack of strong military and political leadership within organizations; ceasefire policies weakening the situation of all (those who agreed ceasefire lost political ground and leverage, while those who did not were weakened by the greater concentration of Burmese forces); and each insurgency operating independently and relying on guerrilla tactics rather than combining forces with a central command capable of large offensives. Each of these points can also be applied to KNU policy over the last fifty years.

14. This experience of shadow sovereignty is not unique to the Karen but has been repeated in other ethnic borderlands. Contrasting Kachin and Karenni experiences of governance, Grundy-Warr and Dean (2003: 94) note that there are some similarities (relative autonomy during colonial rule, the birth of a nationalist movement and resistance to rule from Rangoon) and important differences (e.g. the Kachin Independence Organization has considerably more authority and administrative control inside Burma than the Karenni National Progressive Party does). Nevertheless, they find that both cases challenge conventional views of sovereignty, displaying a multi-layered, lapped, power environment where ‘political territoriality is greatly influenced by contingent, fluid sets of relations, past and present political and social formations, and by regional geopolitics’.


16. The eleven point proposal includes the following points: (1) Establish a nationwide ceasefire and immediately cease military operations in ethnic areas. (2) Guarantee the human rights and safety of all civilians. (3) Build trust among the people. (4) Support the basic needs of the people and ensure that development projects have the full participation and support of local villagers. (5) Allow national media outlets to participate in the peace process. (6) Immediately stop forced labour, arbitrary taxation and extortion of villagers. (7) Release all political prisoners and provide solutions to settle land rights issue. (8) Set out principles for all parties to ensure a genuine peace process. (9) Ensure the legitimacy of representatives involved in negotiations, provide adequate time for their consultation with respective constituencies and establish a clear role for third parties. (10) Initiate a plan for monitoring and ensuring the transparency of the peace process. (11) Establish a flexible process that guarantees progress towards sustainable peace, and in which
all parties speak straightforwardly and avoid using words that may be misunderstood. (See Keenan 2012b: 7). A clearer demand for autonomy in ethnic areas has been made by the United Nationalities Federal Council (UNFC 2013), which issued a statement in August 2013 asserting its position that the ‘present Union of Burma/Myanmar’ should be formed ‘into a Federal Union of national states and nationalities states, having national equality and self-determination’ and ‘to practice federal democracy in this Federal Union’.

17. Reports based on testimony of Karen villagers indicate that the Burma Army is most feared, while there is a greater degree of support for and accommodation with KNU forces. Despite political support for the KNU, some villagers preferred to be under DKBA control as they believed this brought less likelihood of reprisals by Burma Army forces (South et al. 2010; Thawngmung 2011a: 79).

18. Monthly population figures are reported on the website of The Border Consortium: www.borderconsortium.org. Three figures are given: TBC’s verified caseload (which includes all persons verified as living in the camps); TBC’s feeding figure (those who personally attend rations distributions); and the MOI/UNHCR population of registered refugees.

19. It is not entirely clear why the Royal Thai Government refused a role to UNHCR. It seems probable that a number of factors were relevant: a desire to avoid repeating the experience with Indochinese refugees where the availability of international support and resettlement were believed to have been ‘pull factors’ attracting refugees to Thailand; a desire to avoid granting the status of ‘refugee situation’; and a basic political miscalculation: ‘From interviews with RTG representatives, it seems clear also that the RTG did not expect the situation would last so long and become protracted.’ (Vungsiriphsal et al. 2011: 56).

20. This included, in 2009, the refusal of entry to more than 4,000 people who had been forced into Thailand by an SPDC–DKBA offensive. These people were denied entry to the refugee camps though they were permitted to remain on Thai soil and to receive aid and assistance for a short period of time. They were strongly pressured to return to Burma though their village area had been heavily mined. By September 2010 only a few of this group remained in Thailand (KHRG 2010).

21. People choose to resettle because they hope it will provide them with a better future. Berger (2010: 72) imagines a meeting between two migrant workers in Western Europe, where one man, ‘full of the excitement of arrival’ says, ‘Here you can find gold on the ground. I am going to start looking for it.’ His friend replies, ‘That is true. But the gold fell from very high in the sky, and so when it hit the earth, it went down very, very deep.’ Like Berger’s migrant workers, refugees resettled from Thailand often fail to find the gold they are searching for, instead facing unemployment, stigma and the disillusionment of abandoned dreams.
22. As the political climate inside Burma has begun to alter, refugee repatriation is also being considered. This proposal is examined in Chapter 8, Beyond Encampment.
Indigenous peoples’ rights and the law in Latin America
03:: Indigenous peoples' rights and the law in Latin America*

Since the late 1980s, legal innovations at international, continental and national levels have converted indigenous peoples into subjects of rights. This means they are now recognized not only as individual citizens of the countries in which they live, but also as collectives with specific group rights which are different from those pertaining to the rest of the population. Indigenous peoples' right to continue living in a manner different from that of dominant society implies that governments must respect spheres of autonomy for indigenous government and legal jurisdiction. According to international human rights law, these autonomy rights are based on the principle of self-determination that underpins the contemporary system of sovereign nation-States.¹

Throughout the history of Latin America, indigenous peoples have figured among those groups whose human rights have been most systematically denied and violated. Yet in contrast to other regions of the world where acceptance of the concept of “indigenous peoples” has been much more problematic and contested, most countries of the region have accepted the existence of their native populations and have slowly come to accept – at least in theory – that they should exercise some degree of “internal self-determination” (Stavenhagen 2002) within the existing boundaries of the nation-State.

Today Latin America is at the cutting edge of debates about the legal codification and guarantee of the collective rights of indigenous peoples. This is due to a combination of various factors including: first, the approval of “multicultural” or “plurinational” constitutions in the 1990s and 2000s recognizing the existence and rights of indigenous peoples (Assies et al. 1999; Van Cott 2000; Sieder 2002; Sánchez Botero 2010; Yrigoyen 2011); second, advances in jurisprudence within the Inter-American system of human rights (Rodríguez-Piñero 2007; Anaya 2009; Aylwin 2013); second, the invocation of individual and collective rights by indigenous peoples' social movements (Brysk 2000; Yashar 2005; Speed 2007); and, fourth, the growing region-wide tendency towards the judicialization of social claims of all types (Sieder et al. 2005; Rodríguez-Garavito and Santos 2005; Rodríguez-Garavito et al. 2006; Couso et al. 2010).

The indigenous population in Latin America comprises approximately 52 million people; some 11 percent of the region's total population. More than 400 different indigenous peoples survived the conquest by European powers in the sixteenth and seventeenth centuries. In some countries, such as Argentina and Brazil, they now represent less than one or two percent of the total population, whereas in others, such

Table 8.1 Indigenous peoples in Latin America, estimated population 2005

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<th>Country</th>
<th>% of population</th>
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<td>Bolivia</td>
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<td>Guatemala</td>
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<td>El Salvador</td>
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<td>Guyana</td>
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as Bolivia and Guatemala, they are more than 50 percent and growing. Mexico is the country with the largest indigenous population in numerical terms: some 14 percent of the total population or 15 million people. Some indigenous languages – such as Aymara, Quechua, Nahuatl or K’iche’ – are spoken by millions of people, whereas among many of the smaller lowland groups, native languages are rapidly disappearing. Yet in many countries the overall trend is towards an increase in those people self-identifying as indigenous.

According to all social indicators, indigenous populations in Latin America are among the most impoverished of the region’s citizens. As a consequence of the historical dispossession of their lands and their enslavement and exploitation at the hands of colonial and republican elites, native peoples suffer from acute economic, social, political and cultural marginalization. Although only 11 percent of Latin Americans are indigenous, they constitute some 20 to 25 percent of the 40 percent of the region’s population living in poverty and an even higher percentage of the 17 percent living in extreme poverty. More than half of all Bolivians and Guatemalans are poor, but nearly three-quarters of indigenous people in those countries live below the poverty line. In Ecuador more than 80 percent of indigenous people live in poverty and in the rural highlands this figure rises to 90 percent. In Peru more than 40 percent of all families below the poverty line are indigenous (United Nations Development Program (UNDP) 2009). A breakdown of the statistics shows even worse social indicators for indigenous women and children. Indigenous people are the victims of racism and discrimination in society, and especially within State institutions such as schools, hospitals or courts. This particularly affects the growing number that lives in Latin America’s urban areas; currently more than half of the overall indigenous population of 11 million people. Indigenous peoples also suffer from multiple forms of violence associated with current patterns of economic development including the accelerated exploitation of natural resources (such as oil, minerals, timber and biogenetic resources), the construction of roads and hydro-electric dams, and agro-industrial development, all of which have a highly negative impact on indigenous ways of life, threatening the physical survival of many groups.

**Normative transformation: the impact of international law**

Compared to other regions in the world, Latin America is characterized by its “high porosity to human rights norms and institutions” (Rodríguez-Piñero 2007: 185). This is because of a series of historical factors, including the circulation of ideas about citizenship and rights since colonization in the sixteenth century, and the role that law has played in the constitution of Latin American nation-States and their diverse imaginaries, something which continues to be reflected in recent processes of constitutional reform (Goodale 2008). It is also due to the strength of trans-regional
human rights and social movements in Latin America (Sikkink 2005). Latin American
countries have been global front-runners in the legal recognition of indigenous
peoples' rights.

The International Labor Organization's Convention 169 approved in 1989 (hereafter ILO
169), the first international convention setting out the collective rights of indigenous
peoples, was ratified by most countries in the region during the 1990s. This Convention
replaced the earlier ILO Convention 107, which dated from 1957 and which – in
contrast to ILO 169 – was characterized by an integrationist ideology, reflected in
public policies towards indigenous populations in countries such as Mexico and Peru
between the 1930s and 1970s. The region-wide adoption of ILO 169 can be understood
as part of the “norms cascade,” whereby elected democratic governments ratified
numerous international human rights instruments as a means of staking their global
democratic credentials following extended periods of military and authoritarian rule
(Finnemore and Sikkink 1998). Ratification was also a reaction to the growing
continental mobilization of indigenous peoples' social movements which reached its
apogee in 1992, centering on rejection of official celebrations of the Spanish
quincenentary (Stavenhagen 2002; Bengoa 2008).

ILO 169 establishes the obligation on States party to the Convention to protect and
promote the social, economic and cultural rights of indigenous peoples who live within
their national territories, respecting their social and cultural identity and their specific
customs, traditions and institutions. Among its most important articles are those
stating that indigenous peoples have a right to make decisions about development
projects that affect them, and to be adequately consulted about these prior to their
approval and initiation. The promise of “prior consultation” subsequently became a
lightning rod for indigenous mobilizations against the operations of extractive
development industries in their historic territories. Although the constitutional changes
approved in Latin American countries during the 1990s varied in the degree to which
they recognized indigenous rights, all were profoundly influenced by ILO 169 (Van Cott
2000; Yrigoyen 2011). This first phase of multicultural constitutional reforms has been
interpreted by some authors as a means to try and shore up the legitimacy of
governments and as an extension of rights (Van Cott 2000). Others have viewed the
turn to multicultural constitutions and policies as a new form of regulation that reflects
contemporary forms of neoliberal rule (Hale 2004; Hernández et al. 2004; Sierra et al.
2013).

Certainly these constitutional changes led to a wave of policy measures across the
continent in fields such as health and education aimed specifically at indigenous
people. These measures were supported by the Inter-American Development Bank and
the World Bank (Davis 2002; Plant 2002; Andolina et al. 2010). In some countries these
reforms and programs opened important spaces for indigenous professionals to participate in the elaboration and implementation of public policies, creating new institutions such as the Project for the Development of Indigenous Peoples and Afro-Ecuadorians in Ecuador, known as PRODEPINE (Andolina et al. 2010). However, this first wave of reforms failed to respond fully to indigenous peoples’ demands that their historic territories and livelihoods be protected.

The limitations of the constitutional changes approved and the lack of official political will to guarantee indigenous peoples’ rights in practice generated different responses. In some countries, such as Mexico, Guatemala and Colombia, indigenous peoples’ organizations turned to strengthening de facto forms of territorial, political and legal autonomy: for example, the autonomous Zapatista municipalities in the State of Chiapas, Mexico or the indigenous cabildos in the northern Cauca region of Colombia (Padilla 2009; Baronnet et al. 2012). Indigenous organizations have also invoked constitutional and international norms judicializing alleged abuse of their collective rights. Issues including discrimination, control over territories and natural resources, abuse of due process rights and systematic State violence against indigenous peoples have all been contested in Latin American courts.

The judicialization of indigenous rights was particularly marked in Colombia during the 1990s (in part due to the extensive guarantees established in the Constitution of 1991), and that country’s Constitutional Court went the furthest in the region in establishing new jurisprudence guaranteeing their collective rights (Rodríguez-Garavito and Arenas 2005; Sánchez Botero 2010). In most other countries, however, the high courts were less receptive to indigenous peoples’ claims. The prospects for presenting legal appeals in defense of collective rights depends on many factors, including the specific legal formulations protecting those rights, ease of access to presenting a constitutional writ or action,5 or the existence of different support structures for processes of legal mobilization (Epp 1998).

Indigenous peoples and their allies also took their claims to extranational forums such as the International Labor Organization and the Inter-American Commission and Court.6 During the 2000s the Inter-American Court of Human Rights developed its jurisprudence on the collective rights of indigenous peoples and the obligations of the member States of the Inter-American system to uphold them in practice (Morris et al. 2009). A number of cases set important precedents, including that of Awas Tingni vs. the State of Nicaragua. The sentence of the Court in August 2001 developed an “evolutionary interpretation” of article 21 of the American Convention, which protects property rights, extending this to include the communal property of indigenous peoples administered according to their own forms of law (Anaya and Crider 1996; Rodríguez-Piñero 2007). Advances in the jurisprudence of the Inter-American human
rights system are transforming the basis for the defense of indigenous peoples’ collective rights in Latin America. However, although the decisions of the Court have set important legal precedents, in most instances governments have failed to respect them in practice.

Most countries have not passed secondary legislation to implement the commitments acquired in ILO 169. Particularly contentious is the issue of prior consultation: long and bitter struggles have been waged before the courts over what constitutes “prior informed consultation in good faith.” These struggles are evident in Colombia surrounding the struggle of the U’wa people to prevent oil exploitation on their territories (Rodríguez-Garavito and Arenas 2005; Rodríguez-Garavito 2011), and in Guatemala by indigenous peoples opposed to gold mining (Fulmer et al. 2008; Sieder 2007). Such battles have generated an important jurisprudence and public debate on how to operationalize the commitments set out in ILO 169. By 2012, governments were increasingly turning to drafting legislation to regulate processes of prior consultation in the hope of defusing growing indigenous protest over natural resource exploitation (Rodríguez-Garavito 2011).

**The UN Declaration on the Rights of Indigenous Peoples in Latin America**

The UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly in September 2007, is the most complete international instrument on the individual and collective rights of indigenous peoples, bringing together advances in standard setting and setting out States’ obligations. A significant normative advance, the Declaration is slowly becoming a point of reference in indigenous organizations’ campaigns and in attempts to generate national and regional jurisprudence in Latin America. Compared to ILO 169 the Declaration emphasizes the following elements.

**Self-determination**

Article 3 affirms that “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” The recognition of the right to self-determination is effectively the basis for the constitutional recognition of indigenous peoples’ autonomy rights. It also signals recognition that the denial of autonomy rights in the past led to the systematic violation of indigenous peoples’ human rights.

Article 4 of the Declaration links autonomy directly to the right of self-determination: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.” This presupposes measures to guarantee indigenous peoples’ self-government within territories enjoying
a degree of legislative and jurisdictional autonomy. Such measures have been approved in some Latin American constitutions (notably the 2009 Bolivian Constitution, the 2008 Ecuadorian Constitution and the 1991 Colombian Constitution), but in general, official endorsement of autonomy arrangements has been limited to the level of municipal government – something some authors have referred to as “municipalization” of indigenous autonomy claims (Burguete et al. 2008). Nonetheless, widespread trends favoring political and administrative decentralization since the 1980s, combined with the relative stability of national borders in Latin America, means that indigenous claims to greater political autonomy are not automatically seen as a threat to the continued existence of the nation-State. However, the exercise of indigenous political autonomy necessarily involves the more politically contentious issues of control over land and natural resources.

Participation according to indigenous forms of law and governance

Article 18 of the Declaration signals that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.” In other words, the participation of indigenous peoples cannot be mandated through the imposition of mechanisms designed by third parties that are different from the norms, practices and authority structures of indigenous peoples. During the 1990s and 2000s some Latin American countries experimented with more plural forms of participation and representation. While disputes continue over what is an “authentically indigenous” form of government or procedure, this is perhaps one of the less contentious aspects of the Declaration for the region.

Consultations in good faith according to “free, prior and informed consent”

Instead of the figure of “prior consultation” established in ILO 169, the UN Declaration establishes the potentially much stronger concept of “free, prior and informed consent” (FPIC). Article 19 of the declaration states that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” One of the most controversial aspects of ILO 169 was that although it guaranteed the right of prior consultation, nowhere did it stipulate that the results of those consultations had to be respected by governments. By contrast, the Declaration effectively establishes a potential right of veto to indigenous peoples and puts a greater emphasis on governments to uphold indigenous peoples’ rights to self-determination and on all parties to conflict to reach a consensus. However, Latin American governments have
proved unwilling to accept the stipulation that consent must be secured prior to the approval and initiation of policy initiatives deemed to be in the national interest, particularly those related to the exploitation of natural resources.

Rights to land

ILO 169 recognized indigenous peoples’ property rights over lands they had traditionally occupied and used. The UN Declaration offers a much clearer formulation: in article 26 it states:

1. “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”
2. “Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”
3. “States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”

Obviously definitions of “traditional ownership, occupation and use” have yet to be defined. Previous experience in Latin America indicates that this will most likely occur through test cases before the courts and that both governments and the private sector will strongly resist challenges to existing property arrangements.

Intellectual property rights

The UN Declaration recognizes intellectual property rights for indigenous peoples linked to their alternative forms of knowledge. Article 31 states:

1. “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”
2. “In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.”

These provisions have significant implications for the negotiation of commercial contracts, for example to develop biogenetic resources. These issues have already been the focus of indigenous protests and actions before the courts in a number of Latin
American countries and such conflicts are likely to continue. This aspect of the Declaration also has implications for the future negotiation of treaties for trade and economic integration which have, to date, entirely ignored indigenous peoples’ collective rights.

**Rights to development**

The Declaration reflects an emergent right of indigenous peoples to decide their own forms of development. Article 32 signals that:

1. “Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”

Their free, prior and informed consent must exist before the start of any project which will affect their territories or resources:

2. “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”

At the same time, the impacts of economic development on indigenous peoples must be mitigated or compensated for:

3. “States shall provide effective mechanisms for just and fair redress for any such activities and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.”

The ways in which the Declaration affects the politics, jurisprudence and economic policies of different Latin American countries will depend to a large extent on the strategies of indigenous social movements and their allies, on the one hand, and on the national and supranational legal and political opportunity structures that arise, on the other. States will continue to treat “the indigenous question” as a matter to be decided in national policy forums. However, indigenous organizations and their allies will continue to make recourse to transnational organizing and to regional and international arenas in order to amplify their demands.

The role of the UN Special Rapporteur for Indigenous Peoples has been particularly important in this respect: the reports of the Rapporteur for different Latin American countries, including Mexico, Guatemala, Colombia and Chile, made a series of recommendations for policy reforms. At the same time, the Special Rapporteur has made a number of declarations regarding the regularization of free, prior and informed consultation. Even before the Declaration was adopted by the UN General Assembly in
2007, it was invoked by the first Special Rapporteur, the Mexican sociologist Rodolfo Stavenhagen, who served in the post between 2001 and 2008. In one of his reports, Stavenhagen stated that “in relation to mega-development projects, free, prior, and informed consent is essential to guarantee the human rights of indigenous peoples,” and that together with “the right to self-determination of indigenous peoples and communities, these are the necessary prior conditions for such strategies and projects” (cited in Morris et al. 2009: 15). The subsequent Special Rapporteur, US legal scholar James Anaya, also made a series of recommendations about prior consultation and extractive industries. For example, during a visit to Ecuador in 2008 he recommended the inclusion of clauses about plurinationality and prior informed consent in the text of the new constitution. During his time as Special Rapporteur, Stavenhagen signaled the “implementation gap” between existing norms and jurisprudence and official policies towards indigenous populations. Like his predecessor, Anaya produced highly critical reports about the state of indigenous peoples’ rights in different Latin American countries, signaling governments’ failures to meet their international obligations. These reports have become important resources for indigenous peoples’ organizations in their political struggles for collective rights guarantees.

At the same time, the jurisprudence of the Inter-American Court of Human Rights has also begun to reflect the substance of the UN Declaration, particularly with respect to the issue of prior consent. In the case of Saramaka vs. The State of Surinam, resolved in November 2007, the Court stipulated that “the State has the obligation to not adopt any measure without the consent of the community.” As noted by Morris et al. (2009: 19), “the jurisprudence of the Inter-American Court of Human Rights is one of the most protective sources of international law with regard to the issue of prior consultation. In general, the Court’s sentences tend to determine in detail the cases where consultation should be carried out; they establish that in some cases there exists a need to go beyond simply consulting, insisting on the need to obtain free, prior and informed consent.” The conflict between the Inter-American Court and the government of Brazil over the Belo Monte hydroelectric dam in 2011 led to a crisis within the Inter-American System of Human Rights and a move by Latin American governments to restrict the ability of social movements to judicialize their claims at regional level.9

**Final reflections**

Indigenous peoples’ rights are by their very nature indivisible and collective. Respect by governments for such rights means not only implementing policies to tackle marginalization and discrimination, or recognize cultural rights, but also involves profound questioning of the dominant models of political organization and economic development. This explains why the collective rights of indigenous peoples are so controversial and why governments repeatedly continue to violate them, despite
proclaiming their commitment to improving conditions for their indigenous citizens.

In Ecuador and Bolivia, indigenous peoples’ mobilization and their incursion into electoral politics contributed to a second round of “plurinational” reforms in the 2000s, leading to the approval of new constitutions in 2008 in Ecuador and 2009 in Bolivia. These were ostensibly intended to “decolonize” those nation-States, heralding more pluralist arrangements recognizing greater degrees of political and legal autonomy for indigenous peoples. They even incorporated Quechua and Aymara concepts of “good living” (“buen vivir”) into the constitutions, which presuppose forms of development premised on harmony with different ecosystems. However, despite the new constitutions the new left of center governments of Rafael Correa and Evo Morales continued to pursue extractivist models of economic development premised on the exploitation of natural resources including oil, minerals, water and timber. Indigenous peoples’ organizations in both countries increasingly mobilized to oppose these development policies and protest their impacts (Weinberg 2010). In February 2012 the National Confederation of Indigenous Nationalities of Ecuador (CONAIE), the largest indigenous confederation in the country and one of the strongest in Latin America, called on its members to increase their protests against the Correa government following the approval in 2011 of a new mining law favoring transnational corporations and the government’s continued support for oil exploration in the Amazon region (Ortiz 2012). In Bolivia, massive protests in 2011 over government plans for the construction of a transnational road through the protected Indigenous Territory of Isiboro Sécure National Park (TIPNIS), home to the Moxeño, Yurakaré and Chimán indigenous groups, led to clashes between protesters and police and an eventual suspension of the project by the Morales administration (Chavez 2011). However, in February 2012 President Morales approved a new law providing for consultation with TIPNIS inhabitants aimed at securing approval from them to resume work on the controversial road (Herrera Farell 2012).

Evidently normative advances in national, regional and international law affirming the collective rights of indigenous peoples have been an important element in their struggles for inclusion and respect for their cultural difference. Yet law alone cannot resolve indigenous peoples’ multiple claims, and legal mobilization is only one aspect of their broader political strategies. Given the globalized nature of economic development, securing guarantees for indigenous peoples’ collective rights will require action not just within nation-States but also internationally. However, effective international action to guarantee indigenous rights does not exist and recent developments in Latin America suggest that resistance to indigenous claims on land and natural resources is only likely to become more entrenched in the forthcoming period.
Notes


2. The Inter-American Court of Human Rights is one of the most rights-guaranteeing courts in the world, and the decisions and pronouncements of the court and the Inter-American Commission have a significant influence on jurisprudence and legal culture in Latin American countries party to the 1969 American Declaration of the Rights and Duties of Man.

3. Article 7 (1) of the Convention establishes that “The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.” http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169 (accessed March 2012).

4. Article 15 of the Convention states that: “1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.”

5. In Colombia, for example, presenting an acción de tutela is relatively straightforward and low cost, whereas in Mexico the obstacles to presenting an amparo are numerous. See Cepeda 2005; Domingo 2005.


7. The status of ILO 169 varies from country to country: for example, in Argentina
international human rights conventions automatically become part of constitutional norms following their ratification by the congress and senate; in others, jurists have argued that international human rights conventions are subordinate to the national Constitution.

8. For an analysis of cases of prior consultation in Latin America see Carvajal et al. 2009.

9. The Court had ordered the State of Brazil to suspend the construction of the hydroelectric dam on the Xingu river in the state of Pará, deeming that it violated the rights of the indigenous and peasant communities in the region.

References


Terrorists and pirates: Global police and *humanitas afflictata*
The following pages are dedicated to an analysis of the ways in which the figure of the pirate continues to haunt our present. In the first part, I reflect on the juridical transformations that, after the conclusion of the Second World War, have affected the traditional state-centric configuration of the international order. In particular, I focus on the ways in which, in the last 20 years, economic globalization has been supplemented by an accelerating institutional integration, which points toward new global juridical structures. Flirting with Hegel, we may say that the oceanic spaces of the world-market are today a source of juridical paradigms that tend to project a single supra-national figure of political power. As we have seen, it is in the borderless commons of the world that Universal jurisdiction moved its first modern steps as a necessary support for growing international trade. Similarly today, new cosmopolitan juridical figures attend the globalization of productive networks and sustain an ever more all-embracing market. Following Hardt and Negri, it may be maintained that, ‘in postmodernity the notion of right should be understood again in terms of Empire’ (2000: 12).

The central role that the concept of the pirate as hostis humani generis – whose genealogy I traced back to Rome’s Imperial law – has assumed in the last 20 years is the most powerful symptom of these tendencies. It is precisely by taking upon itself the burden of fighting those who were represented as ‘common enemies of all human communities’ that Rome claimed an Imperial role throughout the ancient world. Only by depicting Imperial violence not as war, but as the persecution of outlaw groups (persecutio piratarum), could the Roman Emperor be presented as a global peace-enforcer (pacator orbis). Similarly today, war has disappeared only to make space for global police actions against terrorist networks, criminal mafias, rogue states and pirate outlaws.

In the second part, I thus consider the essential role played by the figure of the pirate in the rhetorical and juridical construction of new ‘enemies of the human race’. Both ‘criminals against humanity’ and ‘global terrorists’ have been recently construed as hostis humani generis, relying on a systematic analogy with classical pirates (Kontorovich 2004; Greene 2008). In order to protect humanity from their threatening presence, new practices of global security and global policing have been introduced and fundamental norms of international law have been suspended, while ‘humanitarian bombings’, ‘surgical strikes’ and ‘targeted killings’ have been legitimized as exceptional but necessary forms of violence. Meanwhile, post-colonial states accused of harbouring or supporting ‘terrorists’ have been branded as ‘rogue’. Like the Barbary ‘pirate states’ of the nineteenth century, they have been stripped of their sovereign right and exposed to punitive bombings, military occupations and civilizing reconstructions. In this section, I briefly follow some of the key historical moments in the genealogy of the contemporary...
concept of 'the terrorist' from the early twentieth century until today, focusing in particular on the discourses surrounding the persecution of 'anarchist terrorism', 'Palestinian terrorism' and 'Islamic terrorism'.

In the last part, I look at the ways in which maritime piracy has been recently constructed as a global security threat, in response to which a transnational system of security seems to be emerging. An unprecedented military coalition, which cuts across traditional geopolitical rivalries, has been given a single common purpose and a single common enemy by the perceived pirate threat to global commercial circulation; moreover, new transnational institutions are constructed in an attempt to limit threats to global market exchange. As opposed to the 'War on Terror', the current global mobilization against pirates seems to be politically uncontroversial. Until today, we have not seen mass mobilizations against either the 'targeted killings' of suspected pirates caught in action nor against the innocent victims always shadowing military operations, and which usually come under the name of 'collateral damage': The indifference toward these deaths has not been the result of insufficient mass media coverage of the events; instead, it is revealing of the hegemonic function of classic historical narratives and the extent to which violence is banalized as an effective tool of global policing. The pirate, thus, continues to be the figure that most perfectly embodies the idea of an apolitical pest, whose killing is offered to humanity as a simple, neutral, righteous and legally sound form of global policing.

**Globalization and the 'humanitarian exception': The return of Empire?**

In the summer of 1944, the Second World War was about to end, leaving behind millions of victims caught in the midst of an endless escalation of violence that reached its apex in the horror of the Nazi camps – where 6 million stateless Jews were exterminated as 'pirates, who do not have the protection of any state and who are not authorized by any state' (Schmitt 1938, as cited in Bojanic 2011: 213). In preparation for the end of the hostilities, the representatives of the United States, Great Britain, China and the Soviet Union convened in Dumbarton Oaks in order to draw the outline of the new world order emerging from the war. On 26 June 1945, the Charter of the United Nations was introduced as the fundamental backbone of a global order that was meant to guarantee a new international stability and the banishment of war (Fassbender 2009: 1–12). The entire structure of the United Nations was conceived with the fundamental aim of centralizing the legitimate use of force in the hands of the new international organization, and away from the individual sovereign states that compose the international community (Kunz 1951: 529–534). Classic international war, thus, was openly proscribed already in the opening words of the Charter, in which it is defined as a 'scourge'.

Nevertheless, the definitive banishment of war was not meant to be equivalent with
the abolition of military forces, the elimination of all means of mass destruction and
the declaration that all violence is ultimately illegitimate and unjustifiable. At the
opposite, the fact that violence can be deployed legitimately was confirmed, although
this privilege was transferred from the hands of the sovereign states to those of the
United Nations. The Charter establishes a ‘regime of international peace and security’ in
which ‘armed force shall not be used, save in the common interest’ (United Nations 1945).
effectively controlled by the five powers that had won what was supposed to be the
last war of humanity – with the legal authority to punish violations of international law
that engender the stability of the international order (ibidem). In order to clad this legal
authority with the iron gloves necessary to enforce it, the United Nations needed to
concentrate in its hands an overwhelming violence capable of breaking any hope of
resistance in those condemned for grave violations of international law.\(^1\) It was
necessary, in other words, to transform the means of war accumulated by the major
powers in a \textit{global police force} that would enforce the decisions of the new
international authority. To this end, Article 47 of the United Nations’ Charter decreed
the institution of a permanent army directly under the control of the Security Council,
and directed by the military Chiefs of Staff of the five major powers. This was meant to
be a global police power endowed with absolute military supremacy, and capable of
annihilating any form of unauthorized resistance to the decisions imposed by the
Security Council (Houck 1993: 1–70).

In the following years, nevertheless, Article 47 was never implemented and remained
dormant, although it was never formally abolished. The increased animosity between
the United States and the Soviet Union, in fact, prevented any such centralization of
power. The absence of a global police force under the direct orders of the United
Nations has thus legitimated the outsourcing of policing functions to different groups
of states, which are authorized to deploy their sovereign violence – the power to kill or
let live – not in the classic institutional forms dictated by the concept of symmetrical
warfare but in police operations meant to ‘maintain or restore international peace and
security’ (United Nations 1945). Luigi Condorelli has ironically pointed out that in the
first 67 years of its activity, the United Nations has relied on its power to distribute
global letters of marque, such as the ones that European states used to distribute to
their privateers until the late nineteenth century (quoted in Zolo 2002: 90). Just as in
the sixteenth century, when private entrepreneurs such as Francis Drake could
legitimize their violence thanks to the explicit authorization of their sovereign, today a
number of states have legitimised their violence thanks to the authorization of the
United Nations. Just as sovereign powers could convert illegal acts of piracy into
legitimate acts of privateering through their concession of special authorizations,
equally today the United Nations has the power to convert illegal wars of aggression
into legitimate operations of global policing. This happened for the first time in the 1950s when the USA intervened in the Korean Civil War, flying the flag of the United Nations. After the end of the Cold War, UN-authorized interventions dramatically multiplied, with actions taking place in Iraq, Somalia, Haiti, Yugoslavia and Kosovo (Zolo 2009). In every single instance, the United Nations has legitimized the use of military violence by member states, including the use of semi-nuclear weapons of mass destruction and the killing of hundreds of thousands of unarmed civilians.²

Nevertheless, it would be incorrect to portray any of these events in terms of classic warfare. Today, UN-authorized interventions are not dramatic ruptures in the global social order but an integral part of it: they ‘maintain or restore international peace and security’ (United Nations 1945). In the new international order prefigured by the United Nations Charter, in fact, there is no space left for the traditional concept of war as an armed struggle between equal states (Beck 2005: 1–7). War is simply unthinkable, since it is impossible for any human group to exercise violence without entering into some relation with the global order. At a formal level, either violence is unauthorized by the United Nations and it can then only be a crime against its order, or it is authorized by it and thus it is part of a collective form of law enforcement for the preservation of that same order. If, according to Hugo Grotius, the essential principle of the classic international order was inter pacem et bellum nihil medium (between war and peace there is no middle condition), here we should rather say inter praedones et lectores nihil medium (between outlaws and police enforcers there is no middle condition). The notion of war is replaced by the binary concepts of law-breaking and law-enforcing violence, while the ambiguous figure of the warrior is forced to disappear from the world stage. In his place, once again, are evoked more characterized, unambiguous figures such as pirates and peace-enforcers, terrorist outlaws and global policemen.

The metamorphosis of war is only confirmed by the vanishing of the traditional concepts of neutrality (Franck and Patel 1991). In fact, if it was once possible to maintain one’s impartiality between two warriors – and continue to live, labour and think untainted by their mutual hatred – today this freedom is on the point of disappearing. Confronted by the total clash between global policemen and global outlaws, a detached indifference or a stance of compassionate understanding for both parts is a precarious position to take. In a veritable re-edition of the interdiction acuæ et ignis, by which the Roman Empire prohibited excessively kind-hearted people from providing water and fire to those banished from its order, Article 2(5) of the United Nations commands us to ‘refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action’ (United Nations 1945). To avoid ambiguities, during the drafting session of the UN Charter, France suggested including in the text that membership in the organization is ‘incompatible with the status of neutrality’ (Werner 2004: 159). In the context of the 1991 bombings of Iraq,
the president of Austria similarly affirmed the doctrine by which ‘when the members of the United Nations act against an aggressor, there can be no question of neutrality, only of solidarity’ (Lahodynsky 1992: 24). What Junger prophetically identified as the central characteristic of Total War – that is, the willing or unwilling involvement of the whole German nation in the mechanism of war – is therefore cast at the global level as the whole of humanity is summoned to participate directly or indirectly in the suppression of the outlaws. As the chief rapporteur to the Drafting Committee of the United Nations Charter once observed, the new organization ‘renders sacred the obligation of all states to participate in its [military] operations’ (Lepard 2003: 258).

During the Cold War years, the capacity of the United Nations to act as the central institution of an emerging global order was seriously undermined. And yet it is unquestionable that ‘the notion of right defined by the UN Charter also points toward a new positive source of juridical production, effective on a global scale – a new centre of normative production that can play a sovereign juridical role’ (Hardt and Negri 2000). The many ways in which the transition from the classic international state order towards the global police order promised by the Charter is far from being completed are obvious and there is no need to describe them in detail (Callinicos 2007). And yet, despite its many shortcomings and limitations, the United Nations, as pointed out recently by Thomas Franck and Faiza Patel:

is the most ambitious organic entity ever created by states. Its central purpose is to replace the outmoded, dangerous national self-reliance on unilateral force with a workable global police system, capable of... responding quickly with levels of force appropriate to a specific circumstance of lawlessness.

(1991: 73)

At the end of a devastating war, the constitution of the United Nations represented the most decisive attempt to include the entire world under a single juridical order. Without the slightest ambiguity, the supra-national institution was erected as an alternative to the form of interstate order that had dominated European modernity. It was at once pre-modern and post-modern in its form. In its Universal, boundless aspiration, it resuscitated the dream of a Universal Empire capable of embracing the whole of humanity under a single law and a single sword, which had animated the writings of European jurists, philosophers and poets up until the eighteenth century. Yet it also responded to powerful material processes that tend to integrate the entire world into a single commercial system ceaselessly engendering contracts (that must be guaranteed) and conflicts (that must be resolved). In the last 20 years, these powerful tendencies toward the constitutionalization of a supranational power that were first inscribed into the United Nations’ Charter, and then partially held back during the Cold War years, have emerged once again in all of their revolutionary potential.
As we have seen throughout the last chapters, after each major conflict of the last two centuries the victorious powers have always tried to establish a cosmopolitan peace that would police the established order. The Holy Alliance, the League of Nations and the United Nations all emerged with this same explicit aim. After the conclusion of the Cold War, it was the United States that declared the emergence of a ‘new world order’ – a novel global configuration of power in which, in the words of George H.W. Bush, ‘the United Nations, freed from cold war stalemate, is poised to fulfill the historic vision of its founders’ (Kerton-Johnson 2010: 32). At the centre of this emerging order the notion of global security has gradually emerged, elaborated in documents such as the 1992 National Security Strategy of the United States (Intriligator and Coulomb 2008).

At the heart of this concept operates the idea that growing interdependence – and the accelerating speed with which merchandise and information, but also violence and factors of crisis, travel around the world – requires new forms of global policing. Disorder and lawlessness can no longer be tolerated, even when they are localized in a particular state, or in stateless areas like the oceans of the world. The Western ‘way of life’, in fact – especially in the major Western metropolitan conglomerates – is dependent on systems of production and consumption that are increasingly global.

The economic systems of the major Industrial nations have become more vulnerable. They depend on the free and regular access to energy sources and raw materials located throughout the world, on free and secure maritime and aerial commercial lanes, on the stability of international markets and global financial hubs.

(Zolo 1997: 43)

As Tony Blair clearly put it, in his speech ‘Doctrine of the International Community’, which was symptomatically delivered during the bombing of Serbia in April 1999:

We are all internationalists now, whether we like it or not. We cannot refuse to participate in global markets if we want to prosper.... We cannot turn our backs on conflicts and the violation of human rights within other countries if we want still to be secure.

(Fairclough 2005: 54)

In the last 20 years, in other words, there has been a growing demand for the creation of apparatuses of security and control that would be immediately operative at the global level, by-passing traditional national borders. The necessity to enlarge traditional concepts of national defence has been based on an increasingly hegemonic narrative, which assumes that accelerating processes of commercial exchange, human circulation and inter-cultural communication have been eroding the power of traditional barriers, so that it becomes impossible to isolate the state from outside flows (Brand 2005). In order to open the state to the world-market, all sorts of human
and commercial circulation must be allowed to traverse state borders (Foucault 2009: 33–34). As Thomas Friedman, arguably the leading popular guru of globalization in the United States, breathlessly put it: ‘globalization involves the inexorable integration of markets, nation states and technologies to a degree never witnessed before’ (1999: 7). The very concept of globalization projects a coming-into-being of ‘the globe’ as a new integrated system inhabited by a finally united human species. And yet this is presented, from the very beginning, as a human community that must be perpetually secured and defended (Policante 2010). While traditional statements of national defence justified military spending, and the necessity for organized violence, on the basis of the necessity to defend the enclosed order of the state from the rest of humanity, the contemporary concept of global security justifies the organization and deployment of violence on the basis of the necessity of defending humanity from multifarious, ever-present ‘security threats’ (Zolo 1997: 133; Hardt and Negri 2004: 18–25).

Partly as a consequence of such thinking, much effort has been made to develop a doctrine of ‘sovereignty as responsibility’, whereby state sovereignty becomes conditional upon respect for international law and fundamental human rights (Nolte 2005: 389–392). In case of violations, state sovereignty has been suspended by appeal to a ‘humanitarian exception’. Military interventions in formal violation of international law, and without authorization from the UN, have been therefore legitimized on a number of occasions (Elden 2006). The humanitarian exception, in this sense, suspends the jus cogens norm of international law that protects sovereign nation-states from external military aggressions. Especially during the 1990s, a number of scholars have argued that a new customary law was emerging from the practice of states, which would legitimate the use of military violence in the name of human welfare (Orford 1999). International lawyers such as Antonio Cassese have asserted that, in response to ‘egregious crimes against humanity’, states can legitimately confer on themselves the role of global policemen, even without the authorization of the Security Council (1999a; 1999b: 799). Similarly, Michael Glennon has advocated the complete abandonment of traditional rights of sovereign immunity, in order to affirm an international law aimed at ‘alienating the disorderly’ in order to construct ‘a more orderly world’ (1999: 7), while Lee Feinstein and Anne Marie Slaughter (2004) have argued that lawful states should feel free to treat ‘rogue states’ in an unequal manner, since they have already sacrificed their rights through criminal behaviour. Similar arguments in support of unauthorized police actions have fuelled an endless stream of writings. Authors such as Fernando Tesón (1992; 1995; 2005), Geoffrey Robertson (2000), Thomas Weiss (1999), Thomas Franck (2001) and Michael Ignatieff (2002) have all, in different forms, supported the right of major powers to act outside traditional norms of international law in case of emergencies that threaten the welfare of humanity.
In most of these works, the affirmation of various 'humanitarian exceptions' somehow obscures the fundamental question of who is to determine when, in concrete terms, an emergency exists. What global authority is entitled to speak in name of humanity and thus determine the identity of the 'rogue states' that can be lawfully bombed, invaded and civilized? What global authority is entitled to point out who are the 'criminals against humanity' to be punished in the name of the species? These questions remain suspended in an ontological instability that cannot be resolved within the internal logic of international law. Ultimately the question posed by the category of hostis humani generis may only be answered through the exogenous intervention of a sovereign decision at the global level. In fact, as we have seen, the suspension of standard norms of international law regulating sovereign jurisdiction – which was introduced in order to allow the major European power to persecute pirates all over the world, regardless of their nationality – has been interpreted and used in radically different ways, by different powers, in different historical and geographical contexts. Throughout the centuries different Imperial powers have claimed the authority to determine who might be labelled a pirate, and thus an 'enemy of humanity'. In fact, the concept of the pirate as hostis humani generis has always maintained a fundamental ambiguity: what are the limits of the human community? What characteristics or practices bond it together in a single group? And what is inimical to this grouping? Who is, in concrete terms, the 'common enemy'? Who is to decide this? These essential questions have been posed time after time throughout modernity by the figure of the pirate; today they are posed, in an even more dramatic form, by the current affirmation of a 'humanitarian exception'that would allow the use of devastating violence in the name of humanity.

It seems today that international law is more and more taking the form of an Imperial constitution (Hardt and Negri 2000). The discourse surrounding contemporary humanitarian interventions affirms the existence of a single global legal order, which is meant to regulate human coexistence throughout the world. The affirmation of global norms, nevertheless, implies also the appearance of global outlaws who systematically violate them. If the idea of a 'humanitarian exception', which systematically justifies the suspension of traditional norms of sovereign immunity triumphs as a general view in international law, then there will be no doubt about the fact that we have entered a new historical phase. During the NATO intervention in Kosovo, Jürgen Habermas described the bombing of Belgrade as a 'pure anticipation of a future cosmopolitan state that it also seeks to promote' (2000: 61). Similarly, Ulrich Beck has argued that traditional international law is in the course of being supplanted by 'a global domestic policy', which involves 'a new kind of postnational politics of military humanism' based on 'the use of transnational military power with the aim of enforcing the observance of human rights' (1999: 985–987).
What remains to be determined is where global sovereignty resides today – in other words, who has the authority to interpret international law and decide on the ‘humanitarian exception’. Who can convincingly and legitimately invoke the right to use violence in order to protect humanity? A multiplicity of actors have recently justified violence in humanitarian terms, including: the United Nations, the NATO coalition, the United States and a plethora of other sovereign states, but also individuals such as Ted Kaczynski, who considers humanity to be threatened by the rise of an integrated technological system destined to become a space of total control (2005). Convinced of his vision, this professor of mathematics concluded that the necessity to save humanity from ‘technological slavery’ justified the use of violence against those supporting its tyrannical dominion. Between 1978 and 1995, Kaczynski engaged in a bombing campaign against modern technology, planting or mailing numerous home-made bombs, killing three people and injuring 23 others (Waits and Shors 1999: 1–12). An essay in The New Yorker by Cynthia Ozick described Ted Kaczynski as America’s ‘own Raskolnikov – the appealing, appalling, and disturbingly visionary murderer of Crime and Punishment –… a philosophical criminal of exceptional intelligence and humanitarian purpose, who is driven to commit murder out of an uncompromising idealism’ (1997: 114).

This extreme story illuminates many of the dangers implicit in every discourse that evokes humanity as an endangered global population which must be protected. First of all, it is clear that those who claim to act in defence of humanity can justify the most terrible violence in its name: in the humanitarian mind, the choice is between murder and passive acceptance of even more terrible catastrophes. As a supporter of NATO bombings of Serbia and Kosovo, which involved the killing of over 5,000 people, puts it, ‘the choice is between using force for the greater good or inaction... the morality of humanitarian intervention is in many ways unquestionable’ (Merriam 2001: 125). Secondly, it becomes clear the extent in which humanity is nothing but an empty signifier, which must be endlessly filled by shifting ‘mythical structures of signification’ (Barthes 1973: 115–143; Policante 2011a: 465–471). In short, we must recollect that ‘with every significant concept the important thing is, who interprets, defines and uses it; who, through a concrete decision, decides what is to count as peace and disarming; who decides what intervention, public peace and security is’ (Schmitt 1929: 112). Who is entitled to determine what threatens humanity and how to protect it? If anyone (or at least any sovereign state) is entitled, then we are exposed to a global civil war in which opponents will fight one another in the name of their particular conception of what humanity needs. Otherwise, humanitarian discourses hide the fundamental fact that only the major Western powers are entitled to speak in the name of humanity, while the post-colonial world is left to play the role of either the victim to be saved or the monster to be destroyed.
Since the days of the Roman Empire, the claim to serve humanity, extirpating those who threaten its welfare, has played a fundamental role in Imperial rhetoric. Stable Imperial orders left little ambiguity about who possessed the authority to name and fight the *hostes humani generis*. In the Roman Empire, it was the Emperor and no one else who possessed the authority of *pacator orbis*. He was the ‘global peace-enforcer’, entrusted with the authority to determine when the Imperial peace had been broken, and by whom. He was the one empowered to persecute pirates in the name of all communities and enforce the *ius gentium*. Centuries later, the *res publica Christiana* recognized a similar authority to the Holy Roman Emperor, who was meant to protect the House of Christianity from heretics and enemies of the faith. The unity of the Christian Commonwealth was assured by the influence of papal authority, which guaranteed that a particular claim to *imperium* would be recognized by all Christian crowns. Thus, when the papal authority was openly challenged by the ‘Protestant corsairs’ of the sixteenth century, the whole Imperial order rapidly collapsed.

This is why Carl Schmitt described the pirate as ‘a Universal and core concept of enmity’ (2003: 65). Looking at the history of antiquity, the German philosopher correctly stressed how in Imperial times the concept of pirate as ‘common enemy of the human race’, not only obtained its meaning from, but affirmed the existence of the concrete order of the international law of an Empire’ (ibidem). We must add, nevertheless, that in periods of transition, the concept of piracy inevitably loses its relation with the historical reality of a comprehensive spatial order; a struggle to define who is ‘the common enemy’ may then emerge, opposing alternative hegemonic forces. Today, the questions surrounding the pirate as *hostis humani generis* continue to represent the international correlative of the decision on the state of exception and, as such, might reveal a dynamic struggle for hegemony, or the crystallization of a stable Imperial order. If there is a tendency toward the formation of an Empire – that is, a single juridical order that strives to impose its validity throughout the world – certainly this is still an Empire that has no Emperor. There is no global sovereign figure that has been able to impose over all people its authority to speak and fight in the name of humanity.

During the transition from a Republican to an Imperial constitution, Rome increasingly presented itself as an Imperial power imposing respect for a sacred peace (the Pax Romana) and a Universal law (the *ius gentium*), a force imposing the *ius gentium* against disqualified communities of pirates (Domingo 2010: 3–11). The Empire appeared simultaneously as a cosmopolitan power whose might was at the service of a crystallized peace, as an enforcer of international law and as a steward of the Mediterranean commons. Its violence, since it was deployed against groups portrayed as pirates and ‘enemies of all’, was elevated as a service performed in the name of all mankind.
Today, similarly, humanitarian interventions have been presented as operations aimed at protecting humanity from monstrous enemies of the human race. Countless interventions, bombings and deaths have been justified as necessary in order to annihilate ubiquitous ‘criminals against humanity’ and ‘terrorists’. After 2001, in particular, the figure of the ‘terrorist’ rapidly became ubiquitous in a number of interrelated discourses throughout the world. After the suicidal attacks on the World Trade Center, the United States’ declaration of a global ‘War on Terror’ has justified extraordinary security measures including: military attacks against ‘rogue states’, ‘surgical bombings’, ‘targeted killings’, ‘extraordinary renditions’ and torture, as well as the limitation of free speech and other civil liberties. In less than a decade, the figure of the terrorist has acquired an unprecedented, world-historical significance. It is to an investigation of this fundamental concept, and the ways in which its genealogy intertwines with the classic concept of the pirate as enemy of the human race, that I shall now turn.

The War on Terror: A contemporary persecutio piratarum?

As we have already seen, the origins of Universal jurisdiction must be found in the particular spatiality of the world oceans. In this space, removed from the sovereignty of any single state, Universal jurisdiction was a legal instrument that allowed European states to persecute piracy worldwide, irrespective of the nationality of the individuals accused. It was an institution that became particularly prominent in the eighteenth century, when the expansion of international commerce demanded a firm legal ground for the global protection of private property. As Friedrich Hegel (1993), Michel Foucault (2008), Gilles Deleuze and Félix Guattari (2004) have argued (although in very different ways), the oceans of the world were the first area of the world that was thought of as a worldwide space of free circulation organized according to a number of legal principles, which were necessary for the enforcement of contracts, for the defence of property and, in general, for the correct functioning of market institutions. In relation to the suppression of piracy, ‘we can say that there was a juridification of the world, which should be thought of in terms of the organization of a market’ (Foucault 2008: 176). Universal jurisdiction was born as an institution complementary to the Westphalian order of states, and meant to organize the maritime side of the jus publicum europaeum (Schmitt 2003: 179).

For hundreds of years, thus, Universal jurisdiction only applied to the crime of piracy. In An Introduction to International Law, Mark W. Janis affirms: ‘the Universal principle is perhaps best illustrated by the jurisdiction that every state has over pirates’ (Janis 2003: 82); The Princeton Principles on Universal Jurisdiction describe piracy as ‘a crime that paradigmatically is subject to prosecution by any nation based on principles of universality, and it is crucial to the origins of universal jurisdiction’ (Macedo and
Robinson 2001: 45). Louis Sohn, in the introduction to Benjamin Ferencz’s *An International Criminal Court: A Step Toward World Peace*, reiterates:

> The first breakthrough towards an international system for punishing global crimes occurred when international law accepted the concept that pirates are ‘enemies of mankind’. Once this concept of an international crime was developed in one area it was soon applied by analogy to other fields.

(1980: 11)

According to the *Princeton Principles on Universal Jurisdiction*, which is a sort of restatement of current debate on the right to humanitarian intervention: ‘The notion of “enemy of humanity” first constructed in relation to the crime of piracy is crucial to the origins of Universal jurisdiction’ (Macedo and Robinson 2001: 15).

In the nineteenth century, when piracy was no longer a serious threat to the world-market and the juridical order sustaining it, the figure of the pirate maintained a historical significance in the ‘savage wars of peace’ that traversed the colonial world. Since it evoked a form of asymmetry that allowed European powers to portray their violence as a service offered to humanity, while it disqualified the armed resistance of native communities and groups, the figure of the pirate remained at the centre of a number of European discourses that legitimized imperialism and colonization. Moreover, the spectre of piracy continued to serve a role whenever European powers needed to expose to Universal jurisdiction individuals who would have been otherwise difficult to prosecute. England, for instance, utilized the exception opened in international law by the figure of the pirate in order to gain jurisdiction over slave-traders from all countries. This served the cause of suppressing the slave trade in a rapid and effective campaign. Nevertheless, it also legitimized the English claim to act as a global maritime police, further entrenching its hegemonic position in the oceans of the world (Grewe 2000: 554–558).

In the twentieth century, the spectre of the pirate was repeatedly evoked in the context of a sustained campaign for the coordinated suppression of the international anarchist movement. It is in this context that the contemporary figure of the terrorist, as an absolute foe against whom extraordinary measures are both necessary and justified, began to emerge. Between 1881 and 1914, individuals and groups associated with anarchist ideals were responsible for the assassination of numerous monarchs and heads of state throughout the world. In 1878: in Germany, Max Hödel attempts to assassinate Kaiser Wilhelm I; in Italy, Giovanni Passannante tries to kill King Umberto I; while in Russia Sergey Stepanyak-Kravchinsky stabs to death General Nikolai Mezentsov, head of the Tsar’s secret police. In 1879: Alexander Soloviev attempts to assassinate Tsar Alexander II of Russia, while Grigori Goldenberg assassinates Prince Dmitri Kropotkin, the Governor of Kharkov in the Russian Empire. In 1881: Tsar Alexander II of

It is at this point that Theodore Roosevelt, suddenly elevated to the Presidency, called for an international crusade for the eradication of the anarchist movement. In the previous years, the threat that anarchist violence posed to sovereigns, monarchs and the ruling classes of all nations had pushed a number of governments to cooperate against the common enemy (Jensen 2001). Cooperative efforts to share law enforcement information and establish stricter controls on transnational anarchist groups were put in place late in the nineteenth century. In his first message to Congress, Roosevelt advanced the proposal to declare anarchism a crime against the law of nations and the anarchist an ‘enemy of the human race’ against whom all governments would be justified to exercise Universal jurisdiction:

Anarchy is a crime against the whole human race; and all mankind should band against the anarchist. His crime should be made an offense against the law of nations, like piracy and that form of man-stealing known as the slave trade; for it is of far blacker infamy than either. It should be so declared by treaties among all civilized powers. Such treaties would give the Federal Government the power of dealing with the crime.

(Roosevelt 1901: 7)

The international anarchist movement was to be considered, just as the pirate networks that haunted the Atlantic of the eighteenth century, as a danger posed to all organized states. They were denationalized groups, hostile to all nations. Roosevelt, therefore, called for the introduction of extraordinary measures for the suppression of terrorism: freedom of the press should have been limited and special legislation should have guaranteed the infliction of punishments ‘proportioned to the enormity of the offense against our institutions’ (ibidem). Moreover, at least according to the President, the anarchist creed of McKinley's assassin would have justified the criminalization of the whole anarchist movement. In fact, the intrinsic criminality of anarchist doctrines meant that ‘no man or body of men preaching anarchist doctrines should be allowed at
large’, and that ‘anarchist speeches, writings and meetings are essentially seditious and treasonable’ (Roosevelt 1901: 6). Ultimately, no distinction could be made between the assassin and anarchist writers, speakers and thinkers throughout the world:

For the anarchist himself, whether he preaches or practices his doctrines, we need not have one particle more concern than for any ordinary murderer. He is not the victim of social or political injustice. There are no wrongs to remedy in his case. The cause of his criminality is to be found in his own evil passions and in the evil conduct of those who urge him on.

(ibidem)

All anarchists, thus, independently from their individual actions, ought to be condemned and, since no remedy could alleviate their evil, they had to be expelled from the healthy body of the nation. To avoid further metastasis, the United States Congress:

should take into consideration the coming to this county of anarchists or persons professing principles hostile to all governments and justifying the murder of those placed in authority. Such individuals as those who not long ago gathered in open meeting to glorify the murder of King Humbert of Italy perpetrate a crime, and the law should ensure their rigorous punishment. They and those like them should be kept out of this country; and if found here they should be promptly deported to the country whence they came; and far-reaching provisions should be made for the punishment of those who stay.

(ibidem)

Paradoxically, violence against the anarchists is justified since their beliefs are evil, and they are evil because they justify violence. In the following years, the persecution of anarchist groups in the USA escalated to the point that the Secretary of Commerce and Labour instructed the immigration officials ‘to rid the country [through deportation] of alien anarchists’ (Jensen 2001: 34). Finally, on 4 March 1908, the New York Times announced: ‘The United States has declared open war on Anarchists’ (ibidem).

Marcus Rediker has described the eighteenth-century clash between European maritime Empires and the multinational pirate crews that disrupted commerce throughout the Atlantic world as ‘a tale of two terrors’ (2004: 4). In his words, the public executions of pirates were theatrical representations of ‘a clash of two different kinds of terror. One was practiced by rulers as they sought to eliminate piracy.... The other kind of Terror was practiced by common seamen like William Fly who sailed beneath the Jolly Roger’ (2004: 5). Similarly, the electrocution of Leon Czolgosz was a theatrical representation – reproduced on film and screened in American cinemas – which symbolically embodied a clash of two terrors (Porton 1999: 16–17). On the one hand, there was the anarchist assassin who thought, arching back to a long tradition that may be traced back to Cicero, that tyrants were hostes humani generis from whom humanity
must be defended at all costs. On the other hand, there was Theodore Roosevelt, who thought, arching back to another long tradition that may be traced back to Cicero, that pirates and now anarchists were *hostes humani generis* from which humanity must be defended at all costs. This mode of thinking was so entrenched that, months after Roosevelt compared the suppression of anarchism to the persecution of pirates, Emma Goldman compared Czolgosz to Marcus Junius Brutus the slayer of tyrants (1901: 471–477). In both cases, the claim that the protection of humanity requires the extirpation of monsters in human form justifies an exceptional violence that escapes all controls.

The events surrounding the wave of anarchist violence, which at the beginning of the last century shook the world and unveiled the mechanisms of an escalating dialectics of terror, echo our contemporary predicament in many ways. Since the beginning of the new millennium, a spiral of violence has risen from the ashes of the World Trade Center. In reaction to this act of terror, the leaders of the American super-power immediately declared a ‘global war on terror’. This is a global military, legal and ideological struggle, targeting both ‘terrorist organizations’ and the ‘rogue states’ accused of supporting them. It initiated with the invasion of Afghanistan in 2001, and it continued with the invasion of Iraq in 2003. It has involved the occupation of both countries for almost a decade, until today, as well as a series of military operations, surgical bombings, extraordinary renditions and targeted strikes throughout the world. This is no longer a war in the classical sense, a symmetrical interstate conflict governed by defined rules of engagement, with limited objectives and a clear temporal frame separating war from peace. Rather, the ‘War on Terror’ resembles the *persecutio piratarum* that traversed the Mediterranean world in the days of the Roman Imperial *pax*. It is a form of violence that cannot be contained in well-marked battlefields, but rather traverses the entire Imperial space. It is not a rupture in the international order that is likely to terminate with the establishment of a new order, but a form of police violence that is fully internalized to the global order.

In November 2001, George W. Bush depicted the new scenario in a speech to the United Nations: ‘Civilization itself, the civilization we share, is threatened....The only alternative to victory is a nightmare world where every city is a potential killing field’ (Shomura 2010: 53). This is, in other words, a violence that cannot be stopped by peace treaty but must be perpetually reiterated in order to maintain the very conditions on which peace and order exist. As Vice President of the United States, Dick Cheney explained in 2006: ‘I don’t think it’s possible to negotiate any kind of settlement with terrorists.... I think you have to destroy them. It’s the only way to deal with them’ (Fattah 2006: 3). The ‘War on Terror’ can and must be a war of extermination, since the ‘other’ has nothing in common with us: there can be neither dialogue, nor common understanding. The limitless character of the ‘war on terror’ therefore reflects itself on
the abstract, undecipherable figure of the ‘terrorist’. In the US National Security strategy from September 2002, in fact, the construction of a terrifying figure of the ‘terrorist’ appears as the necessary precondition for an effective military campaign. The first step towards the realization of a perpetual ‘humanitarian exception’ is ‘using the full influence of the United States, and working closely with allies and friends, to make clear that all acts of terrorism are illegitimate so that terrorism will be viewed in the same light as slavery, piracy or genocide; behaviour that no respectable government can condone or support and all must oppose’ (Bush 2002: 4).

This form of political rhetoric – which denies any symmetry or common ground between ‘us’ and ‘them’; which portrays ‘humanity’ not as a community traversed by conflict, but as a single front under attack; which banishes the other from civilization and the human race, and therefore evokes into being a total war from which no one can withdraw – is rooted in centuries of anti-pirate discourse. It is not surprising, then, if the contemporary figure of the ‘terrorist’ bears many of the characteristics, and serves many of the functions, that the ‘pirate’ had in a number of past Imperial formations. With its threatening, fleeting and ungraspable presence, the terrorist, like the pirate, legitimizes the Imperial sword as necessary for the preservation of peace and the protection of humanity. Moreover, a number of state lawyers and legal scholars have recently proposed placing terrorists in the same legal black hole that was first developed for pirates in the eighteenth century and, since then, has served as a dumping ground for countless people (Halberstam 1988; Detter 2007; Vlastic 2011). The spectre of piracy has been evoked in particular in the context of debates regarding the legitimacy of targeted killings, extraordinary renditions and tortures.

In fact, the War on Terror has not only embroiled countries like Afghanistan and Iraq, which were classified as contemporary ‘pirate states’ and thus stripped of their sovereign immunity, invaded, occupied, civilized and reconstructed. It has taken as its fields of operation the entire earth, without geographical barriers or limitations (Policante 2011b). Even countries that might appear at peace cannot be considered immune from the global logic of security and, in a number of them, the apparatuses of global policing have already suddenly appeared in order to kill. In Pakistan, for instance, peace did not prevent US drones from killing, according to data compiled by the New America Foundation, ‘an estimated 3,225 people since 2004, of which 2,769 were reported to be militants’ (Cockburn 2012: 12). The use of ‘targeted killings’ in countries officially at peace has escalated since 2009, offsetting hopes that the election of Barack Obama to the Presidency of the United States would be sufficient to end this practice (Krishnan 2009: 83). Quite to the contrary, in April 2011, John O. Brennan, the Assistant to the President for Homeland Security and Counterterrorism, publicly defended the American right to kill suspected terrorists wherever they are: ‘the United States is in an armed conflict with al-Qa’ida, the Taliban, and associated forces... there is nothing in
international law that prohibits us from using lethal force against our enemies outside of an active battlefield’ (Chiesa and Greenawalt 2012: 1387). According to this view, the United States would be entitled to intervene throughout the world in order to kill anyone who has been classified as a ‘terrorist’. A number of legal scholars have justified this view on the basis of the ‘pirate precedent’: if terrorists, like pirates, can be categorized as ‘enemies of the human race’, then ‘targeted killing’ would be nothing but an effective execution of Universal jurisdiction (Sinor and Blackwood 2005; Burgess 2005, 2008, 2010; Colangelo 2007; Detter 2007; Vlasic 2011; Hickman 2011).

The recent tendency to extend Universal jurisdiction to those labelled ‘terrorists’ is not completely unprecedented. In the last 20 years, the argument has had persistent appeal for countries such as the United States and Israel, who strive to open an avenue that would allow them to kill ‘terrorists’ based in other countries, and with whom they are not willing to begin an open war. In February 1978, for instance, the Israel Law Review published an article by Shalev Ginossar entitled ‘Outlawing Terrorism’. The author argued that ‘every terrorist is an enemy of mankind, humani generis hostis, and as such he must be treated.... The apprehension and suppression of its perpetrators is not only within the power of every State, but it becomes for them a duty they owe to the family of nations’ (Ginossar 1978: 155–156). Moreover, he insisted that international law should consider as terrorists not only those responsible of acts of violence but all the people associated with a terrorist organization: ‘their individual guilt is so enormous that the mere fact of belonging to a terrorist movement calls for the same penalty as that incurred by its leader’ (ibid: 157).

In the last pages, the article assumes darker tones when the author considers that ‘the enemies of humanity have succeeded in penetrating into what was meant to be the very citadel of civilization... we have even seen a terrorist organization being granted official status in the governing bodies of the United Nations, including the International Civil Aviation Organization itself!’ (Ginossar 1978: 155). Although never named, the reader cannot but infer that the mysterious terrorist organization that has penetrated the citadel of civilization is nothing but the Palestine Liberation Organization, which was then recognized as the ‘sole legitimate representative of the Palestinian people’ by the United Nations and over 100 states with which it holds diplomatic relations (Brynen 1990). The conclusions of the article risk being truly terrorizing and genocidal: since the PLO is a terrorist organization and all those associated with it must be considered terrorists, and since terrorists are ‘enemies of the human race’, one is not too far from suggesting that all Palestinians are in fact hostes humani generis who can be persecuted wherever they are found. One month after the publication of this article, Israel invaded Lebanon with the declared intent of destroying Palestinian bases in that country (Norton and Schwedler 1993). The conflict resulted in the deaths of 20 Israeli and almost 2,000 Lebanese and Palestinians, most
of them civilians. Between 100,000 and 250,000 people were forcefully displaced (Chomsky 1983: 192). Finally, Lebanese sovereignty was denied and transformed into a borderless ocean which the Israeli army could penetrate in order to enforce its right to persecute Palestinian ‘terrorists’.

The line of reasoning first pioneered by Ginossar reappears today in the context of the global war on terror. In fact, after the humanitarian interventionism of the 1990s, the war against terrorism has become the new pivot around which international relations turn. And yet both of these global discourses appeal to this forgotten legal category of ‘enemy of the human race’ that finds its underpinning in the oceanic free space of circulation, and its genealogy in the ways in which piracy has been discussed and problematized since the beginning of Roman Imperial Law. In September 2001, the terrorist attack on New York’s Twin Towers opened up a new global stage in which the piratical category was to become fundamental. Since the beginning of the global ‘War on Terror’, the spectre of the pirate as hostis humani generis has been evoked in order to justify the practice of ‘targeted killings’ of suspected terrorists throughout the world. Moreover, it has also served the aim of justifying the right to ignore the Geneva Convention in exceptional spaces like Guantanamo and Abu Ghraib. In 2004, for instance, the then Deputy Assistant Attorney General of the White House John Yoo, complaining against the protests of human rights activists, asked:

Why is it so hard for people to understand that there is a category of behavior not covered by the legal system? What were pirates? They weren’t fighting on behalf of any nation.... Historically, there were people so bad that they were not given protection of the laws. There were no specific provisions for their trial, or imprisonment. If you were an illegal combatant, you didn’t deserve the protection of the laws of war.

(quoted in Thorup 2009: 409)

And the following year Yoo contended that ‘War has different rules for a nation and different rules for people who choose to fight kind of like pirates who are outside the control of a nation’ (ibidem). On these bases, Yoo has argued for the exclusion of ‘terrorists’ – but also of soldiers serving states condemned as ‘failed’ or ‘rogue’ – from the protection of the Geneva Convention (Yoo and Delahunty 2002). Moreover, he has supported the right of the US President to order torture, meaning the infliction of suffering ‘equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death’ (quoted in Annas 2005: 2128; Yarwood 2008). Finally, in June 2012, after a CIA drone strike had killed 15 suspected terrorists in North Waziristan, Yoo publicly complimented Obama’s choice and, in the Wall Street Journal, invited the President to consistently declare terrorists ‘enemies of mankind’ whom ‘no one should mourn the death of’:

According to press reports, aides claim the president is a student of St.
Augustine and St. Thomas Aquinas who brings their views to targeting choices. But... just-war theory should broaden, rather than limit, the use of force against terrorists. The work of the Catholic theologians drew upon traditions stretching back to the ancient world that would have considered terrorists to be hostis humani generis, the enemy of all mankind, who merited virtually no protections under the laws of war. A return to first principles such as hostis humani generis may prove a better guide for a nation at war than a president's day-to-day instincts.

(Yoo 2012)

This exceptional violence, that obliterates all legal and moral limits, is part of a discourse that portrays the tortured subjects as people who, through their actions, have excluded themselves from humanity and, therefore, from the protection of all human laws. It is part of a discourse that portrays humanity as a victimized population with no autonomous political agency and continuously threatened by bestialized 'enemies of the human race'. The War on Terror is thus legitimized as a service offered to mankind, a form of violence that exceeds the fundamental norms of the international legal order in order to respond to the ever-present 'terrorist emergency'. As a consequence, the doctrine of 'humanitarian exception' – developed during the humanitarian wars of the 1990s as an emergency power to suspend fundamental norms of international law, in a particular locality and for a limited time, in order to prosecute 'egregious crimes against humanity' (Cassese 1999b: 791) – is generalized and transformed. The War on Terror, in fact, removes all temporal and spatial limitations that were initially imposed on the 'humanitarian exception': the persecution of the terrorist 'enemy of the human race' is a continuous source of Universal jurisdictional powers by which those claiming to fight for the protection of humanity can intervene anywhere at any time. The function of global policing – which now may be activated with or without the authorization of the Security Council (Glennon 1999: 5; Cassese 1999b: 791–793) – thus becomes a nowhere tangible, all pervasive, ghostly presence which 'intervenes for security reasons in countless cases' outside and even against the law (Benjamin 1996: 267).

The concept of 'the terrorist' today serves, at a global level, a similar role to the one that has been historically played by the concept of 'the pirate' in the oceans of the world. It is an empty signifier that offers itself to interpretation. If it is to be accepted that terrorists, like pirates, are to be considered hostis humani generis, nothing can stop the escalation of violence and eventually the coming into being of a global civil war of devastating consequences. Two current barriers to 'surgical strikes,' 'humanitarian bombings' and 'targeted killings' would be removed: jurisdiction and sovereignty. Anyone labelled as a 'terrorist' would have no place in the world, since they would be threatened everywhere by a violence that is capable of surpassing all borders. No state could protect the 'terrorist' since its territory would turn into a sea in which any army – acting in the name of humanity – would be entitled to operate. The protection of
today's peace would then justify continuous military interventions, anti-piracy operations and anti-terrorism strikes. The 'humanitarian exception' would no longer be a temporary and localized exception to the norms of international law, but would truly be global and permanent. No barrier could stop bombings in the name of humanity occurring in any place at any time, for the persecution of ubiquitous 'enemies of the human race' hiding among the innocents. In the words of Saul Newman, it would then appear 'a space of exception – a "no man's land" between legality and illegality – in which law is both preserved and transgressed through the very violence and arbitrariness with which it is enforced' (2004: 579). The land would be submerged in a borderless ocean in which the distinction between pirates and privateers, authorized state agents and terrorists, blurs in a grey zone of conceptual indistinction. Paradoxically, exactly when the process of decolonization and statification of the world seems to have forever eradicated the borderland from the world map, the latter in fact becomes ubiquitous. The ocean is no longer an untameable outside but a space of indistinction that can emerge everywhere, at any moment.

**Security, commons and Somali pirates: Towards a global biopower?**

The current global mobilization against piracy, epitomized by the unparalleled coalition of navies involved today in joint anti-piracy patrols around the Horn of Africa, becomes an interesting phenomenon at this point. One might see, in a sense, the whole history of piracy repeated today on a miniature scale. After the collapse of the Somali State, the lack of sovereign controls was translated in the existence of a juridical void, a space of exception 'beyond the line' that became immediately the occasion for imperialist practices, open plunder and primitive accumulation or, in David Harvey's words, 'accumulation by dispossession' (Harvey 2005). In a second phase, when the exceptional freedom dictated by the absence of sovereignty gives rise to practices that appear to endanger the smooth working of the global market, Universal jurisdiction legitimizes forms of Imperial intervention in the name of humanity, which take the form of global police operations against denationalized pirate outlaws. The imposition of an imperial pax, today enacted in the name of the United Nations, thus rapidly replaces lawless imperialist plunder as the dominant form of interventionism in the region.

Today the United Nations Convention on the Law of the Sea (UNCLOS) defines piracy as 'any illegal acts of violence or detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship' (Rubin 2006: 440) and is limited to the high seas and places 'outside the jurisdiction of any State' (ibidem). Because piracy is considered to be a violation of the law of nations, any state has the authority to seize a pirate ship and dispose of the pirates according to its own legal and political will. The pirates are denationalized and thus stripped of the protection normally afforded by their nationality (Matsuda and Committee of Experts for the
Progressive Codification of International Law 1926: 225). Over the last decade, the number of maritime piracy attacks has increased steadily. In 2008, 293 incidents of piracy were officially reported, an increase of 11% from the previous year. In the last three years, over 1,290 incidents were reported, but many more remained probably unreported due to fear of rising insurance costs (International Chamber of Commerce 2012). In only a few years, then, piracy has been again turned from a marginal economic problem into the centre of a rising system of security that is both global in scope and transnational in its organization.

The rise in pirate attacks in the proximity of the Horn of Africa and particularly off the Somali coast contributed to rising international concern over the issue of piracy. Since the early 2000s, then, major powers in the international system have been working towards turning piracy into a problem of international security. This process reached its first climax in early 2007, when the United States pushed forward the proposal for a ‘Global Maritime Partnership’, an ambitious programme of international military cooperation against piracy and terrorism, which included the vision of a ‘1000-ship navy’ composed of vessels ‘from all willing nations’, destined to become the first materialization of a transnational police force in the service of the safety of global trade (Kraska and Wilson 2009a). On 2 June 2008, the Security Council at the United Nations adopted Resolution 1816, the first ever to deal explicitly with piracy. It was rapidly followed by other three resolutions, all issued in 2008, which provided authorization for exceptional measures against piracy. Resolution 1851, in particular, urged all members of the international community to ‘undertake all necessary measures that are appropriate in Somalia for the purpose of suppressing acts of piracy and armed robbery at sea’ (Ploch 2010: 13).

In response to the call of the United Nations for international cooperation towards the enforcement of international criminal law, the United States created a ‘Maritime Security Patrol Area’ in the Gulf of Aden, involving a coalition of navy warships and aircraft which patrols the waters and airspace of the area (Onuoha 2009). Meanwhile the European Council announced the decision to work toward the inauguration of the first joint European naval operation, a collective venture for the suppression of piracy under the name of Operation Atalanta (Van Rooyen 2011). The European mandate, today in its fourth year, has been recently extended to December 2014 and it now explicitly calls for the targeting of pirate bases on shore and for further direct intervention in the region. Nevertheless, Operation Atalanta constitutes only one of the three major multilateral operations in the area together with the US-led Combined Maritime Force and the NATO’s mission Ocean Shield. The three multilateral operations are coordinated by a single operative framework, which is also inclusive of the Chinese military forces in the area (Homan and Kamerling 2010). Overall, at least 37 states are directly involved in military operations against piracy, including, in a single effort, traditional
geopolitical rivals such as China, India, Iran, Japan and Russia (Kraska 2009b).

For many states, involvement in these collective counter-piracy operations have been motivated as much by political signalling – flaunting a munificent willingness to deploy military violence for the protection of humanity – as by any determination to suppress piracy. Moreover, counter-piracy operations have proved to be an effective disguise for states willing to expand their influence in a strategically significant region (Willett 2011). And yet this unprecedented cooperative military effort is revealing of the ways in which international law remains a profoundly undemocratic juridical system, whose interpretation and enforcement is most often dependent on the interests of only the most powerful international actors (Miéville 2006). If one compares the complete absence of international action to stop the waste-dumping and over-fishing that daily despoils the oceanic commons with the multi-layered, organized response to eradicate piracy, the sense of imbalance becomes glaring.

In fact, for over 30 years now the Gulf of Aden has been the theatre of forms of corporate crime that are responsible for an incalculable destruction of common wealth and human lives. However, before the emergence of Somali piracy, the vacuum of power left behind by the profound crisis of Somali institutions was not only ignored but, in fact, was systematically exploited by international capital (Panjabi 2009). In lawlessness, business interests initially saw opportunity for vast profits, and took advantage of the situation. According to a report by the United Nations Environmental Program, ‘heavily armed foreign boats have often tried to exploit the breakdown of law and order in Somalia since the overthrow of President Mohammed Siad Barre in 1991 by fishing in the rich Somali waters, thus depriving coastal communities of resources’ (UNEP 2005: 133). Moreover, the UNEP has been denouncing, at least since the early 1980s, ‘countless shipments of illegal nuclear and toxic waste of industrial provenance dumped along the coastline’ (UNEP 2005: 134). In 1995, leaders of all 12 major Somali political factions – in one of the first and only joint statements in recent years – complained formally to the United Nations and the European Union about the environmental problems caused by extensive illegal fishing and the dumping of toxic waste by foreign vessels in Somali waters (Panjabi 2009). In 2000, several UN agencies revealed massive pollution by nuclear and hazardous waste (including chemical contaminants and radioactive uranium) caused by illegal dumping of dangerous materials originating in Europe (Hamblin 2008).

In the last decade, European and American fishing industries illegally plundered an estimate of US$300 million of tuna, shrimp and lobster every year from the Somali coastal region – roughly three times the sum proved to have been paid out to pirates by the shipping industry – reducing one of the richest fishing grounds in the world to a deserted toxic garbage heap (Lehr 2008, 2009; Panjabi 2009). The incursions of foreign
vessels provoked some fishermen in the late 1990s into forming armed vigilante
groups to guard their coastlines (Panjabi 2009). Early on, Somali representatives
complained to the United Nations, appealing for help against the illegal activities
being perpetrated in the oceans. They complained not only about the over-fishing by
industrial means but also of having been actively prevented from fishing (Achieng
1999). The devastating effect of this type of corporate-led primitive form of capital
accumulation cannot be overstated in a region where, according to the most recent
reports of the UNEP, over 30 million people depend on maritime and coastal resources
for their daily livelihood (Clifford 2004).

On a more general level, the systematic over-exploitation of the oceanic commons by
major transnational corporations is increasingly threatening the world's marine
ecosystems (Madeley 1999: 80–87). As Mancur Olson (2000) has argued, distant water
fleets and mobile trawlers regularly operate as roving bandits, lacking any attachment
to particular maritime environments, which appears from their perspective to be only a
standing-reserve of economic value to be extracted. The effects of this form of
accumulation by dispossession have proved devastating – not only for local
communities, whose 'traditional ways of life, which for centuries have been sustained
by fisheries are collapsing' (Madeley 1999: 82), but also for the entire inter-species
ecosystem. An international team of maritime scientists has argued that
'human-dominated marine ecosystems are experiencing accelerating loss of population
and species, with largely unknown consequences' (Worm et al. 2006: 786). They contend
that 'a new dynamic has arisen in the globalized world: new markets can develop so
rapidly that the speed of resource exploitation often overwhelms the ability of local
institutions to respond' predicting that unless global policies change 100% of
sea-food-producing species stocks will irremediably collapse by 2048’ (ibidem).

Nevertheless, no state has so far acted forcefully in order to implement the United
Nations Conventions on the Law of the Sea, which banishes both over-fishing and toxic
dumping in oceanic waters. This form of illegality – despite the environmental
disruption and the high cost in human life it implied – is largely left unchecked, despite
the protests of local institutions and environmental organizations. Only when piracy
appeared in the region was the lack of effective sovereign control over the Gulf of Aden
problematized. Piracy rapidly propelled Somali coastal communities to the forefront of
global concerns, leading to an impressive naval response by the armed forces of over
40 major countries: an international military mobilization that represents only the most
visible point of a global security assemblage under construction.

The magnitude of the intervention with which the major military powers are
attempting to control and govern this space of flow is hardly surprising. Up to 50% of
the world's trade by volume travels through the Gulf of Aden and the Suez Canal. By
one estimate, approximately 20,000 ships traverse Somali waters annually. These vessels carry minerals, gas and huge containers filled with every type of consumer product. Even more strategically momentous, over 40% of the world’s oil is moved through the Gulf of Aden (French and Chambers 2010). A number of military analysts have argued that the escalation of piracy in the region could bring not only commerce but also industrial production to a standstill (Stavridis and LeBron 2010). Nevertheless, the Center for Strategic and International Studies estimated that losses due to pirate attacks in the whole of 2011 were equivalent to US$16 billion, which, compared to the US$7.8 trillion representing the total yearly value of international maritime trade, constitutes a minuscule fraction (Scheffler 2010: 3). The fear of piracy therefore has very real effects but, as Julian Reid and Michael Dillon have noted, ‘the governmental hysteria around, and the mobilization of new strategies for the protection of critical infrastructures, tells us more about liberal regimes’ fears over the fragility of their infrastructures than about the actual extent of the material threats posed to it’ (Dillon and Reid 2009: 37).

What is certain is that – while neither fear for the livelihood and security of coastal populations nor concern for environmental destruction were perceived as a problem of security sufficiently threatening to activate any significant response by the international state system – even a limited threat to the safety of commercial circulation was immediately constructed as an overwhelming global security threat (Bueger 2010: 25–26). Prior to the rise of the pirate threat off the Somali coast, no other issue could have brought the navies of the United States, the EU nations, NATO, China, Japan, Iran and Russia to identify a single common enemy and a single common cause. Symptomatically, this common cause has been combating the interruption of international commerce. The only common enemy so far has been the pirate. From this perspective on security – emerging from the very unequal treatment of corporate and environmental crimes versus piracy in the Gulf of Aden – the sea is neither a productive place nor a natural environment, but rather a smooth space of flow, a network of super-highways and lanes of trade; to ‘cleanse the sea’ has nothing to do with pollution and water purity, but means removing the blockages in circulation and restoring the unimpaired speed of commercial exchange. Finally, the concept of global security does not take into consideration the necessities of different local economies, but instead seems uniquely concerned with the preservation of global commercial patterns necessary for the sustenance of a heavily market-dependent liberal way of life (Dillon and Reid 2009).

As opposed to the War on Terror, the current global mobilization against pirates seems to be politically uncontroversial. Until today, we have not seen mass mobilizations against either the ‘targeted killings’ of suspected pirates or the innocent victims, or the ‘collateral damage’ of military operations. This has not been the result of insufficient
mass media coverage of the events; instead, it is revealing of the hegemonic function of classic historical narratives and the extent to which violence is banalized as an effective tool of global policing. The apparent absence of international political controversy is reflected in the fact that the war on piracy has readily gained backing from the United Nations, inducing a common military effort from such mutually antagonistic states as the USA, Iran, Russia, China, Saudi Arabia, India, Pakistan, Japan and the European Union. The global military mobilization against pirates is made to appear as a neutral, righteous and legally sound form of global policing, therefore closing all possibilities of dialogue with the other. A self-righteous attitude that is already producing monsters – as if those who take upon themselves the right to name and fight the ‘enemy of human civilization’ are led, in a sort of Dantesque contrappasso, to lose their own civility in the process. Ralph Peters could thus write, in the famed columns of the New York Post:

Pirates must be punished fiercely and comprehensively. Attack their harbors with land, sea and air power. Kill pirates, sink their vessels (including those dual-use fishing boats) and wreck their support infrastructure. The clans behind the pirates must feel sufficient pain to rein in their young thugs. And we don’t need to stay to rebuild Somalia. We need to leave while their boats are still burning down to the waterline.

(Peters 2009: 11)

As interest in the activities of Somali pirates continued to grow, nevertheless, a counter-narrative emerged from the public claims of local Somali communities that all of a sudden gained a voice in Western media. Repeatedly, the pirates presented themselves as coastguards and defenders of the Somali people from foreign criminal activities off the coast of Somalia (Dawdy 2011). Often condemned as a strategic discourse meant to justify pirate crimes, it certainly attempted to displace the exceptional character of pirate violence, making it instead the visible part of a much wider, invisible system of violence. Interviewed Somalis, in Africa and abroad, again and again stressed the connection between the rise in piracy and the crisis lived by coastal communities. In a telephone interview to the New York Times, the pirate spokesman Sugure Ali declared: ‘We don’t consider ourselves sea bandits. We consider sea bandits those who illegally fish in our seas and dump waste in our seas and carry weapons in our seas’ (Gettleman 2008b). In another interview to the CNN, a young man similarly stated: ‘Since the ocean is our government, we got into the deep and took possession of cargo ships. There is no law that allows us to do that. But what motivates us is life, since we are the people who used to work at sea’ (Boyah 2008).

Authorities have expressed concern about the power of this narrative from below, even when condemning it as ‘partial’ or ‘false’. ‘It’s true that the pirates started to defend the fishing business; and illegal fishing is a real problem,’ said Mohamed Osman Aden, the
diplomatic representative for Somalia in Kenya, 'but since then they got greedy' (cited in Gettleman 2008a). Bronwyn Bruton, a member of the US Council of Foreign Relations, commented that 'Somali awareness of how foreign countries are profiting from their country's misery has increased the pirate's popular support' (Gathii 2010: 22). The interviews collected by Reclaim the Seas, a German organization that followed the pirate trials that took place in Hamburg between 2011 and 2012, for instance, are extremely significant in giving us direct ethnographic access to how the pirate crisis is understood by the Somali public. From the eyes of the interviewed, mostly Somali refugees in Germany, Somalia emerges as the theatre stage of a terrible clash of illegalities, a dialectic of terror, in which the pirates embody the enraged violence of the dispossessed. The first of the collected interviews begin:

I remember when I was in Somalia in the beach you see dead fish, some bad things they threw in our sea, so sometimes you see a lot of dead fish, so they get angry and they talk to each other and they say we become pirates. That's why they are pirates but not me, I am a refugee. If I would be pirate I would have money and I would be alive in Somalia...

(Reclaim the Seas 2011)

The human cost of the current global war on piracy is difficult to estimate. SOS, an organization lobbying to promote tougher policies against piracy and funded by global shipping corporations, has claimed that 64 seafarers have been killed by Somali pirates since 2007 (Jablonski and Oliver 2012). The sailors and maritime workers that suffered the most from the resurgence of piracy are often Filipinos, Bangladeshis and Pakistanis, who compose a great section of the global shipping workforce. They are often underpaid, exploited and work in extremely difficult conditions, suffering hundreds of deaths every year from unsafe and under-regulated working conditions (Fink 2011: 145–202). Marginal and forgotten, working all of their lives unseen, these workers have become victims in need of protection only as part of a discourse meant to justify further military violence. On the other hand, coalition naval forces have been accused of targeting fishermen mistaken for pirates. Although it is extremely difficult to estimate the number of 'collateral murders' caused by the international military campaign against piracy, a few anecdotes have emerged in the media. At least eight Somali fishermen are still missing from vessels that were allegedly attacked by foreign warships in February 2012 (Bridger 2012: 2). Fishermen operating close to Mogadishu repeatedly complained about harassment by coalition warships (Panjabi 2009: 22). On 15 February 2012, two Indian fishermen were shot dead off the coast of southern India by Italian marines who believed them to be pirates, sparking a diplomatic incident between the two countries (Kumar 2012). On 12 March, two Somali fishermen were killed after an unknown naval vessel – later reported to be a US Navy ship – opened fire on their boat (Bridger 2012: 4).
These civilian deaths are symptomatic of the indiscriminate use of force by international naval forces; but they also raise serious questions about the exceptional status of those who are targeted as ‘pirates’. In fact, notwithstanding the catch-and-release policy applied by a number of states that participate in the global mobilization against piracy – a policy motivated primarily by the resistance posed by many states to the cost of deporting the suspects in order to give them a fair trial, and highly criticized in academic circles as a sign of ‘inefficiency’ and ‘excessive concern with human rights’ (Carafano et al. 2009) – military corps have in fact killed a number of people because they were suspected of planning acts of piracy. According to a report from Jack Lang, the UN’s Special Adviser on Legal Issues related to Piracy off the Coast of Somalia, since 2007 at least 300 pirates have been reported killed – with 111 reported killings in 2011 – while probably many more died unreported (Hurlburt 2012).

Hundreds of people have been killed with neither due process nor respect for the Geneva Convention. These deaths have been rarely discussed, never mourned and often celebrated as a sign of ‘effective policy’. In 2010, for instance, the Wall Street Journal published an article that sums up the reasoning behind this tendency; it was aptly titled: ‘Put Pirates to the Sword: Targeted killings are a necessary, justified and legal response to high-seas piracy’ (Gopalan 2010: 13). The global military mobilization against piracy is therefore operating in an ambiguous legal threshold threatening to pry open a state of exception in international law. As it has been argued in relation to the novel and ubiquitous category of the ‘terrorist’, the ‘pirate’ is a concept that seems to prefigure the danger of a global security system operating beyond the law for reasons of ‘extreme necessity’, ‘pressing security’ and ‘exception’. What constitutes a ‘question of global security’ and who is to be identified, in concrete terms, as ‘a pirate’, ‘a terrorist’ or ‘an enemy of humanity’ is never a technical question, but rather a fundamental political issue concerning the life and death of a growing number of people.

The contemporary global persecutio piratarum and the War on Terror reveal the same fundamental biopolitical logic. In both cases violence is not presented as a weapon in a confrontation between equal enemies, but as an instrument meant to serve and protect humanity. In this sense, we might be witnessing the first steps of a global biopolitical logic, which goes beyond traditional national paradigms. As Michel Foucault has shown, during the nineteenth century the creation of the notion of ‘the Nation’, as an organic entity that must be continuously protected by state power, stimulated the formation of a new form of violence. ‘The new discourse,’ writes Foucault, ‘the hegemonic discourse, does not say: “we have to defend ourselves against society” but rather “we have to defend society against all internal threats”’ (Foucault 2003: 62). In nationalist rhetoric throughout the world, the ‘Nation’ has become ‘the pure source of every identity but must, however, continually be redefined and purified through exclusions’ (Agamben 1998: 178). As we have seen, the Nazi State brought this genocidal logic to its most
extreme conclusions: promoting the denationalization of Jews, their expulsion from the body of the nation and, ultimately, their extermination (Foucault 2003). A recurrent theme in Nazi anti-Semitic propaganda was that Jews spread diseases; that they were, in fact, ‘disease incarnate’ (Savage 2007: 416). Therefore they had to be removed by the national body, in order to foster its healthy growth. In a 1936 lecture on radiotherapy, SS radiologist Hans Holfeder showed students an image that sums up the fundamental genocidal logic of aggressive nationalism: ‘a slide in which cancer cells were portrayed as Jews, and X-rays launched against them as Nazi storm troopers’ (Savage 2007: 422).

Today it is no longer the protection of ‘the Nation’ but of ‘Humanity’ that is invoked, at the global level, as a rationale for emergency measures that suspend international law. To paraphrase Foucault (2003), we could say that the new hegemonic discourse no longer says ‘we have to defend our nation from the rest of humanity’ but rather ‘we have to defend humanity from all internal threats’. In discourses that try to support the use of military violence for the protection of humanity against ‘terrorists’ and ‘criminals against humanity’, humanity becomes ‘the pure source of every identity but must, however, continually be redefined and purified through exclusions’ (Agamben 1998: 178). The War on Terror brings this global biopolitical logic to its most extreme conclusions when it produces arguments that equate ‘terrorists’ to ‘pirates’ and ‘pirates’ to ‘enemies of the human race’.

Carl Schmitt could not avoid noticing that German Jews, once denationalized by the racist dispositions of the Nuremberg laws, found themselves in the same state of exception that had been previously reserved for pirates ‘who do not have the protection of any state’ (Schmitt 1938). As we have seen throughout this work, the status of the pirate as hostis humani generis implies not only its denationalization but, even more radically, its symbolic banishment from humanity itself. The extermination of pirates, and today the killing of terrorists, is therefore often equated with operations of pest control or the surgical removal of cancerous cells. In the words of the seventeenth-century author of News from sea – the pamphlet in celebration of the hanging of George Cusack and his pirate crew – pirates are ‘Humani Generus hostes, Publique Enemies to Mankind whom every one was obliged to oppose and destroy, as we do Common vermine that Infest and trouble us’ (News from sea 1674: 3). Similarly, according to Paul Johnson, writing in the 1986 anthology Terrorism. How the West can Win edited by the later Israeli Prime Minister Benjamin Netanyahu:

terrorism is the cancer of the modern world. No state is immune to it. It is a dynamic organism which attacks the healthy flesh of the surrounding society. It has the essential hallmark of malignant cancer: unless treated, and treated drastically, its growth is inexorable, until it poisons and engulfs the society on which it feeds and drags it down to destruction.

(1986: 31)
Therefore, the relationship with the ‘other’ is recast. We pass from a political relationship of enmity and war to a biological relationship of pest control: ‘The enemies who have to be done away with are not adversaries in the political sense of the term; they are threats, either external or internal, to the population and for the population’ (Foucault 2003: 255–256). When the agonistic plurality of states characteristic of the classic international system is subverted by a perspective fixed on the unity of humanity, the classic concept of war is also transformed. While traditional interstate wars took the form of a clash of identities, now a new form of global violence tends to emerge. This appears not as a clash between two equal subjects, but rather as a practice of immunization against the multitude of viral threats menacing the global body of the human population. Sovereignty, understood as the power over life and death, does not fade away; instead we witness a transformation of its logic from the political to the biopolitical. The state continues to kill, therefore exercising what for Foucault is the fundamental act of sovereignty, and yet state murder is less and less the result of a political decision on the friend/enemy distinction; it is instead the ‘collateral effect’ of a biopolitical practice aimed at maximizing the welfare of humanity. Humanitarian bombings, targeted killings and surgical strikes certainly kill and destroy, but with the declared aim of fostering the life of abstract humanity. Throughout history the evocation of the pirate spectre, the paradigmatic hostis humani generis, has served a fundamental role in Imperial law, theory and rhetoric. Once more, the hanging body of the pirate ‘enemy of the human race’ legitimizes and glorifies the violence of Empire.

Notes

1. As noted by Koskenniemi: ‘For a sanction to be effective, it must be able to break the resistance of its target. For national criminal law, that was normally no problem and if it is, then revolution was at hand. Internationally, the presence of overwhelming public force was an exception, however, and in the normal situation different interpretations confronted each other with some amount of force on each side’ (2001: 458).

2. For instance, Operation Desert Storm – the first global police operation of the 1990s, waged by a UN-authorized, US-led coalition force from 34 nations, in response to Iraq’s illegal war against Kuwait – has caused the death of over 200,000 Iraqis and 500 members of the UN expedition force (Adams 1991; Clark 1992: 59–84). In the 42 days of action the coalition used a quantity of explosives superior to the one used by the Allies in the entire Second World War, including several semi-nuclear bombs i.e. fuel-air explosives (Zolo 1997: 68; Clark: 38–84).

3. As we have seen, Cicero argued that the tyrant, like the pirate, was a threat to the whole human community. Just as in the case of pirates, this meant that Roman power was justified to act throughout the world to liberate humanity from tyrants.
Similarly, within the Christian Commonwealth the Emperor possessed the authority to fight and depose tyrants (Schmitt 2003: 65). With the fall of the Christian Empire, nevertheless, the question posed by the pirate category was equally posed by the category of the tyrant: *Qui judicabis?* Who can take upon himself the authority to identify and punish tyrants? This was a question that occupied political philosophers of the liberal and of the anarchist tradition for a long time (Jaszi and Lewis 1957). Theories of natural law in particular often justified tyrannicide as the execution of a higher law. Saint-Juste justified the execution of Louis XVI with reference to both natural law and the law of nations, which he argued had been the basis also for the execution of Charles I in England (Edelstein 2009: 147–148). Anarchists often arched back to the same tradition of natural law, which tended to project a Manichean worldview of good versus evil (Newman 2001: 47–50).

4. Paradoxically, the turn toward the use of Universal jurisdiction enabled by the invocation of the figure of the pirate as ‘enemy of the human race’ has been favoured both by those invested in prosecuting torture and human rights violations, and by those seeking to justify engaging in them. For instance, supporters of the War on Terror have justified the use of torture against ‘terrorists’ on the basis of their exceptional status as ‘enemies of the human race’. In 1980, nevertheless, the United States Court of Appeals in *Filártiga v. Peña-Irala* concluded that ‘the torturer has become – like the pirate before him – *hostis humani generis*, an enemy of all mankind’ (cited in Samuels 2010). This legal chaos suggests two things. First of all, there is a definite tendency toward the extension of the traditional ‘pirate exception’. Second, there is a dynamic struggle over who can legitimately decide who, in concrete terms, is a ‘enemy of the human race’. The result is an international order that is really the worst disorder, in which those who claim to protect humanity from the ‘enemy of the human race’ are themselves accused of being ‘enemies of the human race’.
Anthropocentrism and private property
1. Introduction

In this chapter, I explore private property as a legal-philosophical concept and consider how it embodies anthropocentric assumptions. Private property is prioritised over other areas of law because it plays a primary role in mediating human relationships with the environment and because it contains some of law’s key messages about the environment and our place within it. Furthermore, developing an understanding of the ideas that underpin the institution of private property is critical for its future reform – hence the importance of the arguments to be offered here. The related task of adapting private property toward ecocentric ethics and the legal philosophy of Earth jurisprudence is undertaken in Chapter 5.

In this chapter, I present private property as an indeterminate concept that does not have fixed meaning across place, time or culture. Instead, private property is understood here as a cultural artefact and shaped by economic, religious and philosophical ideas. As C. edwin Baker (1986: 741) contends: ‘Property rights are a cultural creation and a legal conclusion.’ From this perspective, private property lacks an in-built unitary structure that can be discovered through descriptive analysis or logical deduction. Thus, rather than presenting an absolute definition of private property, I aim to construct a composite picture or ‘collage’ of private property ideas and to highlight the cultural norms on which the modern institution is built (Davies 2007: 3).

I begin this chapter by positing that the starting premise for Western theories of private property is human dominion over nature. I trace the origin of this concept in Greek philosophy and consider its application in Roman law. I also consider how this concept was developed by Christian jurists with reference to the myth of dominium as depicted in the Bible. Following this analysis, I investigate the influence of the scientific revolution and the scientific method on Western attitudes toward the environment. I also look at how theories of private property changed during the industrial revolution to promote economic growth and how property came to be defined as a person-person relationship between human beings. Finally, I investigate how liberal and neoliberal political theory influenced the development of private property. In particular, I demonstrate how private property came to focus on the individual and on the maximisation of choice without the construction of corresponding duties or obligations to the human or ecological community.

2. Dominion

If the world was made for us, then it belongs to us and we can do what we
damn well please with it.

(Quinn 1995: 21)

The fundamental starting premise for Western theories of property is that human beings have dominion over nature and that the environment is the object of human property relationships. An English jurist, Lord Scarman, provides evidence of this premise in the opening chapter of his commentary on English law. Scarman (1975: 59) writes, '[f]or environment, a traditional lawyer reads property.' In support, Eric T. Freyfogle (1993a: 49) comments, '[w]hen lawyers refer to the physical world, to this field and that forest and the next-door city lot, they think and talk in terms of property and ownership.' Moreover, English common law has evolved principally to protect the private property rights and economic interests of property owners (Bates 2002: 20). Such property rights can exist directly over parts of the environment (incorporating both land and non-human animals) or over products derived from the environment that exist in some synthetic form, such as a pen or book. Property conceptualism therefore has extensive reach over material realities.

From the outset, it is important to recognise that the conceptualisation of the environment as human property is a mere cultural construct. It is not the case that human beings are inherently separate from the environment or that nature must out of necessity be understood in an instrumental way. Rather, the anthropocentric reduction of the environment to property is just one of multiple possible ways that human beings have defined their relationship to the natural world throughout human history. Perhaps the simplest way to understand this point is by comparison with another statement on the environment from Tanganekald-Meintangk woman Irene Watson. Watson's comments are in regard to a piece of land near where this book was written and which is currently defined legally as private property. Watson (1999: 9–10) writes:

To own the land is a remote idea. The indigenous relationship to ruwe, the land is more complex. In Western capitalist thought, ruwe becomes known as property, a consumable which can be traded or sold. We live as part of the natural world; we are it also. The natural world is our mirror. We take no more than necessary to sustain life; we nurture ruwe as we do our self, for we are one. Westerners live on the land taking more than needed, depleting ruwe and depleting self. So self can be no more tomorrow. Westerners are separate and alien to ruwe... all is one, one is all, we are the land, the land is us and the law is in all things. That is the law.5

While I do not wish to homogenise indigenous perspectives on the environment, Onondaga Chief Oren Lyons makes a similar point when commenting on the disposition of his people from the area near Syracuse, New York. Lyons (2007: 208) states:

The idea of land tenure and ownership were brought here. We didn't think that
you could buy and sell land. In fact, the ideas of buying and selling were concepts we didn’t have. We laughed when they told us they wanted to buy land. And we said, well, how do you buy land? You might as well buy air, or buy water. But we don’t laugh anymore, because that is precisely what happened.

How then are we to make sense of the particular description of private property that came to dispossess and colonise aboriginal people around the world? Because private property is a social institution, I suggest that the most instructive approach is to examine some of the larger cultural attitudes that surrounded its development. I begin by considering the philosophical and theological justifications for the foundational notion of human dominion over nature.

2.1 Philosophical justifications for dominion

The safest general characterization of the European philosophical tradition is that it consists in a series of footnotes to Plato. (Whitehead 1979, 39)

I am a man who loves learning, and trees and open spaces cannot teach me a thing, whereas men in town do. (Plato 1997: 230)⁴

The philosophical origin of human dominion can be traced back to the very root of Western intellectual thought and in particular to the writing of Plato and his pupil Aristotle. Plato is the main historic source of ideas related to ‘otherworldliness’ in occidental philosophy. It is through him that the conception of an unseen eternal world of ideas⁵ gains a foothold in the West. Further, it is from his writings that the belief that the highest good for human beings lies in somehow translocating themselves into such a world has been perennially nourished (Tarnas 1993: 6).

In his classic study of Western metaphysics, Arthur O. Lovejoy traces the origin of the philosophical concept of ‘great chain of being’ to Plato’s concept of plentitude. This concept covers a wide range of premises but I am using it here to refer to the notion that the universe is a *plenum formarum* in which the entire range of conceivable diversity of kinds of living thing is exhaustively exemplified (Lovejoy 1960: 52).⁶ Put otherwise, everything that can exist does exist.⁷ Plato (1997: 1236) rationalises this conclusion in the following terms: ‘the best soul could begrudge existence to nothing that could conceivably possess it and desired that all things should be as like himself as they could be.’

While perhaps benign when read in isolation, the notion of plentitude was strengthened by the concept of ‘continuity’⁸ formulated by Aristotle. This concept was designed to fuse with the concept of plentitude and to be regarded as logically implied by it (Lovejoy 1960: 55). This combination of concepts led Aristotle to conclude that all quantities (lines, surfaces, solids, etc.) must be continuous in time and space.

Importantly, this did not mean that all organisms could be arranged in one ascending and continuous sequence of forms. Aristotle made no attempt to frame any single
exclusive scheme of classification for animals or the environment. Nevertheless as Lovejoy (1960: 56) observes, ‘any division of creatures with reference to some one determinate attribute manifestly gave rise to a linear series of classes.’ And such a series, Aristotle observed, tends to illustrate a shading-off of the properties of one class into those of the next rather than a clear or sharp distinction between them. This minute gradation of differentness is especially evident at precisely those points which common speech implies the presence of profound and well-defined contrasts. Aristotle (1984: 922) writes:

Nature proceeds little by little from things lifeless to animal life in such a way that it is impossible to determine the exact line of demarcation, nor on which side thereof an intermediate form should lie. Thus, next after lifeless things in the upward scale comes the plant, and of plants one will differ from another as to its amount of apparent vitality; and, in a word, the whole genus of plants, whilst it is devoid of life as compared with an animal, is endowed with life as compared with other corporeal entities. Indeed, as we just remarked, there is observed in plants a continuous scale of ascent towards the animal. So, in the sea, there are certain objects concerning which one would be at a loss to determine whether they be animal or vegetable.

Just as the Platonic writings were the principles source of ‘otherworldliness’ and of its opposite in Western philosophy, so the influence of Aristotle is most often recognised as the great representative of a logic that rests on the assumption of the possibility of clear divisions and rigorous classification. Indeed, from the Platonic principle of plentitude, the principle of continuity could be directly deduced: if there is between two given natural species a theoretically possible intermediate type, that type must be substantiated – and so on forevermore. Otherwise, there would be gaps and the universe would not be as full as it might be. This would further imply the ‘inadmissible consequence’ that the source of creation was not ‘good’ in the sense that adjective has in Plato’s Timaeus (1997: 1227).

There are in the Platonic dialogues occasional suggestions that the ideas (and therefore their sensible or physical counterparts) are not all of equal metaphysical rank. However, this tendency toward hierarchically ordered essences remains in Plato only a vague tendency. In spite of Aristotle’s recognition of the multiplicity of possible systems of natural classification, it was he who chiefly suggested to naturalists and philosophers of later times the idea of arranging (at least) all animals in a single graded scale according to their ‘degree of perfection’. Aristotle constructed two formulations of this hierarchy. The first focused on the degree of development reached by the offspring at birth. From this analysis, he discerned 11 general grades, with humankind at the top and the zoophytes at the bottom (1984: 1136–1137). Furthermore, this basic hierarchy is supplemented by the notion of graduation, which includes clear instrumental values (Lovejoy 1960: 56). That is, the environment is
conceived of as being an instrument for human use. The following passage from Aristotle (1984: 1991) illustrates this analysis:

Plants exist for the sake of animals, the brute beasts for the sake of man – domestic animals for his use and food, wild ones (or at any rate most of them) for food and others accessories of life, such as clothing and various tools. Since nature makes nothing purposeless or in vain, it is undeniably true that she has made all animals for the sake of man.

Aristotle's (1984: 1991) second formulation organises the hierarchy with regard to the 'powers of soul.' The scale ranges from the 'nutritive' qualities of plants, to the 'rational' attributes of human beings and then 'possibly another kind superior to this' (1984: 659). Importantly, each higher element in the hierarchy possesses all the qualities of those below and an additional differentiating element of their own. The second ranking had great influence on subsequent philosophy and natural history and was used by later intellectuals to justify the anthropocentric worldview. Indeed, Lovejoy (1960: viii) argues that 'Aristotle's hierarchy is one of the most potent and persistent presuppositions in Western thought.' Following Lovejoy's analysis, I suggest that the hierarchical ordering of the environment was profoundly important to the development of classical law and theories of property. While Greek philosophers had written on both topics (Aristotle 1984: 2008–2009; Plato 1997: 550–551) the Roman Stoics undertook the first sophisticated formulation of private property.

Stoicism was developed by Zeno of Citium and his followers from the third century BCE and became the most influential philosophy of the Hellenistic age. A defining feature of Stoicism was its focus on human ethics and the desire expressed by many of its proponents to give human beings some stable belief system in the face of a hostile and chaotic environment (Tarnas 1993: 76). The result of this impulse is a metaphysics that viewed each component part of the environment as permeated by rationality and divinely planned by the organisation of matter. Zeno described this planning in terms of cosmic determinism (Russell 1972: 254). Indeed, Zeno believed that there is no such thing as chance and that the environment was rigidly determined by natural laws. Moral goodness and happiness is achieved (if at all) by replicating that perfect rationality in oneself and by discovering and enacting one's own assigned role in the cosmic scheme of things.

At the lowest physical level, the world consists of two coextensive principles – passive 'matter' and active 'god'. At the lowest observable level, these principles are constituted into the four elements earth, water, air and fire. Air and fire form an active and pervasive life force called Pneuma or 'breath', which constitutes the qualities of all bodies, and in an especially rarefied form, serves as the souls of all living things (Sedley 2005: 1002). A lawgiver who was also a beneficent providence ordained the course of nature down to the smallest detail. The whole of the environment was designed to
secure certain natural ends that are to be found in the life of human beings. Bertrand Russell (1972: 254) draws out the anthropocentric implications of this metaphysics:

Everything has a purpose connected with human beings. Some animals are good to eat, some afford tests of courage; even bed bugs are useful, since they help us to wake in the morning and not lie in bed too long.

For Greek Stoics, the supreme power is sometimes called God and sometimes Zeus. Whatever the name, this power is not separate from the world and every human being contains part of the divine fire. The entire environment is part of one single system called nature and the individual life is good or virtuous when human will is directed to ends that are among those of nature. Thus, virtue consists in a will that is in agreement with the cosmic and determined order of nature. Russell (1972: 254) elaborates further: ‘The wicked, though perforce they obey God’s law, do so involuntarily; in the simile of Cleanthes, they are like a dog tied to a car, and compelled to go wherever it goes’.

Roman jurists inherited the worldview and hierarchical ordering of nature from their Stoic forbearers and held that ‘virtue consists in a will which is in agreement with Nature’ (Russell 1972: 254). In this context, however, ‘nature’ refers to human nature and not specifically to the natural world. Indeed, human beings were considered to be the measure of virtue and universal truth could be obtained through human reason. This orientation led to the development of natural law jurisprudence or the *jus naturale*.

Stoic philosopher Cicero (2008: 105) provides the classic formulation of natural law:

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts wrongdoing by its prohibitions... It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder and interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us, for he is the author of this law, its promulgator and its enforcing judge.

Cicero describes natural law as possessing three important characteristics. First, his formulation holds that there are universal and immutable ‘laws’ that are accessible at all times to human lawmakers. Second, the law of nature is a ‘higher law’ and superior to laws promulgated by political authorities (the *jus commune*). Finally, consistent with Aristotle’s idea of continuity, Cicero’s formulation holds that all things have natural essences or ends that are directed toward human beings. To discover these ends, human beings are required to use their reflective intellect to draw knowledge, reach conclusions and deduce rational steps about what justice requires (Harris 1996: 7).

Roman jurists argued that the natural end of the environment was human good.
However, because natural law recognises an inherent relationship between law and morality, Roman jurists also made provision for the moral treatment of the non-human world. For example, the *jus animalium* was a specific category within the *jus naturale* that dealt with non-human animals and recognised that they possessed inherent natural rights (Nash 1989: 16). Commenting on the *jus animalium*, Roman jurist Ulpian (cited in Nash 1989: 17) explained that the *jus animalium* was part of the *jus naturale* because the latter included ‘that which nature has taught all animals; this law indeed is not peculiar to the human race, but belongs to all animals.’

Despite this express concern for non-human animals, the overwhelming current of Roman jurisprudence was fundamentally human centred. Cicero, for example, is credited with forming the humanist movement and holding overtly anthropocentric ideas. The influence of Aristotle’s writing on ‘continuity’ and ‘graduation’ are evidenced in the following statement from Cicero (2008a: 159): ‘just as a shield-case is made for the sake of a shield and a sheath for the sake of a sword, so everything else except the world was created for the sake of some other thing; thus the corn and fruits produced by the earth were created for the sake of animals, and animals for the sake of man.’ Cicero’s pupil Seneca (1969: 56) continued this legacy and famously stated: ‘To mankind, mankind is holy.’ This statement became the slogan for humanism through the renaissance and as legal historian Richard Schlatter (1951: 26) notes, Roman jurists ‘wove the philosophy of Cicero and Seneca into law through the concept of dominion’.

Roman jurists did not attempt to define dominion and instead left its meaning to arise from use (Nicholas 1962: 152). During the revival of Roman law during the eleventh century, jurists defined *dominium* as being akin to ‘lordship’ and further noted that it was a sovereign, ultimate or an absolute right to claim title and thus to possess and enjoy an item (Getzler 1998: 82). Despite such absolute language, *dominium* was qualified in practice. Indeed, Peter Birks (1985: 1) contends that '[n]o community could tolerate ownership literally unrestricted in its content.’ As in contemporary law, private property over the environment was limited by the ‘equal use, enjoyment and abuse by all other owners of their property’ (Nicholas 1962: 154). Furthermore, social, economic and political factors could also limit private ownership for example through taxation or land use restrictions.

Despite the great level of evolution and the increasing sophistication that the Western concept of private property has undergone since the classical period, our law has never moved away from the central underlying Roman idea that the land exists as human property and that humans have dominion over the environment. Indeed, this starting point has become the unquestioned presupposition on which all other theories of property have since been based. Speaking directly with regard to the evolution of property, Joshua Getzler (1998: 81) notes: ‘Roman ideas about private and public
property provide a kind of DNA of legal ownership, the intellectual structure within which most later legal thought has developed.' In agreement, S.F.C. Milsom (1981: 119) notes that the common law doctrine of "seisin" and "right" [were] forever dazzled by the Roman vision of possession and ownership.

I now consider the influence of Christian theology on the development of Western rationality and the concept of private property. As part of this analysis, I illustrate how Christian myths concerning the divine grant of dominium to human beings, fused with Roman law to form the dominant theory of private property through the Middle Ages and to the nineteenth century.

2.2 From dominion to dominium

Christianity is the most anthropocentric religion the world has seen.

(White 1967: 1203)

The next significant development for the Western theory of private property occurred at the hands of Christian jurists. Following the conversion of Roman Emperor Constantine to Christianity in 313 AD, 'clerical jurists combined classical humanist philosophy with Christian myths of the Garden of Eden and the Fall of Man [to make] the standard theory' of property of the medieval church (Schlatter 1951: 26). This combination of conceptualisations was favourable to the early church leaders who had no express desire to amend exiting property arrangements in such a way that would challenge church (Pipes 1999: 10). For them, the concept of dominion 'not only solved this dilemma: it dovetailed neatly with other Christian myths and doctrines' (Schlatter 1951: 35; Humfress 2005: 167–171).10

The Roman concept of dominion was strengthened and given continued longevity by the Christian idea of dominium. Both words share the common etymological root domino, which means to 'rule' or 'power over another' (Onions 1996: 198). The most explicit Christian reference to human dominium over nature is found in Genesis, Chapter 1. Here we are told that God made human beings in his own image and stationed them in a special position in relation to the rest of creation. Moreover, human beings are explicitly given dominium over all things. Genesis 1: 28–31 states:

Be fruitful and increase in number; fill the earth and subdue it. Rule over the fish of the sea and the birds of the air and over every living creature that moves on the ground. Then God said, I give you every seed-bearing plant on the face of the whole earth and every tree that has fruit with seed in it. They will be yours for food. And to all the beasts on the earth and all he birds of the air and all the creatures that move on the ground – everything that has the breath of life in it – I give every green plant for food and it was so.

(Zondervan 2002: 7)11
Religious scholar W. Lee Humphreys comments that in this on this passage, noting that Hebrew linguists have interpreted the operative verbs ‘subdue’ (kabash) and ‘dominion’ (radah) to signify a violent assault or crushing. According to these interpretations, the image ‘is that of a conqueror placing his foot on the neck of a defeated enemy, exerting absolute domination’ (Humphreys 1971: 67). Theologian Gloria Schaab (2011: 45) supports this interpretation, arguing that church leaders used this passage to limit moral value to human beings. In contrast, the rest of the natural world was positioned as having only ‘instrumental value’ – that is, as ‘valuable solely in terms of what it supplies the human being’.

Further insight can be gained through a reading of the fall of humankind depicted in Genesis 3: 13–19. In this passage, God caught Adam and Eve eating from the forbidden tree. On receiving their confessions, God banished them from the Garden and inflicted hardship on them and the serpent that tricked Eve. Mythologist Joseph Campbell (2002: 59) argues that one of the dominant messages portrayed in this passage is that the environment is something to be condemned. Indeed, in this story we see human beings, God and nature as three separate entities in conflict. Zen philosopher Daisetz T. Suzuki (1954: 294–295) comments: ‘Man is against God, Nature is against God, and Man and Nature are against each other. God’s own likeness (Man), God’s own creation (Nature) and God himself – all three are at war.’ Thomas Berry (cited in Jensen 2004: 37) supports this interpretation of Genesis, arguing:

> There is nothing to indicate a love of existence or a capacity for intimacy with the natural world for its own sake. Not to use it for monetary or even spiritual purposes but to be present in it.

This textual analysis of the development of anthropocentrism in western rationality is strengthened through a consideration of the Abrahamic biblical myths. G.W.F. Hegel provided the most insightful analysis of this point in his early paper ‘The Spirit of Christianity’ (1971: 182–301). While this paper is predominately read for the insight it provides into the logical structure of Hegel’s ethical vision,12 I limit my consideration to Hegel’s contention that biblical Judaism represents an important moment in the development of Western rationality and our perceived separation from the environment (1971: 182; Bernstein 2003: 395).

It is significant to Hegel’s argument that he begins ‘The Spirit of Christianity’ with the story of Noah and the flood. Hegel interprets this mythological event as a moment of rupture that brought Western consciousness out from the ‘state of nature’. He describes the flood as a ‘destructive’ and ‘invincible’ force that reveals the indifference of the environment to human ends. Western rationality emerges in response to this event and is generated as a means to human survival against a cold and indifferent natural world (Bernstein 2003: 395).
Following his discussion of the flood, Hegel argues that Western mythology reveals two basic ways or paths through which one can master nature. The first is through something 'real' or material such as a collective practical activity such as building a city or a dam. The second is through 'some thought' such as the invention of the Jewish God (1971: 183). According to Hegel, Noah adopted the second solution by posing the ideal of God to set against the hostile environment and then ascribing reality to that ideal. By adopting this method, Noah gives the ideal of a Jewish God power over material reality. Yet, the mere thought of such a God cannot possibly provide for an actual mastery over the natural world. Hence, a certain type of conceptual deferral or complex machinery must also be built into the experience and the mythology of God.

Hegel scholar Jay Bernstein (2003: 396) describes the mediation of God’s relation to nature through his relation to human kind as the ‘theological contract’. Bernstein describes the terms of the contract as follows: 'God promises to restrain the forces of nature on the condition that human beings master their nature, nature within, our murderous hearts, by obeying his laws of conduct.' Nature, from this perspective, is reduced to a sign of human obedience to God. Hegel (1971: 187) states this thought unequivocally in his account of Abraham: ‘It was through God alone that Abraham came into a mediate relation with the world, the only kind of link with the world possible for him.’

Importantly, Hegel argues that Noah’s strategy for mastering nature is ultimately self-defeating. He writes (1971: 184): '[Noah] made a peace of necessity with the foe and thus perpetuated the hostility.' This sentence encapsulates Hegel’s contention that nature-dominating rationality is necessarily self-defeating: the logic of causal manipulation and the subjection of our self to an external authority both internalise the conception of nature as other and as something antagonistic. As Bernstein (2003: 397) suggests, ‘[N]ature knows only one solution: domination and control.’

The ideas of domination and control were the central organising principles behind the religious attitude toward property developed by the early Christian church. For these writers, the idea of human dominion over nature constituted an unquestioned assumption or starting premise for their writings. Yet, as with the Roman jurists, the early Christian writers also wrote within the framework of natural law and their writings on property are saturated with a vision of interpersonal human ethics. As early as the third century, Clement of Alexandria advanced an ethic of Christian charity on the grounds that God had bestowed the Earth to human beings in common and that each was to use only what he needed (Schlatter 1951: 36). In accordance with this view, St Ambrose followed Cicero is saying that by nature all property is for the common use of human beings.

While there was divergence of opinion among the early Christian jurists, the orthodox
position of the Western Catholic Church was codified by St Thomas Aquinas in his *Summa Theologica*. Aquinas’s writings on property reflect a subtle combination of humanist Greek philosophy and Christian theology. Aquinas (1981: 1470) considers the early Christian view that, in a certain sense, ‘it was not natural for man to possess external things.’ However, he ultimately rejects this position, correctly reasoning that God’s original grant of the Earth to human beings in common did not logically preclude private ownership. Drawing on Aristotle, Aquinas gives unequivocal support to the concept of plenitude (1991: 75) and affirms the primacy of human beings and the ‘great chain of being.’ Aquinas argues (1991: 789) that non-human animals are ‘ordered to man’s use’ and have ‘no independent moral standing.’ He also draws on Aristotle’s *Politics* to argue against holding property in common on the basis that it promotes discord. Indeed, Aquinas (1981: 1471) argues that private property was vital to spiritual growth and served the public good by enabling the giving of alms.

Under the influence of Aquinas, the Christian view of private property shifted from being a ‘regrettable but unavoidable reality’ to being a theory that was defended with vigour (Pipes 1999: 17). As testimony to Acquinas’ enduring influence, in 1329 Pope John XXII (cited in Pipes 1999: 17) drew directly on Aquinas to restate human dominion over nature in a papal edict: ‘Property (dominium) of man over his possessions does not differ from the property asserted by God over the universe, which He bestowed on man created in his Image.’

Had the religious interpretation of dominium remained the exclusive possession of theologians, its subsequent influence on law would have been slight. However, from the Middle Ages to the modern era, jurists and political theorists have cited dominium as a justification for private property (Schlatter 1951: 57). The most well-known example is Sir William Blackstone (1796: 2) who defined property as ‘that sole and despotic dominion that one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.’ Blackstone (1796: 2) also justified the institution on the following basis:

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man ‘dominion over all the earth, and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.’ This is the only true and solid foundation of man’s dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator.

Under the influence of Christian authors, the idea of human dominion over nature was firmly entrenched (Locke 1970: 14; Raff 2005). This perspective underwent further significant development during the scientific and industrial revolutions. I turn now to
consider this period and its consequence for the concept of private property.

3 The scientific and Industrial Revolutions

During the seventeenth century the notion of human dominium was supplemented by a mechanistic philosophy that described the environment as a fragmented, lifeless, machine (Ehrenfeld 1978; Leiss 1994; Lovejoy 1960; Merchant 1990). The basis for this thinking was the scientific revolution that began at the end of the sixteenth century and continued until the Industrial Revolution in the eighteenth century. Like all major shifts in epistemology, the scientific revolution had a profound impact on the Western worldview. John Bernal (cited in Brown 2007: 36) captures this transition in the following terms: 'The renaissance enabled a scientific revolution which let scholars look at the world in a different light... religion, superstition and fear were replaced by reason and knowledge.'

The scientific revolution has a significant impact on all major scientific fields and more fundamentally in the way that scientists conceived and interacted with the natural world. Further, as mechanistic philosophy infiltrated the political class, this shift in perspective came to influence law and the institution of private property (Graham 2011: 28–58; Schlatter 1951: 125).

3.1 The scientific revolution

Many authors have traced the origin and development of the scientific revolution (Jacobs 2009). Because of his influence on the development of scientific method, our investigation begins with Francis Bacon. Bacon was one of the most original and profound of the intellectual reformers of the sixteenth and seventeenth centuries. According to John Milton (2005: 77) Bacon's 'dream was one of power over nature' derived through experiment and embodied in appropriate institutions and used for the amelioration of human life. According to Bacon, this could only be achieved if rational speculation was coupled with the craft skills in the practical arts. This led Bacon to develop a new method of inquiry based on eliminative induction (as opposed to deductive logic or mathematics). As described by Bacon, eliminative induction drew on data extracted from extensive and elaborative constructed natural histories. Unlike the orthodox methods of logical deduction, Bacon hoped that his method would be able to make use of negative as well as positive instances of natural history and thus allow conclusions to be established with certainty.

Bacon’s scientific writings were driven by the desire to perfect eliminative induction and to position it as a lasting process for reestablishing the mastery of nature that human beings had enjoyed in the biblical stories (Tarnas 1993: 273). Hans Jonas (1984: 140) supports this interpretation, noting that the intention of Bacon’s epistemological method was to ‘gain knowledge and power over nature and to utilize power over nature
for the improvement of the human lot. Bacon provides further content to this aim in
*The New Atlantis*. Here Bacon (1990: 34–35) argued that ‘the purpose’ of human society
is to acquire ‘the Knowledge of Causes, and Secret Motions of Things; and the
Enlarging of the bounds of the Humane Empire, to the Effecting of all Things possible’.

Bacon’s concern with mastering nature is premised on a perspective that positions the
natural world as ‘other’ and as a mere ‘object’ for human use. Like his Christian
predecessors, Bacon assumed that human beings occupied the central place in a
God-created universe. This is made clear in Bacon’s (1985: 270–271) interpretation of
the myth of Prometheus: ‘Prometheus clearly and expressly signified Providence... the
special and peculiar work of Providence was the creation and constitution of Man.’ He
argues further:

“The chief aim of the parable seems to be, that Man, if we look to final causes,
may be regarded as the centre of the world; in so much that if man were taken
away from the world, the rest would seem to be all astray, without aim or
purpose... and leading to nothing. For the whole world works together in the
service of man; and there is nothing from which he does not derive use and
fruit... insomuch that all things seem to be going about man’s business and not
their own.”

From this perspective, human beings are separate from the environment. Only human
beings are ‘subjects’ and in a position to conduct objective inquiry. In contrast, the
natural world is a separate object under investigation. Within this framework it is
ontologically impossible to be both subject and object – ‘something is either culture or
it is nature; human or not human; the inquirer or the object of inquiry’ (Graham 2011:
29). Bacon argued that this belief in the centrality of human beings would eventually
be carried over into the secular realm and be maintained in practically all narratives of
human evolution, even though God would be dispensed with in most scientific accounts
of the origin of the universe and of our species.

Importantly for the argument being sketched in this chapter, the dichotomy that Bacon
drew between human beings and the environment resulted in violent implications –
particularly with regard to the extension of patriarchy in Western rationality (Merchant
1980). Commenting on the goal of his scientific method, Bacon (Farrington 1949: 62)
holds: ‘My only earthly wish is... to stretch the deplorably narrow limits of man’s
dominion over the universe to their promised bounds... putting [nature] on the rack and
extracting her secrets... storming her strongholds and castles.’ At no time did Bacon
(Farrington 1949: 62) hide his agenda: ‘I come in very truth leading you to nature with
all her children to blind her to your service and make her your slave... the mechanical
inventions of recent years do not merely exert a gentle guidance over Nature’s courses,
they have the power to conquer and subdue her, to shake her to her foundations.’
Elsewhere he notes: ‘We have no right to expect nature to come to us... Nature must be
taken by the forelock, being bald behind’ (Farrington 1949: 129). He also warns that delay or more subtle method ‘permit one to clutch at nature, never to lay hold of her and capture her’ (Farrington 1949: 130).

Bacon’s scientific method had a profound impact on the philosophical investigations of René Descartes. Descartes is often called the father of modern philosophy (Garber 2005: 174) and sought to start philosophy anew by breaking with the dominant traditions of the seventeenth century. Descartes (1985: 113) followed Bacon’s instruction ‘never to accept anything as true if [one] did not have evident knowledge of its truth’. Hence the Meditations (2006) begins with a series of arguments intended to cast doubt on everything formerly believed and culminating in the hypothesis of an all-deceiving evil genius, as a device to keep former beliefs returning. The rebuilding of the world begins with the discovery of Descartes’ (2006: 13) well-rehearsed cogito argument – ‘I think, therefore I am’. This ‘I’ is a self, known only as a thinking thing and it is discoverable independently of the senses.

While Descartes provides a fascinating first position for philosophy, what concerns me the most about his argument is the essential hierarchy and division of the world that his argument implies. According to Descartes, rational human beings know their own awareness to be certain and entirely distinct from the external world of material substance. The material world has less certainty and is perceptible only as an object. Thus, res cogitans – thinking substance, subjective experience, spirit, consciousness – was understood to be different and separate from res extensa – extended substance; the objective world, matter, the physical body, plants and animals, stones and the entire physical universe (2006: 145). Only in human beings did the two realities come together and both the cognitive capacity of human reason and the objective reality and order of the natural world found their common source in God (Garber 2005: 174–175).

According to Descartes, the physical universe was entirely devoid of human qualities. Rather, as purely material objects, all physical phenomena (including non-human animals) could be comprehended as machines – much like the lifelike automata and ingenious machines, clocks, mills and fountains being constructed and enjoyed by seventeenth-century Europeans (2006: 137). God created the universe and defined its mechanical laws, but after that the system moved on its own. Such a substance was best understood in mechanistic terms, reductively analysed into its simplest parts and exactly comprehended in terms of those parts, arrangements and movements. As Descartes (1985: 139) argued: ‘The laws of Mechanics are identical with those of Nature.’

Because human beings combine material and spiritual qualities, Descartes argued that we have ‘rendered ourselves the lords and possessors of nature’ (Descartes 1985: 141). Moreover, he argued that animals were insensible and irrational machines that
'moved like clocks, but could not feel pain' (cited in Nash 1989: 18). Further, in his sixth discourse on method, Descartes (1998: 34) held that 'coercing, torturing, operating upon the body of Nature... is not torture [because] Nature's body is an unfeeling, soulless mechanism.' For Descartes, the scientific method was much more than a tool for the attainment of objective truth. He used it to solidify the logic of human mastery over the environment (Graham 2011: 31).

Deprived of any autonomous life force, the non-human world was considered as an instrument for the attainment of human ends. It was also vulnerable to manipulation and exploitation according to human will. Thomas Berry notes:

Descartes killed the Earth and all its living beings. For him the natural world was a mechanism. There was no possibility of entering into a communion relationship. Western humans became autistic in relation to the surrounding world.

Like all major transformations in thinking, the scientific revolution had a significant impact on the way that Western culture perceived and related to the natural world. Furthermore, Schlatter (1951: 125) argues that the 'new scientific thinking influenced the political writers on property.' Nicole Graham (2011: 38) states this point more boldly, noting: ‘The anthropocentric division of the world into nature and culture formed the basis of the modern concept of property in law.'

The historical context within which this perception operated and flourished coincided with the growth of capitalist economies and with the Industrial Revolution. The mechanistic philosophy of the scientific revolution, in particular Descartes’ (1998: 34) description of nature as an 'unfeeling, soulless mechanism,' provided the perfect intellectual footing for growth economics to flourish. Karl Marx (1992: 512–513 fn 27) picks up on this point, noting that Descartes 'saw with the eyes of the manufacturing period' and that both Bacon and Descartes 'anticipated an alteration in the form of production and the practical subjugation of Nature by Man'.

3.2 The Industrial Revolution

The Industrial Revolution's dams, mills, factories and canals used land with increasing intensity, causing damage that more and more frequently extended to neighbouring, increasingly populated lands. Sometimes things went wrong, causing fires, floods and explosions, while pollution and other kinds of damage were inherent in the activities themselves. (Guth 2009: 450)

The Industrial Revolution began at the conclusion of the scientific revolution during the eighteenth century and concluded at the beginning of the twentieth century. This period was characterised by technological advancement, most notably in agriculture, manufacturing, mining and transport. While often neglected in the literature, each of these activities is fundamentally connected to private property, which is the medium
that law uses to facilitate land use interactions (Alexander 1999; Freyfogle 2003; Hall, Finkelman & Ely 2004; Horwitz 1977). To analyse the relationship between the Industrial Revolution and private property, I focus on the historical evolution of property in the United States. While jurisdictional and historical differences are acknowledged, the development of private property in the United States provides an important insight into how other Western capitalist systems evolved over the same period. Further, developments in law and jurisprudence from the United States continue to exert significant influence other common law jurisdictions to this day (Freyfogle 2003).

Prior to the Industrial Revolution, property rights in the United States were underpinned by an ‘explicitly anti-development theory’ that limited landowners to what courts regarded as natural use (Horwitz 1977: 32). In the 1879 case Bryant v LeFever, the English Common Plea Division explained the notion of ‘natural use or incidents’ in the following terms:

What then is the right of land and its owner or occupier? It is to have all natural incidents and advantages as nature would produce them. There is a right to all the light and heat that would come, to all the rain that would fall, to all the wind that would blow, a right that the rain which would pass over the land should not be stopped and made to fall on it, a right that the heat from the sun should not be stopped and reflected on it, a right that the wind should not be checked, but should be able to escape freely; and if it were possible that these rights were interfered with by one having no right, no doubt an action would lie.20

The ‘natural use’ idea of private property equated to strong trespass law, which barred all uncontested entries onto the land and nuisance law that prohibited neighbours from indirectly impairing a neighbour’s enjoyment of land. Furthermore, a landowner could not disturb the natural drainage of land or take water from a river to the extent that it ‘diminished its quality or quantity’ for landowners downstream. Finally, under the doctrine of ancient lights, landowners could halt any construction that interfered with sunlight (Freyfogle 2001b: 4).

It was quickly recognised that this conception of private property stood in the way of economic progress. To increase economic growth, lawmakers were required to ‘materially change the meaning of landownership to facilitate ... intensive land uses’ (Freyfogle 2001b: 4). Horwitz (1977: 253) comments that: ‘[L]aw once conceived of as protective, regulative, paternalistic and above all, a paramount expression of the moral sense of the community, had come to be thought of as facilitative of individual desires and as simply reflective of the existing organisation of economic and political power.’

Fundamental to this shift, was the idea that private property entailed the right to use the land more intensely than had been practised by previous generations. For example,
communities who once enjoyed water laws that protected natural flow had these protections removed so that industries could draw more water and even introduce pollutants into the water system. Industrial parties required the right to emit smoke that degraded air quality; to make noise that scared livestock and on occasion to emit sparks which had the potential to set wheat fields on fire. Waterwheels disrupted the migration of fish, tall buildings blocked sunlight (Freyfogle 2001b: 4). In essence, the legal concept of private property was reconceptualised to promote market growth 'at the expense of farmers, workers, consumers' (Horwitz 1977: 254) and, of course, the environment.

Over the next 100 years, lawmakers entrenched this shift in positive law, redefining land as a commodity that could be used, exploited and even destroyed to satisfy production and profit. The most important avenue for shaping property rights during this period was the common law. An illustrative case from 1805 was the New York Supreme Court decision in Palmer v Mulligan. In this case, Palmer established a sawmill on land held along the Hudson River. Years later, a competitor constructed a dam, 180 metres upstream that altered Palmer's access to the natural flow of water. Palmer sued the competitor, citing case law that protected riparian rights. Two dissenting judges decided that the defendant 'clearly' had no right to obstruct Palmer's riparian right. They held:

The defendants have clearly... no right to obstruct the plaintiffs in the enjoyment of the water. They have an equal right to build a mill on their soil, but they must so use the water, and so construct their dam, as not to annoy their neighbour below in the enjoyment of the same water.

However, the three majority judges decided differently, holding that riparian rights were to give way to cost/benefit economic analysis (Horwitz 1977: 33). On this point, Justice Livingston held that the public benefit 'always attends rivalry and competition' and that Palmer's claim would have the consequence of closing down the defendant's mill. Arguing against this outcome, Livingston held that the public interest was served by allowing all landowners to use their land productively. To side with Palmer would simply grant a monopoly. He noted further that the no harm principle 'should be limited to such cases only where a manifest and serious damage is the result of such use or enjoyment'.

While the reasoning in Palmer is commonly advocated in courts today (Horwitz 1977: 63–108), it represented a dramatic departure from the existing case law of the period. Joseph Guth (2009: 451) argues that this decision was the first time 'the American legal system allowed an enterprise to damage a neighbouring landowner without paying compensation based on an explicit consideration of the relative economic efficiencies of competing uses of land'. Horwitz (1977: 38) argues further that the Palmer decision
introduced the ‘entirely novel view that an explicit consideration of the relative efficiencies of conflicting property uses should be the paramount test of what constitutes legally justified injury’.

While it would take many years before courts fully accepted this decision and defined a new legal test to determine this balance, Palmer stands firmly for the emerging notion that property implies the right to develop and exploit the land for economic purposes (Horwitz 1977: 37). By the end of the nineteenth century, judges widely accepted Livingston’s claim that industrial activity generally produces net social benefit despite increasing environmental harm. Indeed, judges held that society would be better off if everyone accepted this damage rather holding steadfast to the undisturbed and quiet enjoyment of the land. According to Guth (2009: 452), this reasoning was based not on a conclusion about ‘economics and the social good’ but on the basis of a ‘passionate belief in industrialization that was widespread in American society’.

At the beginning of the twentieth century, private property had undergone a radical transformation from being a regrettable but unavoidable institution, to being a primary facilitator of human interaction with the land. The narrative of private property that emerges from this period was that of human dominion over a lifeless, mechanistic machine. The industrial revolution was fuelled partly by this narrative, which it used to justify more intensive forms of land use and the shaping of property rights in pursuit of economic growth.

The concept of private property also continued to perpetuate anthropocentric values during the twentieth century by defining property as a human–human relationship and by placing only minimal emphasis on the object of the property relationship. This development is now considered here, with respect to the writing of John Locke, Jeremy Bentham and Wesley Newcomb Hohfeld and the gradual succession of positivist over natural law descriptions of property.

4 Separation and fragmentation: Locke, Bentham and Hohfeld

The mechanistic perception of the natural world advanced during the scientific revolution was vital for industrial progress. Improvements in technology enabled human beings to exercise a degree of control and mastery over the environment never previously known in human history. During this same period, the legal–philosophical concept of private property also changed from a focus on the relationship between people and the land to a relationship between and among people. In other words, the dominant conception of property shifted from describing a tangible reality to a dephysicalised description of human interactions (Vandevelde 1980: 333). Graham (2011: 134) describes this shift as follows:

In legal theory, ‘dephysicalisation’ means the removal of the physical ‘thing’
from the property relation and its replacement with an abstract ‘right’. Deophysicalisation describes the shift from the person-thing model of property to the person–person model of property.

The historical foundation of deophysicalisation in English law is located in John Locke’s *Two Treatise of Government*. Locke provided the foundational narrative of colonial property law and evaluated non-English societies by reference to their laws, economy and whether they used land as a resource or a ‘thing’. Indeed, Locke (1970: 16) argued that the ‘cultural development’ of a given society is measured by ‘its sufficient removal from the common state Nature hath placed it in’.

The book of Genesis was foundational to Locke’s theory of property. Consistent with the early church jurists, Locke argued that God had gifted the Earth to humankind as collective property. However, he held that any individual could seize a piece of land from the common stock and make it his own simply by mixing his labour with it. The individual, Locke reasoned, owned himself and his labour. Because of that ownership, he also owned the fruits of his labour. When a person mixed his labour with a physical thing, it was only proper (and morally correct) to allow him to own the thing as well as the value added (1970: 287–288). Inherent to this justification for private property is the view that the environment lacks intrinsic value – it is passive and vulnerable to power. Moreover, Locke relates persons and things to each other only via the process of value adding or wealth maximisation. The underlying presumption is that the environment can only be valued through human interaction (labour, use or ownership) and uncultivated land was waste (1970: 299–302).

It is important to note that Locke’s justification for private property was linked to a very specific idea of labour. In the *Second Treatise*, Locke speaks almost exclusively in terms of agrarian farming methods, rather than more intensive labour such as mining, grazing, manufacture or other forms of industry that could theoretically provide an equal claim to proprietorship through labour (Arneil 1994: 603). And yet, with the advent of the Industrial Revolution, it was the proponents of latter forms of labour that most often utilised Locke’s writing as a justification for private property. As Macpherson (1962: 204) points out, Locke’s justification of private property ‘was only needed when and because a moral case had to be made for putting every individual on his own in a market society.’ As interpreted by the manufacturing classes, the communal customs of agrarian communities had the least claim to it. Indeed, enclosure and cultivation increased the productive value of the land and were thus promoted as the kinds of labour that justified title.

**4.2 Positive law and Jeremy Bentham**

Jeremy Bentham rejected the natural rights justification of property advocated by Locke and others. Instead, he argued that private property could only be justified with regard
to positive law: 'Property and law are born together, and die together. Before laws were made, there was no property; take away laws, and property ceases' (1931: 113). He notes further that property is not physical but 'metaphysical, it is a mere conception of the mind' (1978: 41).

These comments reflect a recognition of the diverse number of things that might be considered valuable items of possession. For Bentham (1983: 283), this list includes 'power, reputation and condition in life... not forgetting exemption from pain'. Further, Bentham argues that the division of property into 'real' and 'personal' was obsolete and failed to account for a growing economy, wherein land was not the sole source of wealth and power. For example, in Bentham's submission to the Real Property Commission in 1828, he advanced a unified system of property law that was broad enough to include 'newer proprietary rights such as shares in companies and copyright' (cited in Sokol 1994: 287).

Bentham's political philosophy had two significant consequences for the concept of private property. To begin with, by rejecting the natural rights justification of private property and seeking to expand the number of things encompassed by the institution, Bentham promoted a person–person (as opposed to a person–thing) conception. Second, the merging of both personal and real property into one expanded category (based on the person–person model) transformed social wealth from land into a legal right to land. In regard to this second point, Graham (2011: 138) argues that 'If[n] effect, what Bentham’s theory of property achieved was the separation of land from the idea of property and from the body of law itself by “elevating” the entire basis of property from natural rights to cultural rights: Real property was no longer fixed to an external reality – it is dephysicalised and exists only in an abstract form (Graham 2011: 138). The abstraction between people and things perpetuated the anthropocentric separation of people from place by defining ‘people and culture in opposition to land and nature’ (Graham 2011: 139). The thing itself (land in the case of real property) was an object and could only receive as much consideration as was necessary to further human good.

By the mid-eighteenth century, the conception of property as the product of natural law had given way to the ‘self-sufficient determination of positive law’ (Fitzpatrick 1992: 54) as articulated by the sovereign.23 As a result, there was no inherent need for property law to have regard to morality or derive its character from humankind’s relationship to the Earth. Rather, private property was whatever the legislators decided it was and it came to be directed by instrumental values and the pursuit of social goals (Coyle & Morrow 2004: 96).

this shift, arguing that Bentham's repression of the physical and moral aspects of property ‘forgets the ground on which it stands’. By denying these aspects, Bentham's description creates an illusion – what Kevin Gray (1991: 1) described in a different context as ‘property in thin air’. Furthermore, the shift toward instrumental positive law meant that property law focused less on environmental considerations and increasingly on providing for the demands of a growing industrial economy. Moreover, the sense that property was a social or community institution was eroded and the responsibility for limiting use rights came increasingly under the purview of the state.

4.3 Hohfeld's contribution

By later in the nineteenth century, Bentham's dephysicalised conception of property was established as the dominant theoretical discourse. Furthermore, during the 1880s and 1890s, American courts began recognising new property interests and defining property as a right to value, rather than as a right to some tangible item. According to Kenneth Vandevelde (1980: 358), 'legal commentators were acutely aware of the development of the new property' and the commercial potential it embodied.

However, initial determinations regarding the constitution and applicability of dephysicalised property rights were both arbitrary and confusing. Wesley Newcomb Hohfeld (1913, 1917) wrote two seminal articles in response to the general confusion attending the notion of 'rights', an analysis with some relevance for debates concerning the nature of property rights. Consistent with Bentham's analysis, Hohfeld (1913: 24) contends that the law weighs the 'aggregate of abstract legal relations' rather than deferring to 'figurative or fictional' categories. In the context of property specifically, legal rights do not refer to 'a tract of land or chattel' but property 'denotes a right over a determinate thing' (Hohfeld 1913: 22).

For Hohfeld, the term 'right' can be analysed to reveal four fundamental categories of juridical relations. First, the basic term 'right' describes a claim that is correlative to another person's duties. Next, the term 'liberty' (or privilege) means that the holder has no legal duty to refrain from a particular activity. Hohfeldian 'powers' describe the capacity to change legal relationships – for example, through a contract or a will. Finally, 'immunities' correlate with disabilities of another, e.g. constitutional rights correlate with disabilities of the government to act in certain ways (Harris 2002: 83–93; Hohfeld 1913: 25–58). According to Hohfeld, these categories provide the core elements of all legal relationships. They have been reproduced in Table 2.1, together with their correlative and opposite concepts. (Note that in this table, correlations are represented vertically and that opposites run diagonally.)
### Table 2.1 Hohfeld on rights

<table>
<thead>
<tr>
<th>Right</th>
<th>Liability</th>
<th>Power</th>
<th>Immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Duty</td>
<td>No right</td>
<td>Liability</td>
<td>Disability</td>
</tr>
</tbody>
</table>

Put together, these items make up Hohfeld's eight fundamental legal conceptions (Munzer 1990: 18). For example, to say that X has private property in land means that others have a correlative duty to respect that right. Further, to say that X has a power means that they can voluntarily change their legal relationship with some other person (i.e. their tenant in the case of a lease agreement) who has a correlative liability. Finally, X may have the immunity from being fined for parking their car in a restricted area while, Y may not have this privilege and so has a disability.

The significance of Hohfeld's analysis for the present discussion is that it continues to have tremendous influence on the legal–philosophical property discourse to the present day. Stephen Munzer (1990: 19) notes that Hohfeld's vocabulary has 'no serious rival of its kind in intellectual clarity, rigor and power'. Indeed, Hohfeld crystallised and entrenched the scholarship of Bentham and Hohfeld can rightly be considered to be the most influential scholar under what Vandervelde (1980: 330) terms the 'new property' – that is the shift from Blackstone's natural law person–thing conception to the positivist person–person conception.

### 5 Marx's critique of dephysicalised property

The conceptualisation of private property as a person–person relationship has had significant consequences for the environment. A conception of property that focuses on relations between human persons as owner–possessors significantly diminishes the importance of the subject of the property relationship – or in the traditional view – the 'thing' itself. In the case of land law, a person–person conception is structured in a way that disregards the specific attributes and ecological requirements of the land. Private property is not place based, which means that the same generic rights can be transplanted onto any location and ecosystem (Graham 2011: 190–197). Indeed, this decontextualised relocation of generic property rights can be noted in the appropriation of indigenous lands, which occurred throughout the industrial era – and integral to this process was precisely the displacement of cultures that had developed an intimate relationship to a place and ecologically sensitive habitation practices.

This shift was particularly important in the context of industrial capitalism, which
required constant self-expansion into new territories or undeveloped markets (Luxemburg 2003: 348–399; Wallerstein 2011b: 14). Given this context, it is also worth pausing to consider Karl Marx's analysis of how the dephysicalised conception of property facilitated environmental exploitation and advanced industrial capitalism. In presenting this analysis, I do not wish to portray Marx as an environmentalist or as having a sophisticated ecological ethic, for plenty of evidence can be found to contradict such a view (Marx 1992: 820), and indeed a consciously environmentalist position was a rare position to hold in light of the confronting social problems that faced nineteenth-century Europe. Yet, I suggest that Marx's rigorous critique of private property and his analysis of its relationship to environmental problems remain as pertinent today as ever before.

The idea of an unalienated relationship between people and their means of production was central to Marx's critique of capitalism and to his analysis of property fetishism. He first explored this theme in 1842, as a response to the enclosure of the commons, which forced peasant communities off their land in favour of private development (Neeson 1996). In a major Rhineland newspaper (the Rheinische Zeitung), Marx wrote a paper entitled 'Debates on the Law on Thefts of Wood,' in which he explored the prosecution of peasants who collected wood from the forest to heat their homes and cook food (Marx 1996). While this practice had taken place for countless generations, the growth of industrialisation and the system of private property led to harsh prosecution of those peasants who continued to violate the new property laws.

In the article, Marx lamented how the law had managed to transform into a source of private property that was once a common and had no market value. Under the new laws, 'wood thieves', who depended on the common stock of the forest for their subsistence, were turned over to the forest owner (whoever had property title) and forced into labour, thereby increasing the profits of the owner (Foster 2000: 67). Such a law, Marx argued turned the ordinary peasant into a 'criminal' or 'enemy of the wood'. The poor were thus denied any relation to place that was unmediated by a dephysicalised system of private property (Marx 1996).

Marx developed the more technical aspects of this analysis throughout his subsequent writing. In particular, he returned to the theme of alienation in Das Kapital during a discussion of the duel character of labour as embodied in commodities (1992: 133). In this discussion, Marx looks at some of the universal properties of useful labour (that is – labour that has some social use and demand). He does so because: '[L]abor...is a condition of human existence which is independent of all forms of society' (1992: 133). Indeed, he recognises that '[L]abor [is] an eternal natural necessity which mediates the metabolism between man and nature, and therefore human life itself' (1992: 133).

This idea of 'metabolism' with labour as the mediator of human existence and our
relationship to nature is foundational to Marx’s materialist argument (Foster 2000: 141–177). ‘Use values’ Marx writes ‘are combinations of two elements, the material provided by nature, and labour’ (1992: 133). Hence, ‘when man engages in production, he can only proceed as nature does herself ’ (1992: 133). This is an important point for in Marx’s analysis – whatever we do must be consistent with natural forces or natural law:

[W]e can only change the form of the materials. Furthermore, even in this work of modification [we are] constantly helped by natural forces. Labour is therefore not the only source of material wealth i.e. the use-value it produces. As William Petty says, labour is the father of material wealth, the earth is its mother. (1992: 133–134)

This gendered metaphor dates back (at least) to Francis Bacon (Merchant 1980). However, what is interesting about Marx’s application of the metaphor is that he draws no clear separation between human beings and nature in the labour process. That process is wholly natural and wholly human at the same time. It is construed dialectically as a moment of ‘metabolism’ in which it is impossible to separate the natural from the human. But within this unity there is also a duality. There is, Marx says ‘a process between man and nature, a process by which man through his own actions, mediates and controls the metabolism between himself and nature’ (1992: 283). Thus, human beings are active agents in relation to their property:

Man confronts the materials of nature as a force of nature. He sets in motion the natural forces which belong to his own body, his arms, legs, head and hands in order to appropriate the materials of nature in a form adapted to his own needs. Through this movement he acts upon external nature and changes it, and in this way he simultaneously changes his own nature. (1992: 283)

It is in statements like this that we most readily encounter Marx’s dialectical formulation of the integral relationship between human beings and the environment. Marx contends that human beings cannot interact with our property, or transform it, without also transforming ourselves. Conversely, when we change ourselves, or our perceptions, this can lead to dramatic changes in the environment around us. For Marx, this interplay can never be displaced. Instead, the perpetual transformation of individuals and the world is fundamental to understanding the evolution of human societies as well as the evolution of nature itself (Harvey 2010: 112).

Yet, the new forms of dephysicalised property rendered the material character of labour and other interactions both distant and opaque. The new forms of property also needed to be rendered commensurable with the old or tangible forms of property to facilitate trade. This process of comparison effectively dissolved the ‘concrete and particular’ qualities of the land (Best 1994: 44).

Marx describes this change as being a shift from qualitative value to quantitative value
as represented in the money form (1992: 93). Indeed, because the value of
dephysicalised property is immaterial, it cannot exist without a means of
representation. The monetary system thus becomes a means of tangible expression
that makes value the regulator of exchange relations between tangible and intangible
property (1992: 142). The uniform language of money and the transformation of
tangible things into abstract numbers were essential for the development of capitalist
growth economics. Indeed, even after centuries of anthropocentric intellectual thought,
it is easier to exploit a dollar figure than a piece of land with unique attributes and
ecological functions. A Canadian lumberman evidences this argument in the following
statement: ‘When I look at trees I see dollar bills’ (Jensen 2007: 15).

Marx regarded the dephysicalisation of property as both a cultural and environmental
concern. He argued that human abstraction and alienation from the environment were
inherently unsustainable (Marx 1975a: 276). Referring back to his writing on the
metabolic relationship between human beings and the land, he writes: ‘Man lives on
nature – [this] means that nature is his body with which he must remain in continuous
interchange if he is not to die’ (Marx 1975a: 276). This critique ought to profoundly
disturb anybody that is seeking to make sense of the deepening environmental crisis.

6 The liberal (and neoliberal) theory of private property

So far in this chapter, I have sought to establish the relationship between
anthropocentrism and the concept of private property. I have argued that starting point
for theories of property is human dominion over nature and I have considered how this
notion was captured in early Roman and Christian conceptions of property. I then
described how during the scientific revolution the natural world was conceived as a
lifeless, mechanistic instrument for human happiness. The integration of these
worldviews helped to shape legal scholarship during the Industrial Revolution and
ultimately led to the promotion of a person–person or dephysicalised conception of
property. The person–person model represents the dominant framework in
contemporary property law and acts to promote rights over duties and diminishes any
sense of normative commitment to land as place.

During the twentieth century the most significant influence on the theory of private
property was liberal political philosophy. Liberalism refers to a heritage of thought
about human nature, agency, freedom and value and its bearing on the origin and
function of political and legal institutions (Bentham 1969; Manning 1976; Mill 1989;
Rawls 1971; Sandel 1984). Today, liberalism has associations with progressive politics
and equality. However, the classic meaning emerges from the Latin *liberales*, meaning
‘free man’ and is best described as a form of political organisation and a set of political
values rooted in the primacy of individual liberty (Mill 1989: 16). This exclusive focus
on the rights and value of individual human beings means that liberalism can be used
as a convenient conduit for anthropocentric ideas. Indeed, while there is nothing to prevent liberal theory from taking an interest in culture, community and the environment, such an interest will always be ‘secondary and derivative’ (Waldron 2005: 570).

Further to these points, liberals contend that there is something particularly important in allowing individuals to direct their own lives and act on their own terms (Mill 1989: 20). That is, liberals exalt individual freedom, although what exactly this refers to is subject to some controversy (Manning 1976: 56). John Stuart Mill (1989: 16; see also Berlin 2002) provides the classic formulation of negative liberty, arguing that ‘[T]he only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.’ On this view, freedom flourishes when constraints are removed, and the promotion of autonomy ought to be the central concern of political authorities. Positive conceptions of liberty, by the same token, provide the State with a much greater role and promote the idea that freedom is something to be achieved or brought about by effective education and by the creation of favourable social conditions (Waldron 2005: 572).

The twin pillars of individualism and freedom have exerted significant influence on the contemporary concept of private property.25 Indeed, private property is the key mechanism through which liberals promote their platforms of individual freedom and choice (Waldron 1988: 31–40). Paul Babe (2010a: 531) explains further: ‘In order for life to have meaning, some control over the use of goods and resources is necessary; private property is liberalism’s means of ensuring that individuals enjoy choice over goods and resources so as to allow them to fulfil their life project.’

Consistent with Hohfeld’s analysis, the liberal theory of private property is a person–person relationship. Place or physicality continues to be cast aside as irrelevant. With regard to the specific rights that constitute the liberal conception, theorists commonly draw on the work of Anthony Honoré (1961). Commenting on the relationship between the theoretical accounts of Hohfeld and Honoré, Munzer notes: ‘If one is to use Hohfeld’s vocabulary to elaborate the sophisticated conception of property, it will help to conjoin it with an analysis of private property suggested by AM Honoré’ (1990: 22).

Honoré argued that private property is more complicated than simply holding a ‘right’ or ‘dominion’ over a thing. Indeed, private property is more accurately conceived of as being a bundle of rights, liabilities, powers and duties (1961: 84). In regard to any potential item of property, the bundle could include any of the following standard incidents: ‘rights to possess, use, manage and receive income; the powers to transfer, waive, exclude and abandon; the liberties to consume or destroy; immunity from
expropriation; the duty not to use harmfully; and liability for execution to satisfy a court judgement’ (Munzer 1990: 22).

Under this conception, private property includes (at a minimum) what Margaret Jane Radin terms the ‘liberal triad’ of use, exclusivity, and alienability (1993: 121). Owners may have different sticks relative to their particular property right and individual sticks can be disaggregated or added to the bundle (Singer 2000: 8–10). Furthermore, Honoré does not claim that the ‘standard incidents’ are inherent or intrinsic to the concept of private property. Indeed, Honoré is explicit that his description relates specifically to the ‘liberal concept of full individual ownership’ (1961: 84). The Hohfeld–Honoré combination reveals that the rights attained by property holders (whatever those rights are) provide individuals with the power to act in certain ways in relation to the rights of other people or groups of people. Indeed, private property ‘amounts to the decision-making authority of the holder of that right’ (Baker 1986: 742–743) and can be used to exercise control over things and over the lives of other people.

The specific environmental and social consequences of the liberal conception of private property have been detailed in the context of industrial farming practices (Burdon 2010a), climate change (Babie 2010b) landscape fragmentation (Freyfogle 2002a) and wildlife law (Freyfogle & Goble 2009). Theorists within each of these areas have expressed concern that a conception of private property that focuses exclusively on individual freedom fails to account for the vast network of social and ecological relationships within which human beings exist within. Joseph William Singer captures this concern in his term ‘ownership model’. He describes this idea as follows:

We presume that most uses of property are self-regulating, in that only the owner is legitimately interested and others have no legitimate claims to control what the owner does with his own property. Substantial freedom to control one’s property without interference by government regulation is believed to promote both individual autonomy and economic efficiency. (2000: 3)

This model is taken for granted in mainstream property theory. For example, Jeremy Waldron notes that the ‘organising idea’ of property is ownership and that it is for ‘a certain specified person (rather than for anyone else or for society as a whole) to determine how a specified resource is to be used’ (2005: 60). More strikingly, libertarian property theorists such as Richard Epstein argue that private property means the ‘exclusive rights of possession, use, and disposition’ over a particular resource (1985: 2). Further, Epstein argues that individual freedom should not be interfered with by the state, except in very rare circumstances such as war or natural disaster (Epstein 1998: 187).

In law and economics discourse, the ownership model is taken as scripture and property relationships are conceived as operating through the ‘hidden hand’ of the
market. Most theorists within this discipline begin from the assumption that all of nature should be privately owned and that owners should be provided freedom to use their property as they desire, or to exchange it at will (Singer 2000: 4). For example, legal economist Richard Posner argues that ‘if every valuable (meaning scarce as well as desired) resource were owned by someone (universality), ownership connotes the unqualified power to exclude everybody else from using the resource (exclusivity) as well as to use it oneself, and ownership rights were freely transferable or as lawyers say alienable (transferable), value would be maximized’ (1986: 32).

Consistent with other free market capitalists, Posner argues further that freedom and wealth maximisation are best achieved ‘when goods and other resources are in the hands of those who value them most, and someone values a good more only if he or she is both willing and able to pay more in money to have it’ (1979: 103). According to this view, the regulation of property rights is inefficient, limits the freedom of property owners, decreases business investment, reduces jobs and may end up having a negative impact on people overall. Regulation is only justified when the markets work imperfectly or when government intervention is more expedient than market solutions (Posner 1986: 32–33).

The image of private property that emerges from this discourse is of an institution designed to reflect liberal values and protect individual freedom – which increasingly has come to mean market freedom (Harvey 2007: 6). This freedom is exerted over the environment without inherent concern for either the ecological or the human community. Singer argues that within this framework, ‘the owner has a host of powers and can use the property in almost any way’ they like (2000: 30). This power can be limited when it causes harm to other people or if it infringes the freedom of others to do the same. However, it is clear that the liberal theory of private property focuses on securing choice and freedom to satisfy individual desires. This aspect of the ‘ownership model’ has been described variously as ‘self-regarding behaviour’ or ‘preference satisfaction’ (Singer 2000: 13). J.W. Harris (1996: 30–31) elaborates on this characterisation:

The rules of [a] property institution are premised on the assumption that, prima facie, [a] person is entirely free to do what he will with his own, whether by way of use, abuse, or transfer... [h]e may also, within the terms of the relevant property institution, defend any use or exercise of power by pointing out that, as owner, he was at liberty to suit himself.

Sovereign states have increasingly adopted and enforced the liberal ownership model since the transition from Keynesian to neoliberal economics in the 1970s. This shift toward neoliberal economics has resulted in greater disparities between the rich and the poor, uneven geographical development and hyper environmental exploitation (Harvey 2007: 152–183). Singer offers an explanation of these themes, noting that ‘by
conceiving property as ownership, we invite owners to use their property without regard to the needs of others’ (2000: 6). Put otherwise, we invite (and in fact reward) people to ‘consider their self-interest alone – to act as if no one existed but themselves’ (Singer 2000: 6).

Conceived in this way, ownership and obligation are opposites. Indeed, the ownership model ownership ‘abhors obligation’ because obligations limit ownership and individual freedom (Singer 2000: 6).\textsuperscript{26} The liberal (and neoliberal) concept of property is morally deficient and works to alienate human beings from society and from the natural world. However, as will be demonstrated in detail in the next chapter, human beings do not live alone and property choices cannot be exercised in isolation. Indeed, all tangible items of property are (in one way or another) derived from nature and our property choices have very real and immediate impacts on our community and the environment. Demystifying the anthropocentric narrative that currently dominates legal discourse and coming to terms with our interconnected reality with nature is the foremost task for current and future property discourse.

7 Conclusion

In this chapter, I have argued that the contemporary concept of private property is anthropocentric and is contributing to environmental harm. To establish this argument, I described private property as being an indeterminate concept that reflects the social and cultural values from which it has emerged. Using this description, I then explored significant historical periods in the development of private property.

I began by positing that the starting premise for Western theories of private property is human dominion over the environment. This idea has its roots in Greek Stoic philosophy and Christian theology. It became entrenched in Roman law and was later developed by Christian jurists with reference to the biblical grant of dominium over ‘creation’ to human beings. During the scientific revolution the environment was interpreted as being a lifeless machine and a scientific method was developed that entrenched a human/nature dichotomy. This perception was integral to the Industrial Revolution and helped to facilitate increased environmental exploitation. The resulting increase in economic power led to the deliberate removal of ancient natural law protections for the community, and the environment was made vulnerable to the reformulation of private property constructed as a dephysicalised person–person relationship. Finally, I considered the influence of liberal and neoliberal discourse on private property. I argued that the liberal ‘ownership model’ perpetuates an anthropocentric worldview by inviting owners to exercise their property rights as though they existed in isolation from nature and from the human community. I argued
that this model is socially and environmentally harmful.

In the next chapter, I demonstrate that anthropocentrism does not represent a credible or scientifically valid worldview. In its place, I offer an ecocentric understanding of the environment and the place of human beings within it. In contrast to anthropocentrism, the ecocentric paradigm holds that human beings are interconnected and dependent on a comprehensive community that includes both living and nonliving entities. The paradigm also contends that the Earth is composed of a community of subjects and not objects to be used and exploited. Following this introductory analysis, I consider how law, as an evolving social institution, can adapt to reflect the concept of Earth community. I do this by considering an alternative cultural narrative proposed by Thomas Berry and also by considering the role of social movements in actively challenging and changing the law. This discussion lays the foundations for Chapter 4, which seeks to outline an ecocentric legal philosophy called Earth jurisprudence. This philosophy is then used to construct an alternative concept of private property in Chapter 5.

Notes

1. There is an alternative perspective that holds there is an objective or true concept of property. Richard Epstein (1985: 304), for example, describes private property in essentialist terms, arguing that private property means the ‘exclusive rights of possession, use and disposition’.

2. The Tanganekald-Meintangk peoples come from the lower lakes and Coorong region in South Australia.

3. Note that ‘ruwe’ means land. While this is an accurate description of private property tendencies, it should also be noted that individual relationships to land within Western culture are far more complex and diverse than a monolithic reading of them would imply (Reid 2000).

4. Socrates’ reasoning was in direct and deliberate contrast to the earlier ‘natural philosophers’ such as Thales and the main rival philosophical school established by Pythagoras in 530 BCE. While little can be said about Pythagoras with any definiteness, it is known that he sought knowledge from studying nature’s patterns. Pythagoras also instructed his students on the care of and respect for nature. For example, he encouraged vegetarianism and taught that the souls of dead humans migrated to animals. This teaching sought to establish kinship with nature and is not dissimilar to Eastern religious ideas of reincarnation (Singer 1975: 205–206).

5. The Platonic idea is the expression of the simple thought that every rightly formed conception has its solid basis in objective reality.
6. Note that the concept of plenitude has also been used to refer to the idea that no genuine potentiality of being can remain unfulfilled and that the great abundance of the creations must be as great as the possibility of existence and commensurate with the productive capacity of a 'perfect' and inexhaustible source.

7. For Plato, the totality of existence reflects nothing less than the sensible counterparts of every one of the Ideas. This is revealed in the dialogue *Parmenides* (1997: 360), in which the character Parmenides reminds the young Socrates that in the 'World of Ideas' all things exist, even things paltry, ridiculous and disgusting.

8. Aristotle (1984: 921) defines continuity as follows: 'Things are said to be continuous whenever there is one and the same limit of both wherein they overlap and which they possess in common.'

9. There are obvious difficulties with this philosophy. Most pressing for my current analysis is how one can decide (or will) to be virtuous in the context of a completely deterministic world that limits human freedom.

10. In providing this description of the Christian influence on Western rationality, I also acknowledge an alternative branch of theology, which provides a striking critique of this language of mastery and promotes the recognition of ethical responsibilities to the environment. Exemplars of this view can be noted in figures such as St Francis of Assisi (Sorrell 2009), Benedict of Nursia (Dubos 1973), Norman Habel (2010), Ron Engel (1986), Leonardo Boff (1997) and Thomas Berry (1999). This ecological branch of Christianity is evidence of the deep variety of religious experience within the Christian faith. Nevertheless, I contend that it represents a minor thread in the orthodox or mainstream interpretation of Christian scripture.

11. This covenant is restated in Genesis 9: 1–3.

12. At the centre of Hegel's ethical vision is a compelling analysis of the interconnectedness of all life. He argues that to act against another person is to destroy one's own life. In this way, the flourishing and foundering of each is intimately bound up with the flourishing and foundering of all.

13. This was the solution adopted by Nimrod, son of Noah. In response to the flood, Nimrod is said to have built a 'tower which was to be far higher than the waves and streams could ever rise and in this way to avenge the downfall of his forefathers' (Hegel 1971: 184).

14. For example, in *City of God* (2003: 897) St Augustine described property as the creation of the state (as opposed to something natural) and the fruit of sin. Elsewhere he advises Christians not to own property individually and asserts that there will be no private property in paradise.

15. Using a similar logic, Aquinas asks whether human beings should always remain naked just because we were naked in the state of nature.

16. Commenting on the relationship between Aristotle and Aquinas, Ralph McInery
(1977: 30) notes: 'It has been said that without Thomas, Aristotle would be mute; it can equally be said that without Aristotle, Thomas would be unintelligible.'

17. I have cited Farrington for several of Bacon's quotes because his book represents the most authoritative source for the statements reproduced. The essays from which the quotes were derived were not translated as part of Bacon's complete works.

18. This mechanistic description of nature appears first in the writing of Isaac Newton, who argued that the cosmos was like an immense clock whose basic principles and features could be revealed through a reductionist scientific methodology. Using this method, Newton claimed that nature was rendered 'knowable, adjustable [and] manageable... it belongs to the people who control it' (cited in Suzuki 1997: 14).

19. Commenting on this statement, Thomas Berry (1991a) held: 'Descartes killed the Earth and all its living beings. For him the natural world was a mechanism. There was no possibility of entering into a communion relationship. Western humans became autistic in relation to the surrounding world.'

20. Bryant v Lefever, 4 Common Please Division 172 (1879).

21. Palmer v Mulligan 3 Cai R 307 (1805) at [314].

22. Horwitz (1977: 37) contends that the Palmer decision represents 'the beginning of the gradual acceptance of the idea that the ownership of property implies above all the right to develop that property for business purposes'.

23. Coyle and Morrow (2004: 96) argue that natural rights theories of property 'tended to regard varieties of agrarian communism or agrarian capitalism as the inherent form of property law.'

24. John Stuart Mill (1989) represents the most sophisticated and nuanced advocate of liberalism. While he maintains the primary of individual liberty he also worries about what an exclusive focus on liberty will produce in society. In particular, Mill wants us to not only formulate our own ends but also our own understanding of those ends. To achieve this, Mill writes against some of the foundational pillars of Bentham's description of utilitarianism. Mill wants to develop the inner person and our outward capacities for greatness and achievement.

25. Naffine (2013: 1) contends that the image of the 'fully independent individual' that is projected by liberalism is a 'Weberian ideal type'. See further Weber (1971).

CHAPTER 6

Kaldowinyeri
Kaldowinyeri is a concept, which is difficult to translate, but in part it means ‘a long time ago, the beginning of time itself’; the word originates in the languages of the First Nations Peoples of the Lakes and Coorong region in the south-east of South Australia. It is also the place where I belong. I belong to the ruwe of the Tanganekald and Meintangk. First Nations Peoples who at Kaldowinyeri arrived on the oceanside of the Coorong, singing their arrival in the following tunjari:

\[
\begin{align*}
\text{Guru’nulun ‘and ‘wardand ‘wanunj ganji} \\
\text{‘goronjkanjal ‘lei a ‘meinij ‘nainij’gara’nal} \\
\text{‘guru’nulun ‘and ‘wardand ‘terto’lin} \\
\text{(h’)end ‘barum ai! ‘walanjala talanja’leir} \\
\text{r’einamb ‘maranj’gara’nal.}\end{align*}
\]

The tunjari sang the law into being. Kaldowinyeri was a time when song, stories and law were birthed, as were the ancestors – out of the land. The old people heard the crashing sound of the ocean and the sound made them frightened as they hesitated and stood still. Some wanted to return to the north, but they agreed to stay and settle down. One of our old people called out Tanjo’walo’njan – ‘what will you do now?’ The call brought our peoples – the Tanganee – into existence, and today we again face this question: what should we do now? The ‘doing’ is to reposition our ‘lawful being’, and to reassert a Tanganekald and Meintangk Peoples’ way of knowing the world from within a space that is occupied and dominated by the colonisers’ legal history with its foundation of terra nullius. We are occupied by a colonising terra nullius space which is being emptied of First Nations Peoples’ ways of knowing and living in the world. It is a space in which our laws are taken to be ‘myth’ or non-existent, and our being as originating from some other place. First Nations Peoples continue to resist theories that work to exclude and delegitimise our ancient relationships to the natural world, a world of which we as humans are a part of the whole and not the whole itself. For example, the European idea that First Nations Peoples crossed ancient land bridges to arrive at their territories works to break our connections to country. It is an explanation, which runs counter to First Nations’ understandings, belonging and connections to place.

**Raw Law**

Our First Nations ancestors were once naked. I see a connection in that with our sung laws and the land, all of which are also naked or ‘raw’, undressed from the baggage of colonialism. From my Tanganekald and Meintangk standpoint, what I know as law, what I have named ‘Raw Law’, is unlike the colonial legal system imposed upon us, for it was
not imposed, but rather lived. It is a law way, which emanates from the ruwe and connects the collective or mob⁶ of First Nations Peoples. Knowing law through living, it is different from colonial manifestations of law. The First Nations' view of law now has little place in which to live and living law as a way of life is no longer a possibility or an experience known to the greater part of humanity. The greater part of humanity has come to know 'law' as a complex maze of rules and regulations while the body of Raw Law is being buried beneath muldarbi layers of colonialism.

Many of our First Nations legal systems are embodied in stories and songs. Our ancient laws were not written down; knowledge of law came through living, singing and storytelling. Law is lived, sung, danced, painted, eaten and in the walking of ruwe. Law inheres in all things and is alive in all things, but these days it is an ongoing struggle to keep many things alive in the face of the attempts to bury our law ways as a part of the ongoing colonial project.

First Nations laws are still in conflict with the imposed colonial legal system; in the past our old people struggled and many of our people today continue to struggle against colonialism. In particular we struggle to keep the body of First Nations law alive for future generations. We keep a view of law, which lives in all things and emanates love, caring and sharing, and respect for all things in the natural world. It is a view of the world that supports the capacity of peoples to care for country and all our relations, including those we have with the animal, plant and broader natural world. In pre-colonial times the natural world was 'undeveloped', not because of an inability to transform the ruwe, but because of a relationship of connectedness with all things in the natural world. Those safe and harmonious relationships were maintained by, for example, fire management, fish farming and other sustainable practices that worked with the natural world rather than changing and fundamentally altering that natural world order.

In this work I use the metaphor 'raw' to speak of law and to draw a parallel with my ancestors who were naked people. Prior to colonisation the ancestors lived from birth until death as naked peoples. In death, our naked bodies were rolled in a woven grass mat, smoked and later buried. Only the skull of an ancestor was retained for the living to drink the water of life from.⁷ Many of us remain naked, not all the time physically, but spiritually, and we struggle to remain undressed of colonialism and all that would cover over our naked selves and our ways of knowing.

Throughout this work, I use the term 'colonial' in preference to 'postcolonial'; this is because the position of First Nations Peoples in relation to the colonial project has not shifted. It is still a relationship of conflict. Colonialism seeks the subjugation of our First Nations identity and we resist it.⁸ While I acknowledge the relationship between colonialism, imperialism and capitalism, I privilege the term colonialism because it
retains a reference to the ‘invasion – colonisation – settlement’ event. This has not ended; indeed, it carries the same power, force and intent of the 1788 invasion of Australia. So while the term ‘post-colonial’ is used to illustrate conditions that arise out of colonialism, its use does not negate the fact that the phenomenon of colonialism remains ongoing. A major objective of the ongoing colonial project is to annihilate the core identity of First Nations Peoples and smother our relationships to law, land and the natural world. Those relationships become ‘dressed’ and subjugated to the rules and regulations of the laws of the colonial state. The colonial project raises important questions for First Nations’ understandings of ourselves and our futures: when the laws of naked peoples are dressed in the laws of the colonisers, what do we become? What happens to our naked identity? Are we still naked under the layers of colonial laws and does First Nations Peoples’ law maintain its naked self under the layers of colonial rules and regulations? I will consider these questions throughout this work.

We are related to the natural world

The ancestors – human, animal and plants – are our relations and connect us to law and Kaldowinyeri. A relationship that links us to the past is a connection that is lived in the present and to be recreated in the future. This is the cycle of our ancestors; it is their path or journey, and we continue that walk from Kaldowinyeri. We will continue that walk, for it is a way that the people of the future may just come to understand and reckon with – many now are looking for ways of living beyond that of ‘possessive individualism’. In a conversation between Judith Butler and Athena Athanasiou on settler colonialism, both considered whose interests were served by a ‘possessive individualism’ in respect of land. They also considered whether a ‘possessive individualism depended on a disavowal of more primary social, dependent, and relational modes of existence’. Does individual possession of land ownership cancel out other ways of being? I think it is obvious: mostly it does – this is while many First Nations Peoples successfully hold on to a relational philosophy.

Relational philosophy is embedded in Indigenous knowledge systems; ‘knowledge belongs to a people and the people belong to a landscape’. Indigenous knowledges, unlike those of Europe, carry obligations and responsibilities, such as custodial obligations to ruwe that bind future generations. There are a number of other philosophical differences and those differences present problems for entering into a communication or dialogue with the non–Indigenous world. The following examples illustrate some of those differences:

<table>
<thead>
<tr>
<th>Indigenous</th>
<th>Non-Indigenous</th>
</tr>
</thead>
<tbody>
<tr>
<td>obligations to renew</td>
<td>land land ownership</td>
</tr>
<tr>
<td>balance and renewal</td>
<td>progress, accumulation, control</td>
</tr>
</tbody>
</table>
lateral thinking  linear thinking
consensus  hierarchical patriarchy
reciprocity  one-way exchange
justice, harmony  adversarial punishment
relationships  binaries
eternal time  linear or machine time

Relational philosophy is found in our stories. The Seven Sisters story, song and ceremony lives in the land and lives of women who still know the ancestors and are still talking with them, even though the sisters live in the constellation of stars known as the Pleiades. The sisters travelled throughout the galaxy and landed on earth, leaving holes to mark where they had landed. Travelling across the desert they came across a wild fig tree that was full of fruit, but they passed over that tree, because there was a man waiting to grab them and the sisters were aware of this, 'old lover boy, they call him – so they walk past and stop at a funny little tree with no leaves and just a little fruit'. The sisters also pass on green grass and a waterhole, instead stopping to drink at a muddy, dirty puddle of water, and sit under a stunted tree casting a small circle of shade instead of a cool, shady spot. This was all to avoid 'old lover boy'.

It is our practice to avoid referencing songs and stories that have not previously been published because of the obligation to keep oral traditions and their interpretation in the hands of the storyteller. In our way the story belongs to the storyteller and cannot be told by others without permission. The retelling of stories outside this context has the potential to erode oral traditions and the protection those traditions afford to the integrity and maintenance of the story. Colonial legal systems, both international and domestic, and their intellectual property laws do not protect law stories. It is not usual practice for the custodians to give permission to publish one small part of the Seven Sisters story, and the public telling of this story was originally a response to a proposal to develop a nuclear waste dump on the lands travelled by the Seven Sisters. Often the pressure to protect country will draw stories of country into the public domain for the purpose of protecting and caring for country. It is important to note that law songs or stories are often multilayered – that is, an initial layer may be presented to the public, but the story is further layered by dimensions, which are private or secret and sacred. So, while this story is now in the public domain, it continues to have embedded layers of knowledge that will remain within the realm of the secret, sacred business of the owners of that knowledge. The country where this part of the Seven Sisters song lives is in a region known as Billa Kallina, a place where the Australian federal government proposed the development of a nuclear waste depository. The Seven Sisters' custodians explained that the story was ancient and of the land, and is about how life in the desert is hard but sustainable if you are very smart and settle for less. At the time the story
was told, the Seven Sisters’ custodians and members of the Kupa Piti Kungka Tjuta were working to protect the site. Currently, the Billa Kallina site is no longer threatened. However, the federal government plans to develop another nuclear dump site, in the Northern Territory.\textsuperscript{15}

Many Nungas\textsuperscript{14} believe we are descended from beings of Kaldowinyeri; they are our ngaitji. Our ngaitji represents the relationship or kinship we share with our surrounding natural world. It is a relationship, which teaches us about the unity we share with all natural things. At Kaldowinyeri, the ancestors were human, animal and plant, and the relationship between humans, animals, plants and the environment is our ngaitji relationship, for we are kin. This relationship affirms our connectedness and relationship to the natural world. From our ngaitji we learn about the interconnectedness of all life and the earth, and are reminded that humanity is just a small part of the overall fabric of life and the natural world. The ngaitji relationship determines the interrelationships between human and other natural forms, while humanity’s relationship to the natural world is brought to our awareness through song and stories.

For First Nations Peoples, ownership of the land is an alien idea. In capitalist thought, ruwe becomes ‘property’, a commodity, which can be traded or sold. The Nunga relationship to ruwe is more complex. We live as a part of the natural world; we are in the natural world. The natural world is us. We take no more from the environment than is necessary to sustain life; we nurture ruwe as we do ourself. Settler societies have lived on Nunga lands and taken more than is needed to sustain life and the result, as we know, is the depletion of ruwe and the exhaustion of natural resources. Colonialists consider the land as belonging to them. This is a different idea from that of belonging to land and having a kinship or ngaitji relationship to it. When Nungas approach ruwe we often talk to the spirit ancestor of the place. We will tell the ancestors who we are and also who we might have brought with us to the place. We seek permission from the ancestors for our actions; nothing is assumed. When we take food from the ruwe, we give thanks to the ancestors as a sign of respect and blessings for the future generations to come.

**Being of cycles**

Kaldowinyeri, or a long time ago, in the beginning, is also the time now, and time into the future. The beginning, the present and the future encircle the place of Kaldowinyeri. The Nunga ‘I am’ is not like the other, dominant Western subject of being, which is represented by a straight line of thought – beginning, middle and ending. Instead, a Nunga process encircles; within there is a process that allows a person to become one and to begin again. This process is non-hierarchical and non-linear; rather, it takes the form of a cycle, of the continuity of being, becoming another cycle, nurntikki.\textsuperscript{15} Many
Nunga Peoples have never left nature time: a time in which the ‘old people’ – the elders and the ancestors – lived by the seasons and moon cycles. Many still live by these rhythms and co-exist with the imposition of the clock. The law way of Nungas is not in the past; it is a way of life carried with great struggle into the present, and I argue in this work that Raw Law is the way back to the future and to Kaldowinyeri.16

Our Nunga law ways are still with us but they are suppressed by the Australian state. We are like the animals in the story of the greedy frog struggling to bring water back to the land. The frog story tells of a time when a giant frog drank up the water until the land was all dried up and in drought. To survive, the collective of animals agreed it was necessary for the frog to release the water it had drunk back on to the land. They decided that the strategy most likely to succeed was to make the frog laugh; by laughing the frog would release the water. After many attempts at humouring the giant frog, the animals succeeded and the frog let forth a large laugh and with it released the water back on to the dry lands, filling up lakes, creeks and riverbeds. As a future precaution, the animals then decided that they would prevent the event occurring again by reducing the power of the frog. So, instead of there being one giant frog, many smaller frogs were created and the frog was never again in a position of power to monopolise the land’s waters. This frog remains relevant to our colonial present as this same behaviour can be seen in those tyrants who hold power to dominate many regions of the world. The frog today can be seen, for example, in the body of a transnational mining company, mining for uranium. There is a mine in a very fragile area of South Australia in one of the driest regions of the world.17 The regional underground artesian water supplies have been threatened by the mine’s vast thirst for water. While the animals faced off the giant frog in Kaldowinyeri, the relatives of those ancestors similarly resist greed and are challenged today. Today resistance is mounted against colonialism and state-backed multinational corporate power. The ancestors are in a constant state of being, knowing the world as at Kaldowinyeri, being immersed in the law and ceremony of Kaldowinyeri, knowing it in all the places it takes form – in the body of law, land and peoples. We come back into the future, to where we began at Kaldowinyeri to begin another cycle, and we are met by the ancestors to begin all over again.

In general, in the dominant tradition of non-Aboriginal thought, time proceeds in a straight line, travelling from a to b. Thinking in terms of space limits the movement of persons from a to b. Time in most non-Aboriginal thought is viewed as existing in a separate dimension relative to space. In general, in a Nunga perspective, time and space are encompassed within a circle of becoming. We are always returning to the beginning and are walking into both the future and the past; time and space are encompassed and encircled as one. There is no hierarchy that evolves from the circle. Likewise, also in contrast to the model of majority over minority rule, decision-making in many First
Nations societies is consensual. There was often no concept of majority rule, because the objective was not to find the most popular decision; the decision that best maintained the harmony of the natural world was the one adopted. Within the circle, all life forms are equally valued; there is no hierarchy separating humanity and the natural world. Consequently, the natural world has a voice.

Similarly, the cycle of being does not support the idea that, for example, a god gives 'man' dominion over the natural world. The history of Western thought has marginalised 'natives', animals, plants and all things of the natural world. The question of being was no longer relevant when science became the dominant paradigm.

Being is a continuous cycle; being always returns to become another, returning to its beginning, past, future. This process cannot be extinguished; it is the law. While colonial societies direct that Nunga processes and structures can be extinguished, those Nunga processes or ways will always exist in the natural world and for those who live with those laws and views of the world. A colonialist view privileges ideas on 'progress'.

When I began writing this text the media was filled with talk of colonising Mars. There have been battles in Afghanistan and Iraq, and then some years later came the US financial collapse and its impact on global economies. From a colonialist perspective, the future is unclear. Some predict an ecological disaster, at which moment the environment and humanity are annihilated. The question remains: what, if anything, survives annihilation? This is a question the community addressed in its dealings with the frog. In reducing the size and power of the frog the water was released and life returned following the drought. But the law of that story is that power must be addressed for the continuity of community and life.

**Muldarbi – colonialism**

Muldarbi law said that the Australian continent was clothed with a blanket terra nullius of the land, law and people. The Nunga subject in law was deemed not to exist. We were instead defined as British subjects, but subjects without the legal status of British subjects. Nunga laws thereby became covered by the rules and regulations, part of the muldarbi's colonial project of genocide. An analysis of genocide and its impact on Aboriginal Peoples follows in subsequent chapters of this work.

Muldarbi colonialism has survived for centuries, spreading across continents, always finding contemporary forms in which to embody itself. Across the centuries colonialism has claimed legitimacy for its spread of christianity, civilisation and 'progress'. In 'Australia' today it finds new ways to feed legitimacy. The muldarbi masks its intentions and is often disguised in a form that suggests popular support for the colonial project.
Popular support is important to its survival, also increasing its potency. By claiming popular affirmation the muldarbi’s colonial intentions remain covert. It is covert and goes unnoticed as it drains the lifeblood and identities from ruwe and Nunga Peoples. The muldarbi is also disguised by claims to ‘recognition’ of the Nunga subject. In popularising the muldarbi in the minds of the many, people live under the illusion of well-being in the lands of the colonised, as the muldarbi sucks silently, hidden in the background. The muldarbi is normalised in the minds of the majority. The muldarbi is frequently behind many ideals of recognition of the Nunga subject.

**Illusion of recognition**

The idea of the coloniser recognising the colonised is strange. Since the advent of colonisation, First Nations Peoples have been asking the question of the invaders: ‘by what law have you come on to our lands, and breached our laws?’ Perhaps the question needs to be reversed – that is, ‘how might the colonised recognise the colonisers?’ But we already know the colonisers as tricksters, thieves and murderers, so maybe the rhetoric of recognition is another part of the great colonial game. Is ‘recognition’ another route to legitimising the colonial project and again diverting the focus away from the violation of First Nations Peoples’ laws and lives and the analysis of those crimes? The modern colonial state would, in the first instance, ignore these questions and in the second, position them as simple ‘native’ ones, because the answers to them lie in the complexity and mystery of international law. It is international law that has legitimised colonial exploitation and the mechanisms to prevent any claims for reparations against colonial states. We know the kind of recognition we might expect from this colonialist web – that is, our absorption into the colonial project itself. What is intended goes beyond a conflict of laws between the colonised and the coloniser. It is the annihilation of Indigenous Peoples’ way of being in the world. A conflict ‘between laws’ is a part of the process of annihilation. Our way of being was deemed to be open to replacement by a mythic age of the European states, which magically morphed into a family of nations; we became in their eyes the object of their sovereignty. Our First Nations’ history shifted from the ‘pre-historic’ towards our absorption into their European world. This was without our land, of course; they got that. That is their ‘his-story’. This work attempts to untangle that ‘his-story’ by reclaiming our voice, to speak as subjects of First Nations and to tell our story, as a means of laying tracks for a new cycle, back into the future.

The muldarbi has many faces: terra nullius was one of them. Even though the Australian High Court made the notion of terra nullius unpopular in *Mabo v Queensland (No. 2)*, the myth that our Nunga lands were ‘practically unoccupied’ in 1788 still justified the colonial seizure of our territories. Likewise, the doctrine of discovery was used to underpin the colonial foundations of states such as the United States of
America, Canada and New Zealand. The US Supreme Court case *Johnson v McIntosh*, 21 U.S. 543 (1823) has been considered the major precedent by the English language-speaking settler states and they adopted Chief Justice Marshall’s opinion on the doctrine of discovery: ‘and its principle that the first European discoverer of lands occupied by non-Christianized tribal savages could claim a superior right to those lands under the European Law of Nations’.

The Supreme Court decided in *Johnson* in accord with ‘European international law and customary practice of the time, the discovering European nation had “an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest’.* Australian colonialism was even more killing; terra nullius was applied to the entire territories of hundreds of First Nations Peoples who were deemed at the time to be so backward and uncivilised as to not exist as legal subjects.

The High Court in *Mabo (No. 2)* referred to *Johnson v McIntosh* as the origin of Aboriginal title and it became the source of ‘native title’, a construct of the Australian state and the courts. Native title became ‘known’ as that which will ‘save’ Nunga people from the trauma of terra nullius. This trauma actually has never ended other than in the imaginings of the colonialist. Native title became widely accepted and affirmed as the formal recognition of Indigenous rights to land, but native title was not land rights, and behind this construction of rights to land lurked the muldarbi and its power to extinguish. The illusion of ‘recognition’ created a potency, which allowed victims to be more easily drained of their lifeblood as they were caught unaware. Many were persuaded that native title would put life back into the land and its people, but I argue in this work that this has not happened to date and will not in the future.

Native title does not free me to be who I am, a being of my people’s own Raw Law. It is the killer of Raw Law because native title continues to dispossess us from cycles of Nunga being. It is a muldarbi that will legalise the further, future rape of ruwe. It will make legal the continuing processes of colonialism and cultural genocide. It hides undetected behind its mask of popularity, making new forms of dispossession legal, like the terra nullius muldarbi colonisation did beforehand.

We have been told that the muldarbi is here to protect us, but how can we be protected by a power that subjugates us? Muldarbi thinking continues to spread; its path creates chaos. The muldarbi thought occurs in one straight line. It no longer has a concept of Kaldowinyeri, nor any thought or idea of how the chaos it is creating will end. The muldarbi is a beast of the now, consuming and killing all; it is a killer of Raw Law. It is among us; it was imposed on us and has been dominating the planet for centuries. The muldarbi has brought us to a critical point; here we must endeavour to think of a future that appears to disappear before us. At first a future appears like no other time we have known before, but the story of the frog tells us we have travelled to this muldarbi place.
before. The song has already been sung and is being sung now. So, why is it that there are those among us who continue to try gaining protection and the recognition of ‘rights’ from the muldarbi, which continues to oppress us? Why do they not go outside of the colonially imposed system and its mirage ideas of ‘recognition’ and reclaim Kaldowinyeri? Why do we remain captive within the domestic paradigm of the colonialists? Is it because the illusion of recognition has corrupted our visions? The illusion needs to be shattered. We have to enable ourselves to recreate our own ways of seeing. In writing of the muldarbi, I will unpack and expose its colonial project in an attempt to exorcise it, and to clear a path that seeks to decolonise every aspect of the afflicted, colonised being.

**Ruwe and peoples**

Our ruwe is an extension of ourselves; to take the land from us, and to develop and damage the ruwe is also to damage our relationship to country. What began in 1788 with the beginning of colonisation was more than a dramatic loss of life and violent dispossession of country. It was also the time the colonialist began the covering of Raw Law and the unsettling of country. Wherever the coloniser came to dominate and occupy the land, the songs and ceremonies for country were no longer free to express connections to country and law. Our ancestors were forced to wear clothes; the covering of the Nunga body and way of being took form in both a physical and an ideological sense. The Raw Law also went undercover. The rape of our land and people violated our relationship with the ruwe. Our ability to care for our self and land diminished. The dispossession of the naked peoples and the Raw Law is mirrored in the environmental devastation visited upon the ruwe.

When speaking of First Nations Peoples, I use the plural ‘peoples’. The idea of ‘us’ being one big mob, or one homogeneous First Nations People of ‘Australia’ or the ‘Aborigine’, is a colonial myth. There are hundreds of distinct laws, cultures and peoples of this place now called Australia. My ancestors, the Tanganekald and Meintangk Peoples shared a common language and occupied a continuous territory. Our family clan groups carried an intimate knowledge and relationship to the land, seas and the greater universe. Distinct peoples were connected to all parts of the continent, all having distinct languages, cultures and territories. Thus, the Tanganekald regard themselves as a people, sharing a common culture and language, and occupying a continuous territory with definite boundaries. Nungas were not how the colonist projected us – one big mob roaming aimlessly. At the time of the invasion we comprised 100 per cent of the population; today we are just under 2 per cent.

Another myth created by the British colonialist is that women were without authority and status in traditional societies. Throughout this work I demonstrate that this is not true. Nunga women have laws as the men have laws. White male anthropologists have
tended to reflect the patriarchal sentiment of colonial Australian culture upon us; in imposing the misogynist values of the white patriarchal state they created the assumption that Nunga women were oppressed in the same way that the colonialist states had oppressed their own women. In reality, Nunga women had a considerably higher status within their communities. Ethnocentric anthropologists, themselves historically male, have consistently ignored this reality, remaining largely unable or unwilling to acknowledge the position of Nunga miminis\textsuperscript{35} as lawful women and carriers of law.\textsuperscript{34}

My ancestors walked in the law, as they walked over the land. They sang the law; they danced the law, becoming beings of the law, living in the way of the law. That practice has now become fragmented due to the laws of colonial and state governments. It is difficult to practise the law when a car park lies on your ancestors' graves, or a place for ceremonial gathering and the practice of the law has become a derelict and toxic mine site. Or your brothers and sisters live in fear of jail, early death, poverty and ill health. Nunga views on human 'rights' and obligations and the law are entwined and are inseparable from our natural environment. The overriding principle we live by is a love of the land, a relationship of custodianship between the land and Nugas. But there are few places on earth left where that principle is respected and recognised. The land is viewed by states and the dominant culture as an economic resource to be exploited in the pursuit of development and progress. Concessions are made to create zones of protection for some First Nations Peoples, but this is not enough; it will not allow the law to draw breath and the land to survive. Muldarbi law only tolerates Nunga relationships to land where those relationships are not in conflict with state and development agendas. It is as if Nunga interests are being tolerated until there is a demand for exploitation and development; then the lands in question are harvested and appropriated for integration and assimilation into the capitalist project.\textsuperscript{35} We are constrained in our obligations to protect the land due to the force and power of the state.

The Nunga relationship to law and land is different from the relationships that states and state-protected corporations have with the land. Justice Isaacs in the High Court decision \textit{Commonwealth v New South Wales} expressed the white man's most valued interest in land as one which 'since the beginning of legal history conferred, the lawful right to exercise over, upon, and in respect to the land, every act of ownership, which can enter into the imagination'.\textsuperscript{56}

Australian property law institutionalises ownership and control over land; ownership is measured by capital. By contrast, Nunga laws acknowledge ownership in terms of ancestral and spiritual connections to the land. This form of ownership carries with it obligations in accordance with the law. At the ceremony to celebrate the Aboriginal
Tent Embassy's placement on to the register of the Australian Heritage Commission's National Estate on 9 April 1995, Dennis Walker argued for the real land and law business of First Nations to be 'done.' He responded to the common assertion that we had lost our land, stating, 'we didn't lose it anywhere', the land is still here and we have the responsibility to care for country. Walker highlighted the problem as not being given the

power in the non-Aboriginal legal system to fulfil that custodial right. Until our Elders in Council decide on these matters through their customary laws and until that consent, which Captain Cook was supposed to get, is properly given, then we still live under bad laws.37

The 'bad laws' Dennis talks of are muldarbi laws, which violate Nunga laws, our lands and our peoples.

**Voice and song**

First Nations Peoples' law is of the beginning: of the first songs, sung by the ancestors. When the first steps were walked across the ruwe, country was sung into creation. Law conceived as a way of living is difficult to write about and cannot simply be described or easily translated into a foreign language that is empty of the ideas that our law ways carry. Our law was not written in the way in which the West conceives of writing. Law was painted in ceremonial design and symbols were marked on boundary markers, identifying traditional owners and their ngaitjis. The differences between Nunga and non-Aboriginal legal systems are so extensive that there is no basis upon which comparison can be drawn. The idea of 'Raw Law' came to me as a way of resolving the problem I had in describing or defining the 'law'. Nunga law is undressed of the layers of positivist rules and regulations, which many non-Aboriginal societies have come to accept as inherent to their legal systems. 'Raw Law' is the essential basis of social conduct: respect, reciprocity and caring for country, to name a few. These ethical principles convey the essential nature of the law, which still exists for Nungas, but barely breathes under the introduced layers of colonial rules and regulations.

This is writing from 'inside'. I am of the Tanganekald and Meintangk Peoples, and my Nunga position is the place from which I write, as I write to regenerate Raw Law and to dismantle the muldarbi law. This writing required that I engage in my own struggle38 to decolonise. This is the writing of a song that still sings within me. As a song makes circles, so does this writing; it does not privilege the rules of grammar, or 'normal' or conventional academic structure. This is an important strategy in decolonisation, as the Murri39 performance poet Lionel Fogarty explains:

In my writing I don't believe in compromise at all. I don't want to be a reconciliation writer or a reformist writer. I like to hit psychological minds and cross boundaries. It doesn’t matter if it is in correct grammar or their style of
writing.40

For me, writing about Nunga law was a struggle to find a voice that was proper and law-full, and which was situated beyond the colonial matrix of containment and power. As a Nunga woman of the Tanganekald and Meintangk Peoples, I do not pretend to write, speak or be representative for all Nunga peoples. I do not claim to be the spokesperson for the ‘mob’. The mob can speak for itself when the time and opportunity arise. I am one voice among many; all of the people in our Nunga law ways have a voice, even our children. This writing is not an attempt to narrate the Nunga position; I do not locate myself as the native informant providing a master narrative on Nunga law. Rather, I see this work as one theoretical intervention, which may or may not extend beyond the self in bringing the mob to gather.

This work began its life as a thesis in 1994 and initially I spent time describing Nunga law in contrast to Australian law. I found myself trying to fit a system of laws into something which was so fundamentally different and alien that I abandoned that approach when part way into the project. Out of that process I decided I would not deal solely with the problem of conflict and reconciliation between Nunga law ways and the Australian legal system. Instead, I decided to take a leap into the known places of the ancestors and the task of recentring First Nations law. This took me to a place the muldarbi determined did not exist – a place where the muldarbi has no power; a place where law lives. I have sought to write on law from ‘inside’ my Nunga being, rather than to write on Nunga law through the colonial layers of the master narrative on law.

Ultimately, this work has been a difficult process, not only for the reasons that writing and communicating are difficult, but because in the act of writing I was also engaged in a struggle to decolonise. Writing enabled me to break out of a mould, a colonial mould formed of and about my Indigenous being and not by my Indigenous being in connection to law, land and peoples. Early colonial ethnographers made plaster casts of Nunga peoples’ heads and faces, which were to become a permanent record of those whom the muldarbi perceived as the last of the ‘Aborigines’ and plaster moulds of my ancestors have been kept in the South Australian Museum. But we have remained connected to our law and land and have not passed on; we live and have a voice, which is working to decolonise the colonial project.

My voice is not objective;41 I am not pretending that it is. It comes from within my Tanganekald and Meintangk being, from a place I hold as my centre. It is a struggle to hold, because the Nunga voice is always threatened with being extinguished by the conventions of ‘truth’ and ‘objectivity’ imposed by the disciplines of science. In using my own voice I assert my right to be, and in doing this I resist the erosion and dismantling of my Nunga being. I am one voice. The voices of my ancestors are those of a circle of peoples, and they sang the song, repeating the process over and over. That was the law.
The song was sung. The circle formed. It was repeated over and over, circles of song sung across the lands and seas. This is law. In speaking in my voice, I am not attempting to sing the song or tell the story of place; and I will not speak of the sacred, for that is the law. And in a way there is little of Nunga law, which I will seek to describe in my writing, because that is the law.

I have reflected a lot on why and how I speak and write because I feel a pressure to perform. I feel this pressure because of my juxtapositioning as a Nunga woman, surviving in a colonial environment and working in an academic context. The pressure comes from my understanding that to write and to publish in an academic forum means that I must locate myself within a space in which the muldarbi has been working for centuries to dismantle my Nunga being. The risk of entering this space is that I become assimilated by the muldarbi; the challenge is to live and remain a Nunga. In writing this book, I see myself engaged in a process of decolonisation and translation, rather than one of co-option into an academic narrative. This work will be taken up by readers as they see fit, but I hope that it is taken up as an intervention, or a seeding for a different narrative.

I write because our voice, the song and the grandmothers’ laws, have been being killed for so long that writing is an act of survival and resistance in a long and continuing struggle against the killing of the song, and the rape and the murder of the ruwe. This voice may be interpreted by others as being proselytising, a bit angry, and sad, and a bit too spiritual. It is all of this and more as I work towards a more ‘proper’ place, a place where the grandmothers sit.

Notes

1. In colonial times, our old people became known as ‘Ngarrindjeri’, but before colonisation our identities were more diverse and included the Yaraldi, Tanganekald and Ramindjeri, among others. I belong to and identify with my Tanganekald and Meintangk Peoples.

2. Tunjari means ‘song’.


4. The Western Sahara Advisory Opinion, International Court of Justice Reports, 16 October 1975, and Coe v Commonwealth (1978) 18 ALR 592 raised the question of the application of terra nullius to colonial territories where sovereign peoples were living at the time. The partial rejection of terra nullius in Mabo v Queensland (No. 2) (1992) 66 ALJR 408 and its relevance to the justification of the settlement of Australia has been debated. The debate focused on the relationship between international law and the common law. To some the question of the existence or
otherwise of terra nullius was unimportant and whether the doctrine was rejected or simply a device to establish native title had no effect on the authority of the decision. This work intends to reopen this debate.

5. In North America the Bering Strait theory has been used as one explanation of the origins of the First Nations Peoples, while in Australia our ancestors are ‘known’ to have crossed the Torres Strait from Asia. For further discussion on the Bering Strait theory, see Ward Churchill, *Since Predator Came: Notes from the Struggle for American Indian Liberation* (AIGIS Publications, 1995), 265.

6. Mob is a term Aboriginal Peoples of Australia use to describe their kinship relations, or First Nations Peoples’ affiliations.

7. My ancestors the Tanganekald kept the skulls of their dead for use as drinking vessels.

8. Gayatri Spivak, ‘Culture Alive (Notes)’ (1995), 5, *Australian Feminist Law Journal*, 10, Spivak suggests the language of the word ‘post-colonialism’ itself is like throwing words around and is as meaningless as the idea of decolonisation – that is, the idea is thrown around without being based in any truth of decolonisation or moving beyond the event of colonialism.


11. Penelope Debelle and Martin Daly, ‘Are They Trying to Kill Us?’, *The Age* (Melbourne), 28 February 1999, 1.

12. Billi Kallina is about 600 km north-west of Adelaide, South Australia.

13. The Kupa Piti Kungka Tjuta is a group of senior Aboriginal women from the Arabunna, Kokatha, Yankuntjatjara and other peoples who were based in Coober Pedy, South Australia, and were most active against the nuclear waste dump proposal during the 1990s and until the federal government decision not to site the dump at Billi Kallina. Regarding the proposed Muckaty dump site, see David Sweeney, ‘Plan to Use Aboriginal Land as a Nuclear Waste Dump is Flawed and Misguided’, *The Guardian* (London), 31 July 2013. A film about the Muckaty situation is discussed further in Chapter 3.

14. ‘Nunga’ is a generic term meaning ‘first peoples of the land’. I use this term across this work to describe First Nations Peoples.

15. Nurntikki is a Kaurna word meaning ‘to go on forever’.

16. Irigaray, perhaps similarly to Aboriginal philosophical thought, looks at time from a cyclical standpoint; Luce Irigaray, *Je, Tu, Nous-Towards a Culture of Difference* (Routledge, 1993), 75.

17. Western Mining Corporation began mining uranium at Roxby Downs about 800 km
north of Adelaide in the state of South Australia in 1988. They created one of the world’s largest uranium mines. In 2011 the State Government of South Australia approved an extension to the mine that at the time was under the control and ownership of BHP. However, uranium prices dropped and BHP has not yet gone ahead with its plans to expand the mine.

18. Noted in Genesis.
20. Ibid., 2.
21. Popularity is the linchpin of democracy, in never risking making an unpopular decision there is a greater likelihood of holding on to power.
23. Ibid., 102.
25. *Mabo v Queensland* (1992) 66 ALJR 408, hereafter *Mabo (No. 2)* 541 (Deane and Gaudron JJ). In a ruling of six to one the court held that the lands were not terra nullius or ‘practically unoccupied’ in 1788.
27. Ibid.
28. Ibid., 226, 227.
32. Prior to the work of female anthropologist Phyllis Kaberry, *Aboriginal Woman, Sacred and Profane* (Routledge & Sons, 1939) the field was covered by male anthropologists who engendered what was to become the dominant view of colonial settlers – that is, Indigenous women were subservient to Aboriginal men. Kaberry's work began to dispel those myths.

33. Mimini means 'woman'.


36. *Commonwealth v New South Wales* (1923) 33 CLR 1, 42.


38. I use the word 'struggle' throughout, as I write from the inside: the story I tell is one of trauma and struggle to survive an attempted genocide. There are no other words that better describe the process. Perhaps some people might see a more academic description as more appropriate, but in adopting other language it would fail to express the story I tell in the way I have chosen. It would become someone else's story.

39. Murri means 'Aboriginal person', a term used throughout northern NSW and Queensland.

40. Lionel Fogarty, *New and Selected Poems, Munaldjali, Mutuerjaraera* (Hyland House, 1995), x. Diana Eades, 'That's Our Way of Talking: Aborigines in South-East Queensland' (1981) 2 *Social Alternatives* 11, refers to this way of speaking as a form of Aboriginal English, but it is more than this, it is a form of resistance to the colonial order of things.

41. I am nevertheless experienced in Indigenous knowledges, and also Australian and international law. I have worked as a legal practitioner and advocate in international forums and also have experience in the academy.