

Geoconstitutionalism: Authoritative Lawmaking in the Anthropocene

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Heat domes baking regions across the world. Increasingly powerful storms and massive floods. The Amazon region rapidly approaching a tipping point that will convert the forest into a savannah. Melting icecaps in the Arctic and Antarctica leading to rising sea levels. A collapsing Gulf Stream. The sixth mass extinction event. These are but some of the manifestations of what has come to be called the Anthropocene—the current epoch in which “the human imprint on the global environment has . . . become so large and active that it rivals some of the creative forces of Nature in its impact on the functioning of the Earth system.”¹ Law is one of the modes of regulation mustered to begin to address the existential, increasingly exigent, challenges posed by the Anthropocene, as attested by international treaties and the ever more important role of environmental law in the lawmaking toolkit available to modern constitutionalism.

But the challenge of the Anthropocene cuts deeper, questioning two fundamental presuppositions that inform modern constitutionalism, which I define, in loose and ready fashion, as a theory of authoritative lawmaking. On the one hand, it takes for granted that lawmaking concerns human polities located in a natural environment. On the other, it presupposes that the authoritativeness of lawmaking turns on collective self-legislation: *autonomy*. More pointedly, these two presuppositions are internally connected: authoritative lawmaking concerns human polities *because* it is the expression of how modern constitutionalism has interpreted collective self-legislation. On the face of it, the Anthropocene disrupts both presuppositions. Constitutionalism can no longer count on being able to separate the conditions governing collective self-legislation by human polities from the conditions governing the Earth system. At issue is not merely ascertaining how human polities might be able to rule themselves in a way that ensures the relative stability of the Earth system. Much more fundamentally, the Anthropocenic challenge targets the concept of political reflexivity, hence the notion of collective agency, prevalent in modern constitutionalism.

Geoconstitutionalism, as I call it, seeks to address this twofold challenge. As *geoconstitutionalism*, it is a theory of authoritative lawmaking. As *geoconstitutionalism*, it critically probes the interpretation of authoritative lawmaking as collective self-legislation by human polities to ascertain whether and how authoritative lawmaking might be

¹ Will Steffen et al., “The Anthropocene: Conceptual and Historical Perspectives,” in *Philosophical Transactions of the Royal Society A*, (2011) 842–867.

possible for polities composed of humans and other-than-humans: *geopolities*. The compass of geoconstitutionalism is broad, comprising conceptual, normative, and institutional dimensions. I restrict it in this book to the following, far more limited, questions: how might modernity's notion of lawmaking be reconceptualized to account for the *emergence* of geopolities? Following from this: what sense of *collective agency* is available to geopolities as collectives composed of humans and other-than-humans?

In raising these questions, I refer to *modernity* because geoconstitutionalism challenges the modernist assumption that law is only law by and for human beings. Let me be more precise: although I refer to "modernity" *tout court* throughout this book, I focus and on that specific modernity that emerges in response to the challenge of radical contingency sparked by crisis of Scholastic philosophy. This caveat acknowledges that there are modernities, not modernity, although this is not a discussion I will be able to engage with in this book.² I refer to *lawmaking*, rather than to law *tout court*, because at issue is a critical reconceptualization of lawmaking as an instance of modern thinking about collective agency. And I refer to a critical *reconceptualization* of agency to acknowledge the historically situated character of my inquiry, which does not and cannot operate a complete rupture with modernity, if naught else because such a claim would repeat the founding gesture with which modernity sought to break with its own past. To engage in a critical reconceptualization of authoritative lawmaking in modern constitutionalism is to acknowledge that this endeavor works *within and on a constitutional imaginary*. I take to heart Viveiros de Castro's cautionary observation that while the nature/culture distinction must be subjected to critique, the premature dismissal of Western dualisms has not really "gone beyond the stage of wishful unthinking."³ Like the great Brazilian anthropologist, I "would prefer to gain a perspective on our own contrasts," in my case by way of an interrogation that, situated within the horizon of modernity, critically explores how its concept of authoritative lawmaking might be transformed in ways that shed light on the emergence of geopolities. (*ibid*) To this effect, the forthcoming pages engage with other disciplines, including biology and anthropology. But, for reasons that will become clear in the course of the investigation, the book does not attempt to make their findings directly serviceable for geoconstitutionalism.

Is it wise to link the question about geoconstitutionalism to the Anthropocene—a deeply contested concept? Why not refer, instead, to climate change, ecological catastrophe, the new climatic regime, the Capitalocene, the Chtulucene, the Plantationocene, or any of the other expressions that refuse to depoliticize our current situation by ascribing it to *human* agency rather than to certain human collectives? My reasons for this are ontological. I conjecture that the very use of the expression "Anthropocene" is tightly connected to the ontology of reflexive agency underpinning the modern aspiration to human autonomy. The connection works in both directions. For the one, only an ontology the main task of which is to articulate and assert human autonomy can interpret beings as living in the "Anthropocene." For the other, and conversely, to interpret beings as living in the Anthropocene is to acknowledge that it challenges the notion of human agency as

² See, for example, Adolfo Chaparro Amaya, *Modernidades periféricas: Archivos para la historia conceptual de América Latina* (Barcelona: Herder Editorial, 2020).

³ Eduardo Viveiros de Castro, *The Relative Native: Essays on Indigenous Conceptual Worlds* (Chicago: HAU Books, 2015), 197.

autonomous, whether because the Anthropocene encroaches upon autonomous practices or, more fundamentally, because it calls into question the very notion of human autonomy.

This more fundamental challenge announces itself, amongst others, in the resistance to the notion of human autonomy by groups that modern constitutionalism calls “traditional societies.” The flipside of the modernist move to posit an ontological split between humans and other-than-humans is to reserve the predicate “humanity,” in the “fully developed” sense of the term, only for those individuals and groups who organize sociality along the lines of this distinction. A tautology comes into view. On the one hand, “when we compare the objects that have been designated by the word ‘law’ by even the most different peoples at the most different times, we see that all of these objects turn out to be *orders of human behavior*.”⁴ On the other hand, “the most different peoples at the most different times” are properly human—i.e., civilized—peoples if they treat law as an order of human behavior. It might be objected that this characterization of law applies “only to the social orders of civilized peoples, because in primitive societies the behavior of animals, plants, and even inanimate objects is regulated in the same way as human behavior.” (*ibid.*, translation altered) But “[t]his absurd legal content is, in our contemporary point of view, the result of animistic ideas, according to which not only men, but also animals and inanimate objects have a ‘soul’ and that therefore there is no essential difference between them and human beings.”⁵ The conceptual tautology serves to conceal and justify colonialism and racism. In short, the “Anthropocene” functions in this book as the contested label for situations that challenge the boundary between a human polity and its natural environment, and therewith what modern constitutionalism has called collective agency. As will transpire in Part IV, I call these situations manifestations of *Anthropocenic a-legalities*.

A second and related reason for preferring the expression “Anthropocene” resonates with Viveiros de Castro’s cautionary observation. I want to resist the assumption that reimagining what law could mean in and for a more-than-human collective is of itself enough to move beyond what might be called methodological anthropocentrism. Acknowledging that “the human” is the object of sustained critique by various strands of philosophical and anthropological thinking, not least in the philosophy of technique, my claim is that a certain interpretation of the human will continue to be the point of departure for the conceptualization of *lawmaking* for a more-than-human collective. I call this methodological anthropocentrism because I argue hereinafter that no viable concept of lawmaking for geopolities can economize on *intentionality* as structuring human orientation in and towards the world. I will defend a responsive reading of the phenomenological concept of intentionality, which entails defending the view that what counts as human, hence what counts as other-than-human, is not fixed but rather an irreducibly open question. Building on this notion of intentionality, I will argue that lawmaking is a modality of

⁴ Hans Kelsen, *The Pure Theory of Law*, 2nd ed., translated by Max Knight (Berkeley, CA: University of California Press, 1970), 31. (translation altered)

⁵ *Ibid.*, 31-34; translation altered. Viveiros de Castro turns Kelsen’s statement on its head, pointing to the remarkable inverse symmetry between what he calls Amerindian “multinaturalism” and Western “multiculturalism.” Whereas the latter “is founded on the mutual implication of the unity of nature and the diversity of cultures,” “the Amerindian conception would suppose a spiritual unity and a corporeal diversity.” Viveiros de Castro, *The Relative Native*, 196.

collective intentionality, whereby it is precisely the question concerning the distinction between the human and the other-than-human which remains ever open in the ongoing process of determining who and what counts as collective. This thesis by no means suggests that intentionality is constitutive *only* for human orientation towards the world, as enactivism and biosemiotics, amongst others, have compellingly shown (about which more later). Nor does acknowledging the wide scope of intentionality necessarily amount to switching to a defense of biocentrism as the preferred fallback option if one abandons anthropocentrism. I will be at pains, in the later stages of this book, to critically probe the distinction between the organic and the anorganic when making sense of a more-than-human polity. Against a wide variety of views that would summarily dismiss intentionality when seeking to conceptualize lawmaking in and for the Anthropocene, I aver that what is really at stake is how intentionality might be *collective* in lawmaking for a more-than-human polity, and whether this requires rethinking *intentionality* as such, namely, acknowledging the other-than-human that inhabits and transforms what is too quickly taken to be “human” intentionality. I contrast this approach to *ontological* anthropocentrism, namely, a hierarchization of beings that positions human being at its acme and which justifies the presupposition that lawmaking is about human polities located in a natural environment.

Evidently, an alternative move is to get rid altogether of the distinction between the human and the other-than-human, introducing a “flat” ontology populated by, say, actants, as Latour would have it. Although attractive at first sight, the price paid by this strategy is too onerous. It levels down difference to a fundamental sameness, reducing alterity to the status of the not-yet-us in collective action. The fate of a flat ontology is to deny any strong sense of alterity—the alterity of what obdurately resists integration into a polity, including a geopolity—and to call forth a totalizing politics, as we shall see when discussing Latour’s politics of nature. In particular, it will not do, when attempting to make sense of collective agency in the Anthropocene, to simply extend the scope of reciprocity or mutuality, as conceived for human collectives, to geopolities composed of humans and other-than-humans. For this reason, I refer throughout this book to their original condition of *interdependency*, a formulation that allows for asymmetrical relations that join together humans, and humans and other-than-humans.

Thus, an inquiry into geoconstitutionalism takes its point of departure in modernity because it inherits a cut between the human and the other-than-human it can neither dismiss out of hand nor merely continue to accept as it stands. The geoconstitutional locus of this aporia is the “and” in my references to geopolities as composed of humans *and* other-than-humans. On the one hand, the “and” acknowledges that the split is the point of departure for our inquiry. But, on the other hand, if the “and” is merely conjunctive, gathering together two separate and preexistent terms into one collective, nothing of consequence will have been gained by geoconstitutionalism. It would carry forward and even entrench the split, merely yielding a new avatar of collectivity as (ontic) plurality within (ontological) unity: *e pluribus unum*. An alternative—the alternative I will pursue in this book—is to let the “and” function as the placeholder for an inquiry that seeks to establish how the emergence of a geopolity might destabilize and transform the boundary between the human and the other-than-human. I will argue that this boundary speaks to a *chiasm*: it includes what it excludes and excludes what it includes. This chiasm is none other than the lived body, which not only has a boundary but *is* the boundary at which the human

and other-than-human cross over into each other, without either collapsing into a unity or falling apart into a simple duality. Thus, the “and” in “human and other-than-human” is a placeholder for the lived body as a *cross-over being*, and of being, in the verbal sense, as an ongoing process of crossing over. This crossing-over into each other is what I will end up calling *agency*, or more precisely, agency as *co-agency*. Understood in this way, the cross-over is the in-between signaled by the “inter” of “interaction” and “interdependency.” I will work towards this strong, chiasmatic sense of the “inter” throughout this book, identifying in due course its similarities and differences with what Karen Barad refers to as “intra-action.”⁶

Even if one holds on to the tight connection between the Anthropocene and the ontology of reflexive agency, is it wise to approach the question about the authoritative-ness of lawmaking from a *constitutional* perspective? Should we not look instead at property, tort, corporation, consumer, and criminal law, and all those other domains and institutions in which the Anthropocene concretely challenges the authoritative-ness of modern lawmaking? Conversely, is it not these disciplines and institutions to which we should appeal when reimagining the authoritative-ness of lawmaking in the Anthropocene?

Certainly, an inquiry into the ontology of reflexive agency prevalent in modern constitutionalism cannot substitute for the imaginative and essential work of resisting, subverting, and reworking legal disciplines and institutions as we know them today. Although different to that endeavor, my aim is complementary to (doctrinal) initiatives that aim to transform contemporary law. After all, lawmaking takes place in *all* of these disciplines and institutions. The question is, therefore, whether and how an ontology of reflexive agency underpins the concepts of collectivity and collective agency prevalent in different domains of modern law. In effect, the notion of collective self-legislation cuts across the distinction between “public” and “private” law. Private law scholars, no less than scholars of public law, assess the authoritative-ness of lawmaking in terms of collective autonomy, even if both parties are usually at odds with each other about what counts as such. By these lights, the focus on the ontology of reflexive agency contributes to casting light on fundamental presuppositions that have governed various concepts of “private” law, such as property, tort, corporation, and labor. After all, initiatives aimed at holding “private” law institutions to account for their role in catastrophic climatic change move on the ground of the critical adage that private law is public law, showing that private law institutions are in breach of the claim to commonality proper to *collective* self-legislation. In this sense, an inquiry into the ontology of agency resists a purely formal or procedural interpretation of authoritative lawmaking, as is often the case among public lawyers, understanding itself as a companion to, even if not a substitute for, what might be called *material* constitutionalism. Obviously, the question what one means by “material” constitutionalism is itself at issue if, as in its current elaborations, the materiality of material constitutionalism remains within the ontology of reflexive agency prevalent in modernity.

In brief, mine is a philosophical attempt to uncover and think through what has been unthought and is perhaps unthinkable in the fundamental categories that underpin modern constitutionalism’s defense of collective self-legislation. In this philosophical

⁶ Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Durham: Duke University Press, 2007), 178.

endeavor I share the concerns of some of the contributions to what might be called critical theories of the Anthropocene. The reader will see me engage in this book with Bruno Latour, Donna Haraway, Karen Barad, and Elizabeth Povinelli, all of whom have made signal contributions to Anthropocenic scholarship. I will also engage with the work of Margaret Davies, who, in my view, has made the most radical new materialist contribution to rethinking the normativity of Western law in light of the Anthropocenic challenge. But I will also hold these theories at some distance, critiquing what I think they get wrong, and drawing on them where I think they get their critique of modernity right. More specifically, rather than jettisoning the reflexive concept of human agency that informs modernity, even if only for speculative purposes, I aim to explore—on occasion in a sharp polemic with those scholars—whether it can be made to yield conceptual resources that contribute to a theory of authoritative lawmaking in the Anthropocene. This demands engaging in careful and sustained analyses of central philosophical contributions to the reflexive concept of human agency that emerges in modernity, if nothing else to challenge and reorient the critical thrust of what are often simplistic to the point of caricatural dismissals of this key concept. To borrow a wonderful image from Bruno Latour, I want to reopen the “black box” of modernity and the subject, which many a critical theorist of the Anthropocene—including Latour—had thought definitively closed, to reconsider whether and how reflexive agency might continue to play a role in authoritative lawmaking in the Anthropocene.

Here, then, is our *question de confiance*: does acknowledging an original condition of interdependency between humans and other-than-humans also demand defenestrating collective self-legislation? Or might responding to the Anthropocene require, paradoxically, decentering collective self-legislation?

Arguing for the latter, I make the case that a more-than-human polity—a geopolity—calls for *lawmaking in the accusative*. Instead of the simple opposition between the affirmation or denial of the first-person plural perspective, lawmaking in the accusative means that the first-person plural person comes *second*; paradoxically, a “we” emerges as a response to whom addresses *us*. That the second-person comes first means that being addressed as an “us” precedes and conditions becoming a *we*. Collective self-legislation is always adventitious, always the outcome of a heterogenesis, never simply a return to itself by way of the Other, and, in this strong sense, irreducibly dependent on an Other it cannot control—so, too, a geopolity. Thus, the first-person plural perspective is the outcome of a responsive process, not what is given in advance thereof as the collective subject which acts. ~~Collective self-legislation~~, as one might put it.

The book falls into four parts. Part I examines the approaches to the modern concept of subjectivity developed by Martin Heidegger, Hans Blumenberg (with Latour as the main witness called to the stand in support of Blumenberg’s defense of modern subjectivity), and Donna Haraway. Its aim is to clarify the ontology of reflexive agency prevalent in modern constitutionalism and to open a pathway to an alternative reading of collective self-legislation, one which, paradoxically, *decenters* it. There are, however, two different senses of decenteration, which correspond to the two key Anthropocenic challenges to modern constitutionalism. There is, on the one hand, the decenteration of reflexive agency as such, that is, the decenteration of collective self-legislation. At issue here is decenteration as the heterogenesis of a polity, whether human or more-than-human. Geopolities, no less than modern polities, are decentered in this strong sense. On the other hand, there is the

decentration of what Haraway felicitously calls “human exceptionalism.” Constitutionally speaking, at issue is the decentering of lawmaking for human polities located in a natural environment. In this second sense, decentering concerns the emergence of geopolities composed of humans and other-than-humans. My ultimate claim is that making sense of authoritative lawmaking in the Anthropocene demands operating both decentrations.

Parts II and III deal with the first of these two senses of decentration, outlining an abridged phenomenology of what I will call lawmaking in the accusative. Taken together, they collectivize and radicalize the phenomenological concept of intentionality. Part II explores lawmaking as a modality of *bodily* responsiveness. Whereas embodiment has become a central issue across the social and human sciences, it is glaringly absent from views of lawmaking prevalent in modern constitutionalism. Insisting on the corporeality of lawmaking evokes an anonymous, and intercorporeal dimension of be-ing-with that conditions the possibility of a geopolity. Part III elucidates lawmaking as bodily *responsivity* across the intentional registers of perception, representation, and recognition. It argues that a primordial decentration is constitutive for the self-legislation of collectives, not merely in the negative sense that collectives cannot overcome their decentration but rather that, paradoxically, the collective emerges as a response to a summons, a solicitation, by the Other. This paradoxical reading of perception, representation, and recognition, namely, as the retroactive *creation of the given*, reorients these concepts to make sense of lawmaking in the accusative in a way that parries contemporary critiques of representationalism and of “liberal” recognition.

Part IV addresses the second sense of decentered collective self-legislation, namely, the decentration of human polities situated in a natural environment. Drawing on the findings of Parts II and III, it elucidates the structure and the emergence of geopolities composed of humans and other-than-humans, joined together in relations of interdependency. The core structural issue is the notion of *collective agency*: if geopolities, like all polities, are a modality of collective agency, in what sense is a geopolity a *collective*, such that one can meaningfully speak of collective *agency*? In what sense, in other words, does the notion of *legal* interdependency, whatever that might mean, vouch for the presumptive unity of a more-than-human group in joint action? The central genetic concept of Part IV is *Anthropocenic a-legalities*. In general, a-legality is the mode of legal experience in which withdrawal from a given legal order is how something appears in that order. As such, a-legality is the central manifestation of the political in legal orders; it calls into question how a legal order orders by drawing boundaries that include and exclude. If the articulation of and resistance to what counts as the unity, hence the boundaries, of a human polity has been at the heart of modernist conceptions of politics, the Anthropocene alludes, in this book, to situations that challenge the boundary between human polities and a natural environment, opening a space for destabilizing and reconfiguring the complex entwinement, specific to modern lawmaking, of cuts between humans and other-than-humans, on the one hand, and between legal subjects and the objects of relations between legal subjects, on the other. In this context, I will argue that Anthropocenic a-legalities are hyperphenomena that call forth legal responses, but which are in excess of any legal response. This, ultimately, characterizes geopolities, no less than human polities, as articulating and affirming a condition of irreducible interdependency and contingency.

Part I: Modern Subjectivity

The drive to become autonomous, to realize collective self-legislation, defines how modern constitutionalism has approached lawmaking, which is deemed binding if the members of a polity can view themselves not only as the object but also as the subject of lawmaking—as its authors. Our laws are authoritative if, when positing them, we succeed in articulating who we really are as a polity; such is the core of how modern constitutionalism has conceptualized lawmaking: collective self-legislation. As such, autonomous lawmaking bespeaks a politics of self-identity. To be sure, the identity of the polity as the subject and object of lawmaking is aspirational, perhaps an Idea in the Kantian sense. Self-identity is, for modern thinking, the telos of a process that, even if postponed indefinitely in historical time, marks the fulness of collective being, of a collective existence that, as autonomous, hence identical to itself, and truly one rather than divided, has ceased to be dependent on its Other. In its own way, this approach to the concept of (collective) agency reappropriates the Scholastic doctrine of the transcendentals, i.e., the properties of being *qua* being: *ens et unum et verum et bonum convertuntur*. But whereas every being (*ens*) displays these properties, Scholastic philosophy introduced a radical split between contingent, earth-bound beings, human and other-than-human, and necessary being: the *ens realissimum*, to whom unity, truth, and the good attach unconditionally. With the injunction to realize autonomy, to overcome dependent and heteronomous existence, modern philosophy responds to the radical challenge of contingent existence it inherits from the crisis of Scholastic philosophy, offering a new understanding of what counts as necessary—independent—being.

These preliminary, highly sketchy considerations set the stage for the forthcoming inquiry in various ways. First and negatively, they make clear that an inquiry into geoconstitutionalism is not a “turn to ontology,” as sundry interventions in critical theories of the Anthropocene are prone to trumpet. It is a turn—if a turn it is—from one ontology to another. Second, they show that an ontology undergirds any and every concept of agency. If agency, in its minimal characterization, means the capacity to change a state of affairs, then capacity and change are, ultimately, ontological categories. Whereas capacity speaks to *power*, change evokes the *emergence of being*. An ontology of agency brings into play the relation between agential power and the emergence of being. This relation is interpreted differently across the epochal thresholds leading from the Greek to the Scholastic conceptualization of agency, and then on from Scholastic thinking to modernity. It is perhaps not exaggerated to suggest that these different ontologies of agency are, philosophically speaking, what define these epochs as epochs of European thinking. So, third and most fundamentally, geoconstitutionalism invites a critical examination of the ontology of agency governing what might be called modernity’s reflexive turn, a turn tightly linked to the modern concept of subjectivity.

Part I approaches this theme in four steps. The first, in §1, examines Heidegger’s critique of the modern subject as the secularization of the Scholastic *causa sui*. The Anthropocene would mark, in his reading, the completion of European nihilism at work in a

self-grounding and self-ruling subject. Whereas Heidegger interprets the reflexivity of self-rule as unfolding a teleology of world domination, Blumenberg's reconstruction of the passage to modernity suggests that the self-preserving subject is a constitutively dependent being. The second step, worked out in §§2-7, explores how the latter interpretation of the subject, which Kant tersely characterizes as dependent spontaneity, offers a defense of the ontology of agency underpinning reflexive agency. I illustrate its key features with reference to Latour's accounts of technoscience and a politics of nature. His protestations notwithstanding, Latour's constitutionalism for the Anthropocene is thoroughly modern. A third step, in §§8-9, moves in the opposite direction, probing Haraway's proposal to overcome human exceptionalism and its reflexive reading of agency by substituting sympoiesis for autopoiesis, and holobionts for individuals. Closer consideration gives the lie to this double move: sympoiesis is the emergence of autopoiesis, and holobionts are individuals. As becomes progressively clear when probing these three approaches, making sense of lawmaking for geopolitics cannot economize on agential reflexivity. Yet they also expose problematic presuppositions that underlie the ontology of agency prevalent in modern constitutionalism. In the face of this impasse, the fourth and last step, in §10, conjectures that addressing these difficulties demands, paradoxically, the decentration of collective self-legislation. What this might mean, and how it might shed light on lawmaking in the Anthropocene, are the tasks to be addressed in the remainder of this book.

§1. The Secularization of the Scholastic *causa sui*

How, then, to make sense of the ontology underpinning the modern concept of (collective) self-rule? What historical conditions made the modern insistence on agential reflexivity possible, and what understanding of the relation between power and emergent being does it call forth? These issues call for clarification prior to any assessment of whether and how lawmaking might be conceptualized if it is to contribute to shedding light on authoritative lawmaking in the Anthropocene.

A first approach to this panoply of questions is Heidegger's "destruction" of European metaphysics, which aims to unearth, amongst others, the conditions governing the emergence and essence of the modern subject. It is, arguably, the most penetrating and profound of all philosophical critiques of reflexive agency. The essay, *Die Zeit des Weltbildes*, sets the stage for his inquiry:

[m]etaphysics grounds an era insofar as it gives it the ground of its essential configuration through a determinate interpretation of the existent and through a determinate conception of truth. This ground thoroughly governs all the appearances that characterize an era. Conversely, the metaphysical ground thereof must be recognizable in a sufficient reflection on these appearances.⁷

⁷ Martin Heidegger, "Die Zeit des Weltbildes," in *Holzwege* (Frankfurt: Vittorio Klostermann, 1980), 73.

Appealing to a Kantian distinction, one could say that if metaphysics is the *ratio essendi* of an era's principal manifestations, these manifestations are, in turn, the *ratio cognoscendi* of its metaphysical foundation.⁸

His essay works out this circularity in two movements. The first takes its point of departure in a reflection on modern science and reaches completion in the exhibition of its metaphysical foundation. For Heidegger, the essence of modern science is research (*Forschung*), which consists in opening an ontic region, e.g., nature, in conformity with a plan or project (*Entwurf*).⁹ Research goes in advance of—pro-jects—the researched in a two-fold manner. For the one, it anticipates how research is to proceed in the newly opened domain of being. Only with this anticipative disclosure of a domain as a subjective project does the modern concept of method, as the *self-binding* of the researcher, find its place. For the other, research goes in advance of the researched insofar as it prescribes the way in which what it opens up for research can manifest itself in its very being. With this anticipative design that stipulates the being of nature, science makes room for what it does not yet know; its vehicle is the modern experiment—the “experimental” character of research. That research projects means that it *pre-sents*, and this in the sense of positing for itself a design or image that fixes, *secures*, the being of the researched for further research. The world becomes an image (*Bild*) in the same process by which science becomes research. “Only when truth has been transformed into the certainty of presentation (*Vorstellung*), and only then, does science as research come into its own.”¹⁰

The immediately following sentence of Heidegger's essay announces the passage to its second movement, in which the *cogito* reveals the specificity of modern science. “Beginning with Descartes' metaphysics, the existent is determined as the objectivity of a presenting, and truth as the certainty of a presenting.” (*ibid.*, 85) Whereas the center of gravity of the essay's first movement is the world as a scientific image by way of its “project of Nature” (*Entwurf der Natur*), the second movement articulates the modern interpretation of human being as a subject. Indeed, *ego cogito ego sum*, the founding gesture of modern metaphysics, seals European's human being's novel interpretation of itself as a subject, as the ground of being and truth: as the *fundamentum absolutum inconcussum veritatis*—the absolute and unshakeable ground of truth. “When . . . human being becomes the first and proper *subjectum*, human being becomes the center of reference of beings as such and in general.” (*ibid.*, 86).

In what way is the modern subject a ground? A ground, moreover, that is both absolute and unshakeable? And why must it be the absolute and unshakeable ground of truth?

a) Ground. “The *subjectum*, the fundamental certainty, is the permanently secured co-presentation of presenting human being with the presented beings, whether human

⁸ This section draws and expands on, Hans Lindahl, “Collective Self-Legislation as an *Actus Impurus*: A Response to Heidegger's Critique of European Nihilism,” in *Continental Philosophy Review*, 3 (2008), 323-342.

⁹ This is, of course, a reference to Kant's notion of knowledge: “reason has insight only into that which it produces after a plan (*Entwurf*) of its own . . .” Immanuel Kant, *Critique of Pure Reason*, translated by Norman Kemp Smith (Hong Kong: MacMillan Education Ltd, 1987), Bxiv. See also Martin Heidegger, *Die Frage nach dem Ding: Zu Kants Lehre von den transzendentale Grundsätzen* (Tübingen: Max Niemeyer Verlag, 1987), 49-82.

¹⁰ Heidegger, *Die Zeit des Weltbildes*, 85.

or nonhuman, i.e., the objective.”¹¹ The subject makes good on its claim to being a ground inasmuch as it must necessarily be thought *along with* all beings other than itself as determining these, regardless of their ontic domain, in what they are, namely, as *objects*. Scholastic philosophy ascribes this twofold function, which defines the meaning of a ground, to God. The secularization is unmistakable, or so Heidegger argues. In the same move by which the object substitutes for the Scholastic *ens creatum*, so, too, the subject displaces the *ens increatum*. God had to die so that the subject could install itself on Earth.

b) The absolute ground. The subject is not merely a ground; it is marked out in the manner of an absolute or unconditioned ground. Wherein lies its unconditionality? “As *actus purus*, God is pure reality, therewith the causality of all reality.”¹² Over and against the *ens creatum*, God is an independent being, and this in a preeminent sense, namely, as the being that is neither posited nor brought into existence by another being. Ontologically, reflexivity accrues to the first cause of being, of the Being which, uncaused, causes itself: *causa sui*. Descartes’ sententious *ego cogito ergo sum* first assures for the modern subject the status of an unconditioned being: “The fundamental certainty is the always indubitably presentable and presented *me cogitare = me esse . . .*”¹³ Ego posits its own being in the very act of thinking; *me cogitare = me esse* opens up the way for a self-positing—an absolute—ground.

c) The absolute and unshakeable ground. But there is more: the subject is also the unshakeable ground of beings. “The highest being is pure, continuously fulfilled realization, *actus purus . . .* this being (*ens*) is not only what it is (*sua essentia*), but is, in what it is, always already permanent and invariable (*es suum esse non participans alio*).”¹⁴ If Scholastic philosophy attributed this property to the highest being, Descartes, by contrast, discovers a single unshakeable, because indubitable, proposition: *ego cogito ergo sum*. In and through all possible transformations, the ego alone remains permanent and invariable—identical to itself. “In Descartes’ principle, *ego cogito ergo sum*, human being knows itself unconditionally certain as the being whose being is most certain. Human being becomes the self-positing ground and measure of all certainty and truth.”¹⁵ Positing the subject as the ground of being finds its accomplished metaphysical formulation in the principle of sufficient reason, first voiced by Leibniz: *nihil est sine ratione*. If, in general, the principle states that there is a reason or ground for every being as to that it is and what it is, the ground of the principle itself is, for modernity, the subject, who grounds beings in this twofold way, and in so doing renders them objective. “Being as the objectivity of the object is brought into relation with the presentation (*Vorstellen*) of the subject. This relation between subject and object now holds as the domain for deciding about the being of beings, namely, about each and every being only as the objectivity of objects . . .”¹⁶

¹¹ Heidegger, *Die Zeit des Weltbildes*, 106. See also Martin Heidegger, “Der europäische Nihilismus,” in Martin Heidegger, *Nietzsche II* (Pfullingen: Günther Neske, 1989), 148-168.

¹² Martin Heidegger, “Die Metaphysik als Geschichte des Seins,” in Heidegger, *Nietzsche II*, 423.

¹³ Heidegger, “Die Zeit des Weltbildes,” 106.

¹⁴ Heidegger, “Die Metaphysik als Geschichte des Seins,” 415. The Scholastic dictum reads, literally: “you are your own being, not participating in another.”

¹⁵ Heidegger, “Der europäische Nihilismus,” in *Nietzsche II*, 134.

¹⁶ Martin Heidegger, *Der Satz vom Grund* (Pfullingen: Neske, 1986), 99.

d) The absolute and unshakeable ground of truth. The absoluteness and unshakeability of the subject are placed at the service of the subject's relation to *truth*, namely, as its ground. As such, the subject decides about its own truth and the truth of all beings other than itself. Human being becomes the *measure* of beings since "he decides from himself and for himself what is allowed to hold as being." Protagoras, too, held that "man is 'the measure of all things, of the existence of the things that are and the non-existence of the things that are not.'"¹⁷ But an entirely different understanding of the human relation to being goes from antiquity to modernity. For Greek thinking, in Heidegger's reading of measure (*métron*), Protagoras' aphorism meant that what appears, appears of and from itself to human being, its custodian. By contrast, the modern subject is the being that adjudicates in advance, and for itself, what *counts* and *can* count as being, i.e., as true.¹⁸ *Cogitare*, the exemplary form of agency in modernity, secularizes the *agere* of an *actus purus*. This is, in Heidegger's view, the implication of characterizing the ontological productivity of *cogitare* as a *vor-stellen*, as a pre-senting—a representation in Descartes' vocabulary. As a mode of agency, presenting is the self-positing act of the ego, whereby it posits something as the presented of its presenting: as its object. Objectivity is not merely presented in and from the "I think," but is presented *for* it, i.e., is placed at the subject's disposition. The true is the objective, where the objective (the *cogitatum*) is earmarked with the essential determination of its permanent and thoroughgoing availability for the subject: "... the presented is not only given as such but is posited as available."¹⁹

Technology as *Ge-stell*—the mode of revealing that discloses the existent as an inventory or stock (*Bestand*) available for exploitation—is, in tandem with modern science, the *ratio cognoscendi* of modern metaphysics.²⁰ Thus, the cogito principle inaugurates a novel ontology of agency in which the world is rendered as pure availability for human self-aggrandizement. One can hardly overstate the importance of the point Heidegger is making. Intrinsic to the modern subject is, in his view, the *loss of relationality*, the loss of the Other as Other, in the autarchy of a self-grounding. Such is the upshot of the Scholastic dictum cited heretofore by Heidegger: "you are your own being, not participating in another."

In this vein, Heidegger would view technoscientific responses to the Anthropocene as specific achievements of collective self-rule *qua* drive to humanize the world, such that human being everywhere encounters only itself.²¹ This is perhaps most visibly the case with geoengineering, when the question is raised, "[w]ho, if anyone, has the legitimate authority to make decisions regarding intentionally changing the world's climate?"²² The answer to this question is of the greatest planetary consequence; yet

¹⁷ Plato, *Theaetetus*, translated by Harold North Fowler (London: William Heinemann, 1987) Loeb Classical Library, 152.

¹⁸ Heidegger, Appendixes to "Die Zeit des Weltbildes," 100-104.

¹⁹ Heidegger, "Der europäische Nihilismus," 152. Similarly, Horkheimer and Adorno: "Human beings distance themselves from nature through thinking in order to place it before themselves in such a way that it can be dominated." Max Horkheimer and Theodor W. Adorno, *Dialektik der Aufklärung*, in Max Horkheimer, *Gesammelte Schriften* (Frankfurt: Fischer Taschenbuch Verlag, 1987), Vol. 5, 63.

²⁰ Martin Heidegger, "Die Frage nach der Technik," in Martin Heidegger, *Vorträge und Aufsätze* (Pfullingen: Neske, 1990), 9-40.

²¹ (*ibid*, 311) I refer to collective self-rule as the generic term for reflexive agency and to collective self-legislation when focusing on the reflexivity of lawmaking.

²² Jesse Reynolds, *The Governance of Solar Geoengineering: Managing Climate Change in the Anthropocene* (Cambridge: Cambridge University Press, 2019), 2.

whichever way the answer falls is immaterial from the point of view of the question itself. For humanization is already built into the question as such: a “no” that holds back from geoengineering presupposes an interpretation of the world as in principle manipulable and available for human determination. If “yes,” a recurrent ratcheting up of humanization becomes unavoidable, as James Lovelock makes clear: “The more we meddle with the Earth’s composition and try to fix its climate, the more we take on the responsibility for keeping the Earth a fit place for life . . .”²³ The drive to humanize the world is no less operative in the modes of de-extinction and re-wilding. So, also, the notions of “planetary boundaries,” the avowed aim of which is to “support a safe operating space for humanity,” and of “ecosystem services” for humanity, as per the UN Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services panel (IPBES).²⁴ For Heidegger, the Anthropocene is, indeed, the human era, but as the era in which European human being becomes a subject. The Anthropocene can only be a new geological epoch because it brings to completion a metaphysical epoch augured by the unconditioned *agere* of the Scholastic *actus purus* and subsequently secularized, in its first and decisive formulation, in Descartes’ *ego cogito ego sum*. Against those who would prefer to label this era the “Capitalocene” or “Plantationocene,” rather than the Anthropocene, Heidegger would retort that both labels are specific manifestations of the ontology of agency governing modern subjectivity.²⁵ The Anthropocene, he would aver, marks the historical and metaphysical triumph and completion of an era in which the subject holds sway; it is the definitive expression of European nihilism.

What about the politics and law of modernity? In particular, what about modernity’s interpretation of democratic lawmaking as collective self-legislation? This question is apposite because if collective self-rule grounds technoscience, it is also the clarion call of political and legal modernity. The thrust of this charge is devastating. No less than in technoscience, the modern concept of democratic lawmaking would unfold the teleology of untrammled world domination operative in collective self-rule. Heidegger’s critique of modern subjectivity suggests that the mathematization of nature by modern technoscience, as a condition for its conquest, can be extended to the juridification of society attendant on collective self-legislation. Modern technoscience is mathematical; modern politics is juridical. Indeed, positive law objectifies by subjectifying: by positing beings—human and other-than-human—as legal subjects with rights and obligations, positive law renders those beings available for assignment to one or the other finality of a collective policy. Modern technoscience is mathematical as a “determination of the thing, which is

²³ James Lovelock, *We Belong to Gaia* (London: Penguin Books, 2021), 73. The report “Reducing the Risks of Climate Overshoot,” published on September 14th, 2023, by the Climate Overshoot Committee advises governments to place a moratorium on geoengineering in light of the unintended consequences it can generate. See <https://www.overshootcommission.org/report> (accessed on September 14th, 2023).

²⁴ Johan Rockström et al. (2009): “Planetary Boundaries: Exploring the Safe Operating Space for Humanity,” in *Ecology and Society* (2009), 32; IPBES, “[Report of the Plenary of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services on the work of its seventh session](#) (2019) (last accessed on April 14th, 2023)

²⁵ Jason W. Moore, *Capitalism in the Web of Life: Ecology and the Accumulation of Capital* (London: Verso, 2015); Andreas Malm & Alf Hornborg, “The Geology of Mankind? A Critique of the Anthropocene Narrative,” in *The Anthropocene Review* 1 (2014) 1, 62-69; Maan Barua, “Plantationocene: A Vegetal Geography,” in *Annals of the American Association of Geographers* 113 (2023) 1, 13-29; Sophie Sapp Moore, Monique Allewaert, Pablo F. Gómez, and Gregg Mitman, “[Plantation Legacies](#),” in *Edge Effects*, first published on January 22, 2019, updated on May 15, 2021. (last accessed on June 17, 2023).

not experientially derived from the thing itself and which, nevertheless, underlies all determination of things, mak[ing] it possible, and mak[ing] room for it in the first place”²⁶ So, too, the positivity of modern law means that lawmaking *pro-jects* society; it is an *entwerfen* that determines in advance how social relations must show themselves to participants, and with which they must identify, if those relations are to be amenable to transformation by and for the sake of a polity: collective self-legislation. *Cogitare* is not limited to “thinking”; it functions as a placeholder for pro-jection, for the presentation of something by a subject as available for the subject. Lawmaking—law as a “making,” as a *positum*—is one of the modalities of *cogitare*, of the ontology of agency that obtained its initial and decisive formulation in Descartes’ *ego cogito ego sum*. “Modern lawmaking” is a pleonasm. This is how I would like to extrapolate Heidegger’s critique of subjectivity to the domain of lawmaking.

By these lights, when Hans Kelsen states that “to view the law (considered purely positivistically) as simply an external coercive system . . . is to conceive of it merely as a specific social technique,” one would be wrong to understand positive law merely as a means to an end, even if the law is a means to “what is socially desired.”²⁷ Certainly, human rights act as a shield against the instrumentalization of legal subjects when the law becomes a technique available for realizing any social end. But this shielding function of human rights is itself only thinkable against the background of the modern drive to humanize reality in all its manifestations. In the same way, the protection of nature by environmental lawmaking by no means presages, Heidegger would note, a turn away from European nihilism, for economic lawmaking and environmental lawmaking are two sides of the ontology of agency underpinning lawmaking. Just like with the question concerning geoengineering, only a being that can regulate the exploitation of nature through economic law can also protect it through environmental law; they are the two faces of legal domination. It would not be otherwise with lawmaking regulating de-extinction or rewilding, nor with legal measures that would forestall breaches of the planetary boundaries or that aim to secure ecosystem services. So, too, when law is put at the service of a “pre-figurative” environmental politics that engages in transformative, counterhegemonic resistance to capitalism.²⁸ No less than conventional environmental policies, a pre-figurative politics is a pro-ject, a collective *Entwurf* that posits for itself the reality of the real. What announces itself in the positivity of lawmaking is the ontology of agency that comes into its own with modern subjectivity: *Ge-stell*. Posited law is *ge-stellt*.

Thus, Heidegger renders acute the critical intention of the secularization theorem, i.e., the thesis that the discontinuity with the past which modernity claims for itself is in fact its opposite, namely, alienation from an origin hidden and continuously effectual in modern consciousness. Ultimately, the progressive articulation of the principle of autonomy in modernity’s philosophy, technoscience, culture, art, and *a fortiori* in its politics

²⁶ Heidegger, *Die Frage nach dem Ding*, 49-82.

²⁷ Hans Kelsen, *Introduction to the problems of legal theory*, translated by Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 1992), 28.

²⁸ See, e.g., Davina Cooper, “Towards an adventurous institutional politics: The prefigurative ‘as if’ and the reposing of what’s real,” in *The Sociological Review* 68 (2020) 5, 893-916; Laura Centemeri and Viviana Asara, “Prefiguration and Ecology: Understanding the Ontological Politics of Ecotopian Movements,” in Lara Monticelli (ed.), *The Future Is Now: An Introduction to Prefigurative Politics* (Bristol: Bristol University Press, 2020), 130-143.

and law, consists in the progressive accomplishment of European nihilism. Collective self-legislation as the principle governing the modern concept of lawmaking is, in its fundamental epochal significance, nihilistic, namely, “the essential non-thinking of the essence of the nothing.”²⁹ This, Heidegger maintains, is not an accidental feature in the historical development of modernity that could be reversed by adequate “corrective” measures. It follows from European’s humanity’s move, at the outset of modernity, to assure for human being the position God had enjoyed in Scholastic philosophy: a planetary grab.

Subjectivity, whether theoretical or practical, whether deployed in technoscience or in democratic lawmaking, is *eo ipse* the ontology of agency at work in modernity: a mode of being in which the telos of human self-empowerment is world conquest. In Hobbes’ words, “I put for a general inclination of all mankind, a perpetuall and restlesse desire of Power after power, that ceaseth onely in Death.”³⁰

§2. Radical Contingency and Self-Preservation

Does self-rule entail that the modern subject necessarily arrogates to itself the position of the Scholastic *causa sui*? Is another gloss of reflexivity possible in which technoscience and democracy are not necessarily modalities of the subject’s self-aggrandizement? Is the reflexivity deployed in modern theory and practice without further ado the expression of European nihilism? In brief, what concept of agency in its fundamental meaning of the power to bring forth being is involved in what I called the reflexive turn operative in the ontology of agency prevalent in modern constitutionalism?

Against the secularization theorem, Blumenberg proposes to read the passage to modernity as a response to a problem inherited from Scholastic philosophy. Although Blumenberg’s critique is directed against Karl Löwith and Carl Schmitt, it is no less germane to Heidegger: “[w]hat mainly occurred in the process that is interpreted as secularization . . . should be described not as the transposition of authentically theological contents into secularized alienation from their origin but as the reoccupation of answer positions that had become vacant and whose corresponding questions could not be eliminated.”³¹ Indeed,

[t]he Middle Ages left behind a question of which antiquity was unaware . . . In the face of the entire stock of ideas which it had received from ancient metaphysics, the Middle Ages forced itself to conceive of nothing, or the void (*nihil*), almost as the normal metaphysical state of affairs and to think of the creation from nothing as a miracle continually effected against this normality.³²

The Scholastic answer to this problem focuses on the doctrine of continual creation and divine concursion: “The answer was the extravagant claim of a constant, inward, and most radical dependence of the world on God.” (*ibid*) Leibniz’s famous question—“Why is there something rather than nothing?”—neatly captures the Scholastic concept of contingency: the existent world is dependent on *causa sui* not only in what it is but also in

²⁹ Heidegger, “Der europäische Nihilismus,” 54.

³⁰ Thomas Hobbes, *Leviathan* (London: Penguin Books, 1985), 161.

³¹ Hans Blumenberg, *The Legitimacy of the Modern Age*, translated by Robert Wallace (Cambridge, MA: The MIT Press, 1986), 65.

³² Hans Blumenberg, “Self-Preservation and Inertia: On the Constitution of Modern Rationality,” in D.E. Christensen et al. (eds.), *Contemporary German Philosophy* (University Park, PA: The Pennsylvania State University Press, 1983), Vol. 3, 209-256, 218.

that it is.³³ Blumenberg has meticulously documented the progressive sharpening of the concept of contingency in late Scholasticism to the benefit of what he terms “theological absolutism,” wherein Nominalism’s magnification of God’s *potentia absoluta* goes hand in hand with the reduction of human being to powerlessness in respect of a world no longer dependable or enduring in its actuality. In its final and critical phase, Scholastic contingency brings about the disappearance of a world-order for European human being. In the face of the extreme pressure to which contingency submits the Scholastic interpretation of human being and its relation to the world, relying on God for the continued preservation of the world is no longer either plausible or acceptable. The *transitive* conservation of the world in being—the answer of theology to the problem of the *nihil* it had invented—is reoccupied in modernity by intransitive conservation: *conservatio sui* or self-preservation.³⁴ One could perhaps speak of the ontology of agency accruing to the subject as modernity’s insurrection against radical contingency.

As concerns knowledge, the initial situation of extreme existential uncertainty triggered by radical contingency is recreated by the *malin génie*. The *cogito* is the first response to this situation, but by no means the last. Indeed, the problem of radical contingency continues to reverberate in contemporary philosophies of science.

Latour’s description of human agency in modern technoscience is a late manifestation of the modern insurrection against this condition of radical epistemological uncertainty. His description of a laboratory experiment in the Amazon Forest is a brilliant, perhaps unwitting, confirmation of the specificity of modern technoscience. At issue, he points out, is “the epistemological question of scientific reference.”³⁵ The Amazon experiment’s aim is to establish whether the forest is advancing into or retreating from the savanna, given that a certain species of fire-resistant trees that usually only grows in the savanna has been sighted at the edge of the forest; some specimens were even located as much as ten meters into the forest. (*ibid.*, 26) Latour, never one for milquetoast statements, announces that his purpose in describing the experiment is to show that “scientists master the world, but only if the world comes to them in the form of two-dimensional, superposable, combinable inscriptions.” He immediately adds that “[i]t has always been the same story, ever since Thales stood at the foot of the Pyramids.” (*ibid.*, 29)

Is there really no difference between Thales and Latour and his scientists?

Describing the work of the group of scientists, he points out that “[t]he sciences do not speak of the world but, rather, construct representations that seem always to push it away, but also to bring it closer.” (*ibid.*, 30) Laboratories are the sites for these representational practices; experiments, their vehicle; “the production of certainty,” their quest. (*ibid.*, 30). And so, botanists and a pedologist plot a zone at the edge of the forest, setting

³³ “Contingency expresses the ontic constitution of a world created from nothing and destined to disappearance, a world conserved in being only through the divine will, [a world] which is measured against the idea of an unconditioned and necessary being.” Hans Blumenberg, “Kontingenz,” in Hans D. Betz *et al.* (eds.), *Die Religion in Geschichte und Gegenwart. Handwörterbuch für Theologie und Religionswissenschaft* (Tübingen: J.C.B. Mohr, 1959), Vol. 3, 1794. See also Hans Blumenberg, “Ordnungsschwund und Selbstbehauptung. Über Weltverstehen und Weltverhalten im Werden der technische Epoche,” in *Das Problem der Ordnung. Verhandlungen des VI deutschen Kongresses für Philosophie*, eds. H. Kuhn and F. Wiedmann (Meisenheim: Verlag Anton Hain, 1962).

³⁴ For a collection of essays on the modern subject and self-preservation, see Hans Ebeling (ed.), *Subjektivität und Selbsterhaltung: Beiträge zur Diagnose der Moderne* (Frankfurt: Suhrkamp, 1976).

³⁵ Bruno Latour, *Pandora’s Hope: Essays on the Reality of Science Studies* (Cambridge, MA: Harvard University Press, 1999), 26.

up a grid of coordinates and dividing it into smaller squares rendered available for yielding knowledge through a methodologically secured pathway. Experimental research begins with the extraction of soil samples, follows through with archiving, comparing, classifying, synthesizing, and writing, and ends, provisionally, with the publication of an answer to their research question, an answer which other scientists may seek to confirm or falsify in due course.

Two aspects of Latour's description are of interest here. First, to acquire knowledge is to acquire (provisional) *mastery* over an original situation characterized as epistemologically chaotic: "René [one of the scientists described by Latour; not Descartes, but certainly one of his recent avatars! - HL] is the master of the phenomenon that a few days earlier was tucked away in the soil, invisible, and dispersed in an undifferentiated continuum." (*ibid.*, 53) As he also puts it, "[t]he pace [of scientific research] must be accelerated if we are to avoid being overwhelmed by worlds of trees, plants, leaves, paper, texts. Knowledge derives from such *movements*, not from simple contemplation of the forest." (*ibid.*, 39) Yes, indeed. How far removed this interpretation of knowledge stands from Greek *theōría* and *thaumàzein*! If Greek thinking expresses wonder about a reality that gives itself of itself to human contemplation, uneasiness and restlessness drive modern technoscience's disclosure of the world, submitting its findings to rigorous "ordeals" (*épreuves*) to secure the referent, hence the certainty, of knowledge. Insisting that scientific knowledge does, after all, disclose "the things themselves" echoes the early modern experience of the loss of reliability of the world for human cognition.³⁶ Although Latour's characterization of technoscientific agency as oriented towards "world mastery" is erased from and even rejected in his later writings, he never ceases to qualify laboratory experimentation as the process of submitting its findings to exacting ordeals to guarantee the reference of technoscientific knowledge.

Interestingly, Latour's ethnographic study of the *Conseil d'État* also elucidates the "ordeal of the process of review" to which this venerable French institution submits both drafts of administrative lawmaking and the dossiers that materialize the passage of law. Like his description of the methodologically guaranteed objectivity of a scientific judgment, his painstaking analysis of the "passage" of the law effectively highlights the extent to which a methodological self-binding aims to secure the objectivity of legal judgments in the modern understanding of lawmaking, an objectivity that is about finding the right balance between realizing the values of justice and legal certainty.³⁷

Latour emphasizes, secondly, the extractive and transformative—in this twofold sense abstractive—character of representational processes in technoscience, something entirely different to the Greek understanding of mimesis.

³⁶ *Ibid.*, 16. I return briefly in §11 to Latour's claim, in *Pandora's Hope* and elsewhere, that the disconnection between words and things, hence the need to reconnect them, harkens back to Plato's *Gorgias* and the "fear of mob rule." *Quod non*. See Bruno Latour, *Science in Action: How to Follow Scientists and Engineers through Society* (Cambridge, MA: Harvard University Press, 1987), 179-195, for the different senses in which scientific research is a trial.

³⁷ See Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'État*, translated by Marina Brilman and Alain Pottage (Cambridge: Polity Press, 2010), 192, 141, 69. I discuss Latour's reconstruction of legal objectivation in §19, as exemplified by the Conseil d'État's judgments, arguing that the maturation of a file, which Bruno Latour calls the *mise en dossier* leading up to a final judgment, is, phenomenologically speaking, a *mise en intention*. Conversely, a *mise en dossier* casts light on the materiality of intentional processes, an issue at the core of post-phenomenological accounts of technique.

For the world to become knowable, it must become a laboratory. If virgin forest is to be transformed into a laboratory, the forest must be prepared to be rendered as a diagram. In the *extraction* of a diagram from a confusion of plants, scattered locations become marked and measured points linked by cotton threads that materialize (or spiritualize) lines in a network composed of a succession of triangles.³⁸

Succinctly, “in losing the forest, we win knowledge of it.” (*ibid.*, 38) Technoscientific research, as described by Latour, involves an active, methodologically guaranteed, *distancing* from what is given, with a view to making the given *yield* what it does not yield of itself. “[T]he botanist gains so much more from her collection than she loses by distancing herself from the forest.” (*ibid.*, 37-38) Only thus, through the mediated and ever repeatable chain of references circulating from the real to a statement about the real and back, can technoscience guarantee the reliability of knowledge: its objectivity.

As becomes clear from Latour’s description of the soil experiment, the object of knowledge has its counterpart in a subject who stipulates the method that establishes what is and can be given to cognition, such that the soil samples can deliver knowledge available for confirmation or falsification in new experiments: an *Entwurf*. Only through a strict methodological self-stipulation and self-regulation of what can appear and how it must appear does technoscience pass “from ignorance to certainty, from weakness to strength, from inferiority in the face of the world to the domination of the world by the human eye.” (*ibid.*, 30)

Certainly, the laboratory experiment at the edge of the Amazon Forest is not the separation of wax into its primary and secondary qualities as in Descartes, a separation which, in Latour’s view, is exemplary for the modernity of the moderns. But his admired scientists carry forward the Cartesian distancing from what gives itself of itself in our everyday perception as a condition for guaranteeing the objectivity animating modern technoscience. The experiment is a late variation on what Edmund Husserl describes as the “idealization” of nature exemplified by Galileo, who constructed pure geometrical figures that are not found in concrete experience, but which are possible because these figures are commensurate with it.³⁹ No less than in Galileo’s physics, those aspects of the forest which do not lend themselves to methodologically secured objectivation are declared subjective and, for that reason, secondary. To be real, for Latour and his botanists and pedologist, is to be objective. In Latour’s words, “[r]eality . . . is what resists all efforts at modification” because it has been stabilized through ordeals, yet a reality that always is susceptible to being questioned and banished into the domain of the unreal by new ordeals.⁴⁰ The ontology of agency presupposed by his description of “science in action” trades in the lived world with all its secondary qualities for the world of scientific objectivity—the very move he calls “modern.” If the laboratory experiment with the soil samples is the *ratio cognoscendi* of the modern subject, the ontology of agency informing the modern subject is the *ratio essendi* of the botanists and pedologist at work in the Amazon, whose work Latour celebrates so fulsomely.

³⁸ Latour, *Pandora’s Hope*, 43-44; italics added.

³⁹ Edmund Husserl, *The Crisis of European Sciences and Transcendental Phenomenology*, translated by David Carr (Evanston, IL: Northwestern University Press, 1970), 301, 343. See also Heidegger, *Die Frage nach dem Ding*, 53-82.

⁴⁰ Latour, *Science in Action*, 13; 179.

In brief, the *nihil* continues to haunt Latour's account of technoscience. Much more than he is perhaps aware of or prepared to admit, Latour's description of scientific research reprises Heidegger's description of technoscience as a *Herausforderung*, a challenging that extracts truth from what is given. In Blumenberg's more accurate genealogy of modernity, Latour's description of technoscience exemplifies the modern concept of reality of which the *cogito* is the first but by no means the only formulation, namely, reality as

*as the result of a realization, as a successively constituted reliability, as a consistency that is never finally and absolutely granted; that remains dependent on a future in which elements can appear that could shatter the previous consistency and banish what had been recognized as real into unreality . . . This concept of reality [is] . . . necessarily related to the never complete, never fully exhausted unity of a world, the partial experienceability of which never allows of excluding other contexts of experience and thus other worlds.*⁴¹

Latour aptly illustrates this concept of reality and its attendant interpretation of the ontological productivity of human agency when describing "science in the making." No less importantly, the sedimented knowledge of "ready-made science" determines what counts as a fact, but never completely. Scientific controversy has been closed, but only provisionally, always susceptible to new controversy; a "black box" has been closed, but can be opened again, even if the intellectual and monetary costs of doing so become ever more onerous for the iconoclast.⁴²

So much for technoscience; now the novel ontology of agency prevalent in modern practice, including theorizations of democratic lawmaking. The initial situation of extreme epistemological uncertainty Descartes recreates by way of the *malin génie* finds its political and legal counterpart in Hobbes' state of nature. The social contract, which he explicitly characterizes as the exercise of self-preservation, is the first political and legal response to this perilous condition, inaugurating an insurrectional ontology of agency that obtains completion in Marx's notion of revolutionary praxis, as formulated in the 11th Thesis on Feuerbach. In a negative formulation of what he calls "right reason," Hobbes notes that "the whole breach of the laws of nature consists in the false reasoning, or rather folly of those men, who see not those duties they are necessarily to perform towards others in order to their own conservation."⁴³

Importantly, Hobbes' characterization of right reason reveals a key feature of self-preservation: its *relationality*. At the heart of the social contract lies the insight that self-relations pass through relations to the Other. Hobbes argues, accordingly, that self-preservation demands preservation of the Other, both of which within the unity of a commonwealth. *Self-preservation* is preservation-*with*. Hobbes' subversive reinterpretation of the Scholastic *recta ratio*, itself a transformation of the ancient Greek *orthòs lógos*,

⁴¹ Hans Blumenberg, "Wirklichkeitsbegriff und Möglichkeit des Romans," in Hans-Robert Jauss (ed.), *Poetik und Hermeneutik 1* (Munich: Eidos Verlag, 1964), 9-27, 11.

⁴² The characterization of technoscientific cognition as a "making" is no coincidence: it reoccupies—not secularizes!—the problem inherited from the Scholastic notion of divine power. Aquinas, when laying out the plan of the *Summa Contra Gentiles*, announces the subject matter to be treated under the general heading of divine power: "the bringing forth of things into being." "Bringing into being" receives its fundamental determination as a "making" (*facere*) or "doing" (*agere*). See Thomas Aquinas, *Summa Contra Gentiles*, translated by James F. Anderson (Notre Dame, IN: University of Notre Dame Press, 1975) II, 5.

⁴³ Thomas Hobbes, *Man and Citizen* (Indianapolis, IN: Hackett Publishing Company, 1991), 123.

affirms that subjectivity is mediated subjectivity, and, as such, intersubjectivity. Two aspects of Hobbes' account of right reason merit further attention at this point. For the one, and emphatically, it shows that a relational ontology is not foreign to modernity, as new materialism often claims, paradigmatically captured by Haraway's phrase, "becoming with," which over the years has acquired, sociologically speaking, the status of an esoteric badge of allegiance. The aim of the social contract as a model of the genesis of collectivity is to show that one *becomes* a citizen *with* others, where "with" speaks to the reciprocal acknowledgment of an irreducible condition of interdependency. The point is, instead, that modern political and legal philosophies have limited relations of interdependency to human beings, characterizing relations to other-than-humans as subject – object relations.⁴⁴ For the other, the reader will have noticed that, when characterizing right reason, Hobbes posits *duties or obligations*, not rights, as the core of intersubjective relationships. In this, he anticipates contemporary interventions by Kathleen Birrell, Daniel Matthews, and Scott Veitch, who, drawing on Simone Weil, insist on the primacy of obligations, even there where the contemporary rights-discourse seems to have obscured them.⁴⁵ I return to these issues in Part III, when reconceptualizing lawmaking as a response to a solicitation or summons by the other, human or other-than-human, as the primordial manifestation of an obligation and with respect to which the emergence of a legal obligation is strictly derivative.

Yet, whereas intersubjectivity retains an instrumental character in Hobbes, its properly ethical reading appears later, with the notion of reciprocal recognition. Indeed, the passage from transitive to intransitive preservation resonates three centuries later, in Rawls' appeal to reciprocity as the key to the self-grounding of a polity:

[T]he question of reciprocity arises when free persons, who have no moral authority over one another and who are engaging in or find themselves participating in a joint activity, are among themselves settling upon or acknowledging the rules which define it and which determine their respective shares in its benefits and burdens.⁴⁶

So, too, reciprocity is at the root of the democratic identity principle—collective self-legislation—as formulated by Habermas: "the idea of self-legislation by citizens demands . . . that those who are subject to the law as its addressees can also understand themselves as the authors of the law."⁴⁷ In Habermas' discursive reading of self-preservation, a practical discourse demands that "everyone . . . take the perspective of everyone else, and thus

⁴⁴ In a particularly insightful analysis, Cassirer shows how calculus and its concept of a function profoundly transform modern science, whereby an ontology of substances gives way to an ontology of relations. See Ernst Cassirer, *Substanzbegriff und Funktionsbegriff: Untersuchungen über die Grundfragen der Erkenntniskritik* (Berlin: Verlag von Bruno Cassirer, 1910).

⁴⁵ See Kathleen Birrell & Daniel Matthews, "Re-storying Laws for the Anthropocene: Rights, Obligations, and an Ethics of Encounter," in *Law and Critique* 31 (2020) 3, 275-292; Scott Veitch, *Obligations* (London: Routledge, 2021).

⁴⁶ John Rawls, "Justice as Reciprocity," in John Rawls, *Collected Papers* (Cambridge, MA: Harvard University Press, 1999), 208.

⁴⁷ Jürgen Habermas, *Faktizität und Geltung* (Frankfurt: Suhrkamp, 1992), 153. Self-preservation also underpins Pettit's interpretation of non-domination in *Republicanism: A Theory of Freedom and Government*, reprint. (Oxford: Oxford University Press, 2002). So, too, Darwall's interpretation of the encounter between the second- and first-person in Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Cambridge, MA: Harvard University Press, 2009).

project herself into the understandings of self and world of all others.”⁴⁸ Reciprocal recognition is also the core of communitarian readings of democracy, even if they posit a pre-given substantive unity as the condition for such recognition.⁴⁹

Politically, reciprocal recognition characterizes a polity the members of which can view each other as free and equal beings because they are the subject and object of law-making. If and when this transpires, the polity and its participant agents would become autonomous, having become identical to themselves; they would become one, having left division behind; justice, the practical pendant of truth, would reign, there where injustice had triumphed; there would be consensus about the common good, where there had been dissensus. If and only if this set of conditions is met would the polity’s existence be necessary rather than contingent. *Ens et unum et verum et bonum convertuntur*. It would be the collective that satisfies the principle of sufficient reason, the collective that is fully self-grounded.

Collective self-preservation in the form of a “politics of nature” oriented towards achieving the political and legal autonomy of a geopolity is a late example of the modern response to a condition of extreme existential uncertainty confronting humankind, now in the guise of the Anthropocene. To act politically, as Latour puts it, is to move in the “circle” of representation and obedience: “if [the circle] is constantly taken up again . . . we gradually become . . . those who receive from *on high* the orders that they have whispered *from below* to their representatives. We are no longer heteronomous; we become proud of our autonomy.”⁵⁰ Lawmaking is ever more authoritative if reprises of the circle realize over time the identity of the polity as the (represented) subject and as the (obedient) object of lawmaking: the modern principle of democratic identity, but now including other-than-human actants. The parallel with Habermas is unmistakable, for whom “solidarity with the other as one of us refers to the flexible ‘we’ of a community that resists all substantial determinations and extends its permeable boundaries ever further.”⁵¹ For Latour and Habermas, reflexivity means autonomy.

If modern cosmopolitanism equalizes all human beings as potential citizens of a global polity, the notion of an “actant” allows Latour to equalize all beings, human and other-than-human, as potential citizens of a geopolity. Like his interpretation of technoscience, so also Latour’s interpretation of democratic lawmaking carries forward the modern principle of self-preservation, even if humans and other-than-humans now stand together as a polity represented by a “parliament of things.”⁵² It would be beyond churlish to deny the importance of Latour’s original and daring break with the modern presupposition that human polities are located in a natural environment. But this break should not make us lose sight of a more fundamental continuity. Although his reappropriation of

⁴⁸ Jürgen Habermas, “Reconciliation through the Public Use of Reason: Remarks on John Rawls’ ‘Political Liberalism,’” in *Journal of Philosophy* 92 (1995): 117.

⁴⁹ See, e.g., David Miller, *On Nationality* (Oxford: Oxford University Press, 1997).

⁵⁰ Bruno Latour, *An Inquiry into Modes of Existence: An Anthropology of the Moderns*, translated by Catherine Porter (Cambridge, MA: Harvard University Press, 2013), 345.

⁵¹ Jürgen Habermas, *The Postnational Constellation*, translated by Max Pensky (Cambridge: Polity Press, 2001), 148.

⁵² Bruno Latour, *Politiques de la nature: Comment faire entrer les sciences en démocratie* (Paris: Éditions La Découverte, 1999); Bruno Latour, “From Realpolitik to Dingpolitik or How to Make Things Public,” in Bruno Latour & Peter Weibel, *Making Things Public: Atmospheres of Democracy* (Karlsruhe/Cambridge, MA: ZKM Center for Art and Media Karlsruhe/The MIT Press, 2005).

collective self-legislation operates a “turn” towards the other-than-human in law that de-centers the human self, his politics of nature stands at the service of the progressive *self-centering* of the “Earthbound,” who, ever less dependent on the Other and ever more autonomous, come to rule themselves.⁵³ The price Latour pays for his critique of modern anthropocentrism is to introduce and extoll centrism in a new guise, as follows from how he describes the first-person plural perspective, representation, and political reflexivity as ingredient elements of authoritative lawmaking in the Anthropocene. The polity in which the Earthbound were finally autonomous, having become identical to themselves, would be well and truly the *ens realissimum*, to whom unity, truth, and the good would attach unconditionally. Certainly, our present situation offers ever less hope that such a polity will materialize. But that is not the point, normatively speaking, however catastrophic our current situation may be: the notion of an *ens realissimum* is the normative standard governing Latour’s approach to a democratic geopolity, regardless of whether it is “realistic.”

Two flaws in the institutional architecture of Latour’s “parliament of things” follow from this reading of political representation. As he describes it, when the excluded Other, whether human or other-than-human, demands inclusion in a polity, a higher chamber decides on who belongs to the polity, after which a lower chamber seeks to obtain integration of the excluded Other without also demanding its assimilation. But the higher chamber’s question—“How many are we?”—is part and parcel of the lower chamber’s question, “Who are we?”⁵⁴ To decide whether an Other, human or other-than-human, may be included is to adjudicate on whether its inclusion is consistent with sustaining the polity’s identity. Latour’s is a unicameral parliament. The second flaw turns on the presupposition that inclusion, through acts of representation, can take place without exclusion/assimilation. *For Latour, like for Habermas, democratic representation is the process of unification as totalization.* He elides the representational difference that emerges between something and its representations, hence that the Other is more and other than how it can be represented. Contributing, even if imperfectly, to making this difference politically visible is one of the functions of a bicameral parliament in a democracy. For Latour, the problem bedeviling constitutionalism can be solved because, ultimately, political plurality is reducible to legal unity: “they,” the excluded other-than-humans (and humans), are the not-yet-we. Difference is a difference that can be governed, controlled, through an ever-expanding process of political inclusion.

These problems come to the fore, even if discretely, in Latour’s account of what he calls the “constitutional law of the Earth” simulated by a group of students at the Parisian Théâtre des Amandiers in May 2015.⁵⁵ Delegates from some thirty countries got together to represent a range of human and other than human actors and their interests with a view to a negotiated articulation of what joins together the represented as the collective of the Earthbound. One by one the delegations introduce themselves, each claiming a condition of sovereign equality with all the others—*e.g.*, “Forest,” “France,” “India,” “Indigenous Peoples,” “Atmosphere,” “Australia,” “Oceans,” “Soils,” “the Maldives,” “Land,”

⁵³Bruno Latour, *Facing Gaia: Eight Lectures on the New Climatic Regime*, translated by Catherine Porter (Cambridge: Polity Press, 2017).

⁵⁴ Latour, *Politiques de la nature*, 139-178.

⁵⁵ Latour, *Facing Gaia*, 256.

“Endangered Species”—joined together in a “post-natural assembly.” (*ibid.*, 265) The question immediately arises: who gets to select the actors that are to be represented in the assembly? Why these actors and not others? The obvious response, in line with Latour’s totalizing reading of democratic inclusion, is that the delegates invited to convene in a contemporary *Jeu de Pomme* are the outcome of an initial selection, which can later be expanded by that very same assembly to include new delegates of actors who demand inclusion in the collective of the Earthbound. But a deeper problem comes to the surface: are “Forest,” “Ocean,” “Soils,” “Atmosphere,” “Land,” and “Endangered Species” any less categories drawn from the repertoire of categories which guide how (certain) human groups engage with the world than, say, “France,” “India,” “Indigenous Peoples,” and “Australia”? Is not the process of selection that preceded the constituent moment guided by criteria of relevance and importance that certainly can be modified once the collective of the Earthbound has been constituted, but which cannot evade a certain anthropocentrism, a certain *preference in the difference*, as the condition for positing “proud sovereign equality,” as Latour puts it, between certain actors and not others?

Hannah Arendt’s defense of political equality casts light on what precedes claims to sovereign equality among the members of a constituent assembly and their constituencies. “We are not born equal,” she notes; “we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights.”⁵⁶ And she refers approvingly to a passage in the *Nicomachean Ethics* in which “Aristotle explains that a community is not made out of equals, but on the contrary of people who are different and unequal. The community comes into being through equalizing, *isasthèna*.”⁵⁷ No less than in a human polity, so too an equalization process precedes the equality asserted by the participants in a “post-natural assembly.” But what Arendt and Latour fail to notice is that there can be no equalization other than from a certain standpoint, i.e., according to a criterion or standard of comparison, which means that the price for equalization is the *inequalization* of those who, falling outside that criterion, are rendered through exclusion from the collective. Equalization/inequalization holds for a more than human collective no less than for a human collective.

But then: is a flat ontology ever flat? If equality is the outcome of an equalization, is not a flat ontology the outcome of a flattening, a *flattening out of difference*? And is the flattening out of difference not a polite paraphrase of what goes by the name of assimilation?

In defense of symmetrical relations between actants, and in opposition to the asymmetrical relations modernity introduces between the human and the other than human, Latour reproaches phenomenology that “[phenomenology deals only with the world-for-a-human-consciousness . . . Instead of exploring the ways we can shift from one standpoint to another, [it condemns us to] always be fixed in the human one . . .”⁵⁸ Yet, does not the selection of actors to be represented in the “post-natural assembly” at the Théâtre des Amandiers continue to be a *human assemblage*, namely, an assemblage of actors who appear, however provisionally, as relevant and important from a (certain) human standpoint or perspective? Is not *e pluribus unum*—i.e., a difference within a

⁵⁶ Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace, 1951), 301.

⁵⁷ Hannah Arendt, “Philosophy and Politics,” *Social Research* 57 (1990), 83.

⁵⁸ Latour, *Pandora’s Hope*, 9.

bounded unity, a prior closure according to a certain human criterion of what is relevant and important for membership—the condition of possibility of “shifting from one standpoint to another”? Nietzsche: “Equality for equals, inequality for unequals”—that would be the true voice of justice: and, what follows from it, “Never make equal what is unequal.”⁵⁹

In Part III we return to consider how phenomenology addresses this aporia in terms of the paradox whereby representation creates the given. For the moment, I submit that a strong theory of alterity is beyond the reach of the concepts of representation and reflexivity undergirding Latour’s politics of nature. In its absence, one would have to ask what interpretation of *politics* is available to a politics of nature.

Having been keelhailed by Latour for his Stygian interpretation of technoscience, Heidegger would wryly note that Latour’s geopolity reenacts the metaphysics of modern subjectivity as a historical process of progressive self-aggrandizement in response to the *nihil*. He would add that both legs of Latour’s interpretation of a politics of nature—technoscience as an exacting trial and democracy as totalizing inclusion—bring to philosophical completion the long incubation period of the principle of sufficient reason. Boyle may have won the controversy with Hobbes about the relation between politics and epistemology at stake in the vacuum pump, as Latour opines.⁶⁰ But, in hindsight, Hobbes’ characterization of self-preservation as a teleology of progressive self-aggrandizement informs Latour’s conceptualization of collective agency in democratic politics. The *nihil* continues to haunt Latour’s politics of nature, not only in its new and perhaps final avatar, the Anthropocene, but also in terms of the ontology of political agency with which modern constitutionalism responds to the challenge of radical contingency.

§3. Dependent Spontaneity

But what, precisely, is this ontology of agency that obtains philosophical articulation in the principle of self-preservation? What happens to agential reflexivity if it is the outcome of a reoccupation, as argued by Blumenberg, rather than the secularization of *causa sui*, as averred by Heidegger?

The ontological specificity of self-preservation appears if we view the *agere* of an *actus purus* as the boundary concept with respect to which modernity comes to interpret human being’s relation to the existent world. The modern concept of human agency is determined in a two-fold way by the agency of an *actus purus*: negatively, as non-creative, i.e., as conditioned in its activity by a pre-given material; positively, as productive, i.e., as supplying the form (order) of the realized. This was already the case for Descartes, despite what the formula *cogito ergo sum* might suggest. As his replies to Mersenne’s objections make clear, when someone utters the proposition *cogito ergo sum*, “. . . in fact he learns it from experiencing in his own case that it is impossible that he should think without existing.”⁶¹ Consequently, the relation between thinking and existence—more generally: between human agency and existence—is conditioned. Existence is not implied in

⁵⁹ Friedrich Nietzsche, *Twilight of the Idols and the Anti-Christ*, translated by Reginald John Hollingdale (London: Penguin, 1990), 113.

⁶⁰ Bruno Latour, *Nous n’avons jamais été modernes : Essai d’anthropologie symétrique* (Paris: Éditions La Découverte, 1991), 26-46.

⁶¹ Descartes, *Meditations on First Philosophy*, translated by J. Cottingham et al. (Cambridge: Cambridge University Press, 1990), vol. 2, 17 (AT-VII-25).

the concept of thinking (acting), but is rather its condition, a condition on which human agency must rely and cannot supply from itself.

This is what Kant, in the second edition of the *Critique of Pure Reason*, calls dependent spontaneity or conditioned production, where *ego sum* captures the dependent or conditioned character of human being, and *ego cogito* its productive activity.⁶² “If the receptivity of our mind, its power of receiving representations in so far as it is in any way affected, is to be entitled sensibility, then the mind’s power of producing representations from itself, the spontaneity of knowledge should be called the understanding.” (*ibid.*, A51/B75) Whereas God’s mode of agency is what Kant calls “mere self-activity” (*bloße Selbsttätigkeit*), hence absolute and independent because capable of supplying its productions entirely from itself (*ex nihilo*), the mode of self-activity deployed in human self-preservation is absolute but *dependent*. Although the “I think,” in the sense of a judgment connecting subject and predicate in accordance with the principle of non-contradiction, precedes experience as an absolute beginning of causation, the understanding depends on—is conditioned by—*something that affects sensibility*. “Our mode of intuition is dependent on the existence of the object, and is therefore possible only if the subject’s faculty of representation is affected by that object.” (*ibid.*, B72) Dependent spontaneity entails that *ego cogito*—self-activity as the formal cause of the being of beings—can only take place on the basis of the subject’s passivity: *ego sum*, I am affected.

Thus, it is fair to say that the modern notion of subjectivity obtains its first explicit articulation with Kant’s notion of dependent spontaneity, even if it underwent important transformations in later philosophies of subjectivity. Being *affected*—acted upon—by the other precedes the ego’s activity as its material condition of possibility. Thus, self-activity and dependency stand in a constitutive and co-original relation to each other. Although, in Kant, the “I think” precedes experience as an absolute beginning, the understanding depends on—is conditioned by—something that affects sensibility, and, as such, precedes it. Modern subjectivity is a *passive agency*.

Although Kant’s first *Critique* focuses on human cognition, dependent spontaneity also informs the modern concepts of labor and praxis. Labor, Marx notes, is the formal determination of the determinable:

The use values, coat, linen, &c., i.e., the bodies of commodities, are combinations of two elements – matter and labour. If we take away the useful labour expended upon them, a material substratum is always left, which is furnished by Nature without the help of man. The latter can work only as Nature does, that is by changing the form of matter.⁶³

It is not otherwise with praxis, as attested by Marx’s famous thesis of the *Eighteenth Brumaire*: “Men make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past.”⁶⁴ Spontaneity as the subject’s self-activity means that human beings make their own history; but praxis depends on historically given conditions it has not and cannot supply from itself. Making history as praxis presupposes the historicity of praxis. On the one hand, in its historical conditioning and concretion, human

⁶² Kant, *Critique of Pure Reason*, B72.

⁶³ Karl Marx, *Capital*, translated by Samuel Moore and Edward Aveling and edited by Friedrich Engels (Moscow: Progress Publishers, 1995), Vol. 1, chapter 1, 31. (last accessed on April 27th, 2023)

⁶⁴ Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*. (Last accessed on April 27th, 2023)

existence is given, hence the expression of finitude. On the other, the subject relates to its existence as the condition of and opportunity for self-activity, where self-activity means that the subject finds its peculiar fulfillment in giving itself ends and realizing these from the range of opportunities opened by its historically conditioned existence. In contrast to the agency of a *causa sui* transcendent to the world it creates, human agency, as dependent existence, is *immanent* to the world in which and on which it acts. Human agency as being-toward-the-world-with-others is always already being-in-the-world-with-others.⁶⁵ Worldliness is intraworldliness.

The World Social Forum's orotund slogan, "Another world is possible," is a good indicator of the transformed interpretation of the relation between existent and possible being that accompanies the immanent ontological productivity of the modern subject. In Scholasticism's transitive conservation, the existent world is but one of the indefinitely many possible worlds that God could have created, subject only to the condition of logical possibility, namely, the principle of non-contradiction. Thus, logical possibility precedes existence. From the perspective of divine power, the existent world-order is merely *one* of the possible ways of ordering the world, hence that *other* worlds and world-orders were possible. The past tense of "were" attests to the fact that the world, as it exists, was binding on human beings because it was a divine creation. Intransitive conservation, by contrast, inverts the ontological primacy of the relation between existent and possible being: human activity realizes possible worlds by transforming the existent world.

The modern inversion of the relation between the existent world and possible worlds can be traced back to Kant's discussion of inner possibility in his pre-critical essay, "The Only Possible Argument for a Demonstration of the Existence of God," which, in substance, advances three fundamental theses: 1) what exists must be possible; 2) the existent precedes the possible; 3) in contrast to God, whose *ex nihilo* ontological productivity is only subject to the principle of non-contradiction, human ontological productivity concerns *real* possibility: not only must the possible be non-contradictory, it must also be realizable, which means that human activity depends on and transforms the concrete material conditions made available by the existent world.⁶⁶

As the slogan of the WSR makes patent, when the existent world is an obstacle to human self-activity, it can be levelled down to the status of a contingent fact that functions as the material condition for the realization of possible being, subject to the logical condition of non-contradiction. But, strictly, speaking, because the subject's immanent ontological productivity is tied to a concrete situation that conditions its realizing activity, the properly modern insight is not, as the WSF's slogan reads, "Another world is possible," but rather, "Other worlds are possible." The implication of this insight is, as I have

⁶⁵ It is no coincidence that Heidegger's fundamental ontology, regardless of its differences with Marxism, provocatively calls laboring in a workshop "praxis," and that its interruption reveals Dasein's existence as Being-in-the-world-with-others, a world that is always already pre- and co-given with praxis. That it is no coincidence follows from Heidegger's announcement, at the outset of *Being and Time*, that the Analytic of Dasein envisages an ontological radicalization of the *sum* of *ego cogito sum*: existence as constitutively dependent being. See Martin Heidegger, *Sein und Zeit* (Tübingen: Max Niemeyer Verlag, 1986) §10.

⁶⁶ Immanuel Kant, "Der einzig mögliche Beweisgrund zu einer Demonstration des Daseins Gottes," in Kant, *Werke*, edited by Wilhelm Weischedel (Darmstadt: Wissenschaftliche Buchgesellschaft, 1983), vol. 2, A17-18.

elsewhere argued, that *there are human emancipations in the plural, not the emancipation of humanity in the singular*.⁶⁷

Therefore, when Boaventura de Sousa Santos, one of the instigators of the World Social Forum, contends that “reality is not reduced to what exists and that most of what does not exist could and deserves to exist,” he moves on the ground of the novel concept of possibility that emerges in the passage from transitive conservation in Scholastic philosophy to intransitive conservation in modernity.⁶⁸ The oppression of peoples and individuals in the Global South by capitalism, colonialism, and patriarchy demands and sparks multitudinous emancipatory initiatives oriented to bringing forth new worlds, he notes. To this extent at least, Santos firmly embraces the interpretation of Western modernity he understands himself as critiquing. Yes, Santos can take “some distance vis-à-vis the Western critical tradition,” insofar as “it [does] not challenge the horizon of possibilities” available to that tradition, but, *no*, only insofar as he does not take any distance from the concept of a “horizon of possibilities” that emerged with the Western critical tradition, and which is arguably its defining feature. (*ibid.*, 20) His is not, despite his claim, a “radical break with modern Western ways of thinking and acting”; he advocates an insurgent ontology of agency—a “subaltern, insurrectional cosmopolitanism,” as he calls it—in response to the continuing experience of radical contingency called forth by the Scholastic *nihil*, to which modern subjectivity is a response.⁶⁹

Immanent ontological productivity is paired to a novel concept of critique, which targets two forms of forgetfulness to which dependent spontaneity is constantly exposed. For the one, *self-loss* ensues when the subject is oblivious to its spontaneity or productive relation to reality. In other words, the subject loses itself when reality takes on an autonomous and self-sufficient standing over against it. The critique of the fetish in the first chapter of *Capital* is exemplary for the unmasking of self-loss, to which the *Paris Manuscripts* refer as self-estrangement (*Selbstentfremdung*).⁷⁰ So, too, a wide range of contemporary critiques of representationalism, that is, of knowledge as being no more than the reproduction of a pre-given reality. For the other, *self-aggrandizement* is forgetfulness about the conditioned character of the subject’s ontological productivity. To critique negligence about the subject’s dependent condition is to protect the subject from the hubris of Icarus. Kant’s restriction of the metaphysical endeavor to an ontology of appearances is an epistemological implication of the critique of self-aggrandizement. The cited thesis of the *Eighteenth Brumaire* demands of praxis that it understand the structure of capitalism, i.e., the historically given social reality that conditions it, if praxis is to be transformative. Both deviations—self-loss and self-aggrandizement—are rendered possible by the precarious and unstable constitution of the subject as a dependent spontaneity. Marx

⁶⁷ Hans Lindahl, “Inside and Outside Global Law: the Julius Stone Address 2018,” in the *Sydney Law Review*, 41 (2019) 1, 1-34

⁶⁸ See Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (London: Routledge, 2016), 8.

⁶⁹ *Ibid.*, 134, 135. Ernst Bloch’s reflections on existence and possibility in *The Principle of Hope*, to which Santos refers when calling for emancipation from oppression, are a late echo and working through of this inversion. In this, Santos and Bloch are thoroughly modern thinkers. See Santos, *Epistemologies of the South*, 182-184; Ernst Bloch, *Das Prinzip Hoffnung* (Frankfurt: Suhrkamp, 1985), vol. 1, chapters 17-18.

⁷⁰ Karl Marx, *Economic and Philosophic Manuscripts*, translated by Martin Milligan (Moscow: Progress Publishers, 1959), 31.

draws the implication of the immanent ontological productivity of the subject when insisting, in his early work, that critique is *immanent* critique.

In this vein, Heidegger's critique of European nihilism would mean that the Anthropocene is indeed an *essential possibility* of the ontology of agency undergirding the modern subject, namely, a self-aggrandizement oblivious to the subject's irreducibly dependent condition. But, against Heidegger, dependent spontaneity does not *entail* that the Anthropocene is the end of the subject's agency, where end means both culmination and conclusion. Subjectivity as dependent spontaneity opens a space for critiquing the Anthropocene, namely, a self-critique that exposes the obliviousness of the subject's agency to its irreducibly dependent condition. In fact, one may wonder whether contemporary demands to embrace the human condition of irreducible dependency and vulnerability move beyond modernity or whether they carry forward one of its essential possibilities, namely, the radicalization of the *sum of cogito sum*.

§4. Autonomy

Dependent spontaneity is pivotal, moreover, to the development of a new concept of freedom, which Kant's *Grundlegung* characterizes as the "destructive" and "constructive" moments of *autonomy*. If humans are initially given over to a world-order that appears as resisting their self-activity and determining the scope of their possibilities (heteronomy), the first, destructive moment of freedom consists in rendering the extant world-order non-binding and determinable for human agency. This is what Adorno calls "critique," namely, "opposition against given opinions and, therewith, also against existent, seemingly necessary institutions, against everything merely posited that legitimates itself with its existence."⁷¹ In its second, ontologically productive moment, human agency determines the determinable. In this second moment, the determining activity of human agency is norm-producing, giving existence an order that meets the condition of non-contradiction (a universal law).⁷²

The Marxist concepts of labor and revolutionary praxis faithfully follow the path of this double movement of modern freedom. At the outset, the subject laboring in the capitalist mode of production encounters "[a] commodity [as] . . . a mysterious thing, simply because in it the social character of men's labour appears to them as an objective character stamped upon the product of that labour. . ."⁷³ Commodities are "real" to their producers in the manner of autarchic and self-contained entities that resist the subject's self-activity. If reality as reification and hypostatization is the essence of fetishism, a critique of political economy exercises negative freedom by exposing the objectivity of the fetish as mere "objective appearance," levelling down the capitalist mode of production to a non-binding and self-contradictory given. (*ibid.*, 52) This levelling down of what resists the subject's self-activity renders the capitalist mode of production available for revolutionary transformation through the enactment of a classless society rid of the internal contradictions of capitalism in which the subject can come to recognize and realize itself

⁷¹ Theodor W. Adorno, "Kritik," in Rolf Tiedemann (ed.), *Gesammelte Schriften* (Frankfurt: Suhrkamp, 1977), Vol. 10.2, *Stichworte*, 785-786. This is perhaps the most incisive formulation of the principle of sufficient reason I am aware of.

⁷² Immanuel Kant, *Groundwork of the Metaphysics of Morals*, translated by H.J. Paton (London: Routledge, 1991), BA97, BA119.

⁷³ Marx, *Capital*, vol. 1, 47.

through labor as the formal source of its products: positive freedom. This double movement of freedom is the trajectory of *emancipation*, the name modernity gives to an insurrectional ontology of agency that leads from actual to the realization of possible existence.

Latour's depiction of technoscientific research as it unfolds in the laboratory experiment in the Amazon Forest epitomizes the modern concept of epistemological freedom. When avouching that "in losing the forest, we win knowledge of it," he actualizes the twofold movement of modern freedom as described by Kant. Negatively, losing the forest operates a distancing that depletes the forest of its reality and binding character as it gives itself of itself to perception. Experimental research begins as an "undoing"; it is a critical "un-making" or "dis-assembling" of what is given and which, as Latour puts it in a passage cited earlier, threatens to "overwhelm" us: a late echo of a condition of original epistemological precarity and self-loss. Positively, the series of transformations of the soil samples leading up to a scientific judgment is the positive moment of epistemological freedom, a formal determination of the given that lends it its meaning, subject to the minimal condition of a non-contradictory proposition. The laboratory experiment is a "doing" in the mode of a representing; a critical "remaking" or "reassembling" of what is given. Through these transformations, technoscientific research secures the subject against an original condition of epistemological vulnerability, passing from "ignorance to certainty, from weakness to strength, from inferiority in the face of the world to the domination of the world by the human eye." Cognitive self-preservation.

So, too, Latour's account of political agency deploys the negative and positive movements Kant assigns to practical freedom. Negatively, political agency, as described by Latour, saps the extant social order of its reality and binding character, unmasking the split between a human polity and a natural environment as a mere given, i.e., as a contingent, hence transformable, historical manifestation of what counts as a collective.⁷⁴ In his own way, and despite his critique of the critique of the fetish, Latour re-enacts negative freedom, unmasking modernity as an ideology or, in Gramsci's terms, as a hegemonic interpretation of sociality. Against this ideological formation, actor network theory is an undoing or disassembling: "We have never been modern!" Positively, the prior equalization and determination of humans and other-than-humans as actants sets free an ever-more inclusive process of political representation through which "we gradually become . . . those who receive from *on high* the orders that they have whispered *from below* to their representatives. We are no longer heteronomous; we become proud of our autonomy." Actor network theory does after undoing; it reassembles after disassembling the social.⁷⁵ Whereas modern political and legal theories have focused solely on emancipating humans from domination and an original condition of insecurity, both social and natural, a politics of nature heralds the emancipation of other-than-humans by incorporating nature into society. It proposes an emancipatory pathway that, responding to the radical challenge of the Anthropocene, progressively realizes practical freedom as political reciprocity between humans and other-than-humans, who, no longer split, sundered as culture and nature, relate to each other in freedom and equality. Collective autonomy

⁷⁴ As exhaustively documented by Philippe Descola and Eduardo Viveiros de Castro, among others. See Philippe Descola, *Par-delà nature et culture* (Paris: Gallimard, 2005); Viveiros de Castro, *The Relative Native*.

⁷⁵ Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford: Oxford University Press, 2007).

remains the norm of a historical process when history becomes terrestrial rather than territorial. In this, Latour's constitutionalism has always been modern.

The question about collectivity and collective agency raised at the outset of this book reemerges: is the notion of reciprocity underpinning the modern concept of emancipation adequate to making sense of interdependency between humans, and between humans and other-than-humans joined together in a geopolity?

Pending an answer to this question, which will occupy us extensively in Parts III and IV, I conclude this section by provisionally reconstructing the ontology of the subject and its agency as follows: *an agent that stands in a form-giving, and in this sense ontologically productive but dependent, relation to what resists it, understood as the material condition of its agency.*

§5. Securing the Dependent Subject

This reconstruction is provisional because clarifying the motif of resistance to the subject's existence yields further insight into its dependent condition. Here again, Kant provides the key, insofar as what he calls the "affection" of the understanding by what reaches it through sensibility entails that the subject always already finds itself on this side of a happening or occurrence without which it cannot sustain itself, and which it cannot explain or render intelligible from itself. To be a subject is to be exposed to the Other. No less than a meditation about life, self-preservation is also a meditation about death, not as a peripheral or secondary moment of subjectivity, but as co-original with self-activity. In its reaction to the *nihil* the cogito principle takes over death as a constitutive moment of subjectivity. "Constitutive," in that death finds a place in the basic constitution of the subject. In effect, existence concentrates in itself not only the positive condition for the subject's self-activity, but also the moment of danger. In existence, the subject encounters death, its own death, as its own continuous possibility.

This fundamental characterization of human being gives rise to a novel—the properly modern—concept of security. For the problem is not merely how the destruction of the self-sustaining ego could be postponed. The modern reoccupation of continuous creation inverts the problem and renders it acute by asking how it might be possible to prolong the ego's existence. This is the decisive point: for modernity, *securing the continuation of self-activity in the face of resistance thereto becomes the proper object of human agency.* One can scarcely overestimate the significance of this insight for the modern era: the *nihil*, in the mode of a condition of constitutive insecurity, comes to define modernity's understanding of human existence, to which human agency responds by seeking to achieve control over the conditions that govern its existence. Securing the subject, i.e., creating and maintaining the existential conditions required for continued self-activity, becomes the elemental response of modernity to this original condition of insecurity. The so-called self-sufficient and possessive "liberal" subject, a favorite target of neomaterialist pillorying, is certainly not the modern subject in its basic condition of dependency, but rather its ideological inversion.

Although one of its essential possibilities, the contemporary "securitization" of society through biopolitics, as described by Foucault and others, by no means exhausts the

significance of the modern concept of security.⁷⁶ Indeed, biopolitics and the securitization of society are modalities of the modern drive to secure the subject. But they are only possible against the background of the modern concept of subjectivity, without exhausting either its purport or existential possibilities. Indeed, securing the subject also drives the proliferation of initiatives to *empower the disempowered*, such as the Black Lives Matter, LGBTQIA+, the Argentinian *piqueteros*, MeToo, Occupy Wall Street, and Arab Spring movements. In each of these and myriad other cases, securing the subject means transforming the (bio-)social structures that resist its self-activity.⁷⁷

Turning to the law, the emergence and consolidation of human rights is perhaps the most significant legal manifestation of the modern drive to secure the subject. Indeed, the decisive shift in the notion of security attendant on self-preservation is the *ratio* of human rights. Regardless of their classification—political and civil; social, economic, and cultural; collective and “green”; digital; and so forth—, all human rights share a common aim, namely, to secure the continued self-activity of individuals and groups by empowering them to act in the face of their constitutive condition of dependency. Their very proliferation is intelligible as an element of modernity’s multifaceted insurrection against radical contingency.

Resistance to arbitrary power certainly precedes modernity. But the central role that the rule of law occupies in political modernity is only understandable when arbitrariness comes to mean a breach of the proper function of public power, namely, to secure the subject’s continued self-activity. It is thus, with Gerald Postema, but also against his ahistorical gloss of the rule of law, that one should read the tight connection he posits between arbitrariness and security:

Throughout its long history, the idea [of law’s rule] is shaped by the following twofold thought: (1) a polity is well-ordered, and its members are accorded the dignity rightfully demanded by them in the name of their common membership, when its members are secured against the arbitrary exercise of power, and (2) law, because of its distinctive features, is especially and perhaps uniquely capable of providing such security.⁷⁸

Importantly, legal certainty is in modern times acknowledged as part and parcel of the rule of law, namely, that legal orders must provide their subjects with the ability to regulate their conduct in accordance with the order’s norms. In so doing, a legal order sets out the conditions for individual autonomy, in particular the protection of legitimate interests and expectations. The rule of law in general, and legal certainty in particular, aim to secure the individual’s self-activity.

In brief, human rights and the rule of law are the *ratio cognoscendi* of the modern subject; the modern subject is the *ratio essendi* of human rights and the rule of law.

Welfare economics is a further and capital (yes!) manifestation of modernity’s drive to secure the subject’s continued self-activity. Chapter 18 of *The General Theory of Employment, Interest and Money* plays a pivotal role in the architecture of the book that,

⁷⁶ Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978*, translated by Graham Burchell (New York: Palgrave MacMillan, 2007).

⁷⁷ Castells refers to contemporary social movements as turning “powerlessness . . . into empowerment.” Manuel Castells, *Networks of Outrage and Hope: Social Movements in the Internet Age* (Cambridge: Polity Press, 2015), 46.

⁷⁸ Gerald J. Postema, *Law’s Rule: The Nature, Value, and Viability of the Rule of Law* (Oxford: Oxford University Press, 2022), 18.

by all accounts, lays out the theoretical groundwork for welfare economics. Having summarized his main theoretical innovations concerning the principle of effective demand—the propensity to consume, the marginal efficacy of capital, and the theories of interest and money—, Keynes passes to consider the “actual” economic system. He remarks:

[i]t is an outstanding characteristic of the economic system in which we live that, whilst it is subject to severe fluctuations in respect of output and employment, it is not violently unstable. Indeed, it seems capable of remaining in a chronic condition of sub-normal activity for a considerable period without any marked tendency towards either recovery or towards complete collapse. Moreover, the evidence indicates that full, or even approximately full, employment is of rare and short-lived occurrence.”⁷⁹

Keynes’ diagnosis is bleak: a capitalist economic system resists full employment, thereby generating a constitutive condition of insecurity for market participants. Following up on this diagnosis, the closing sentence of the chapter reads, for economists, as a rhetorical flourish that adds nothing to what they did not already know. And yet, its epochal significance is clear: “[t]he unimpeded rule of the above conditions is a fact of observation concerning the world as it is or has been, and not a necessary principle which cannot be changed.” (*ibid.*, 254) The thrust of *The General Theory of Employment, Interest and Money* is to deprive the economic system, as it presents itself in experience, of its persuasive power, of its reality, revealing it as the material condition for transformative interventions that aim to secure human existence through allocation, distribution, and stabilization.⁸⁰ See here a late echo of the destructive and constructive dimensions of practical freedom, as depicted by Kant.

The parallel with the 11th Thesis on Feuerbach is unmistakable: “Philosophers have hitherto only *interpreted* the world in various ways; the point is to *change* it.” The central significance Marx and Engels attach to *need* articulates the modern understanding of the subject as a dependent being, that is, of a *lack* as constitutive of the subject’s being, and of labor and praxis as a “vocation and a task”:

The proletarian . . . who like every human being has the vocation of satisfying his needs and who is not in a position to satisfy even the needs that he has in common with all human beings, . . . This proletarian is . . . confronted with the real task of revolutionizing his conditions.⁸¹

What Keynesian welfare economics does for capitalism, Marxist praxis does for communism. Both interpret capitalism as resisting the continued self-activity of economic agents. Whatever their differences, and these are significant, both are rooted, *qua* studies in economic agency, in the ontology that makes of labor a manifestation of dependent spontaneity. More generally, both articulate a mode of practical agency that seeks to overcome insecurity as constitutive of a dependent existence.⁸² Welfare economics and the

⁷⁹ John Maynard Keynes, *The General Theory of Employment, Interest and Money* (Cambridge: Cambridge University Press, 1991), 249-250.

⁸⁰ The economist will readily recognize in these modalities of economic intervention the classification put forth by Richard and Peggy Musgrave in *Public Finance in Theory and Practice* (New York: McGraw-Hill Book Company, 1973), 3-22.

⁸¹ Karl Marx and Friedrich Engels, *The German Ideology*, transcribed by Tim Delaney, Bob Schwartz, Brian Basgen (Moscow: Progress Publishers, 1968)

⁸² For an account of the transformations in the ontology of change going from Aristotle to Marx, see Hans Lindahl, “Possibility, Actuality, Rupture: Constituent Power and the Ontology of Change,” in *Constellations*, 22 (2015) 2, 163-174.

Marxist critique of capitalism are the *ratio cognoscendi* of the modern subject; the modern subject is the *ratio essendi* of welfare economics and the Marxist critique of capitalism.

§6. Nature as Standing Reserve

The foregoing considerations on the novel concept of security accruing to dependent spontaneity allow me, finally, to make good on a conjecture I have held in reserve till now, namely, that the Anthropocene not only challenges the ontology of reflexive agency subtending the modern subject but also that lawmaking concerns human polities located in a natural environment. Specifically, I suggested at the outset of this book that modern constitutionalism restricts authoritative lawmaking to human polities *because* it is the expression of how modernity has interpreted collective self-legislation.

Consider, first, Rawls' contribution to modern constitutionalism. Having characterized a society as "a cooperative venture for mutual advantage," Rawls famously posits the original position—a contemporary version of the state of nature—as the point of departure for a theory of social justice. He notes: "among the essential features of this situation is that no one knows his place in society, in the distribution of natural assets and abilities, his intelligence, strength, and the like."⁸³ Not only is nature an asset in the state of nature but, more generally, the "natural," whether nature as such or "natural" talents and capacities, is the domain of a contingent existence that, resisting the conditions required for the flourishing of all citizens, demands transformation to the benefit of the less fortunate members of society:

[B]y arranging inequalities for reciprocal advantage and by abstaining from the exploitation of the contingencies of nature and social circumstance within a framework of equal liberty, persons express their respect for one another in the very constitution of their society. (*ibid.*, 179)

Collective self-legislation as the self-grounding of society obtains if, amongst others, natural assets are distributed among the members of a polity in accordance with the famous two principles of social justice. See the internal connection between the two presuppositions prevalent in modern constitutionalism: social justice as the expression of collective self-rule involves the disclosure of nature as an asset or resource available for distribution among a human polity's members with a view to securing their self-activity in the mode of a "life-project."

Critiquing Rawls' attempt to clarify the conditions demanded by a perfectly just society, Amartya Sen proposes a comparative approach that tracks the advancement or retreat of justice in existing societies. Central to his account of social justice is the notion of capability, namely, "the power to do something."⁸⁴ This preliminary definition of a capability, which reprises the hoary ontological characterization of power as an "I can," is subsequently specified as "a person's capability to do things he or she has a reason to value." (*ibid.*, 231) Sen is keen to contrast the capabilities approach to the resources approach, whether utilitarian or Rawlsian. Whereas these focus on the means required to achieve social justice, the capabilities approach "is particularly concerned with correcting this focus on means rather than on the opportunity to fulfil ends and the substantive

⁸³ John Rawls, *A Theory of Justice* (Cambridge, MA: The Belknap Press, 1971), 12.

⁸⁴ Amartya Sen, *The Idea of Justice* (London: Penguin Books, 2010), 19.

freedom to achieve those reasoned ends.” (*ibid.*, 234) For Sen, justice is advanced to the extent that its members grant each other equality in capabilities, that is, become equally free to do those things they have a reason to value. This is what renders collective self-legislation the measure of the advancement or retreat of justice. Whatever their differences, Sen shares this much with Rawls: nature is a means, one of the resources that secures the self-activity of human beings, i.e., to “do what they have a reason to value.”

Carrying forward this line of reasoning, Sen defends “sustainable development” by noting that “the value of the environment cannot be just a matter of what there is but must also consist of the opportunities it offers to people. The impact of the environment on human lives must be among the principal considerations in assessing the value of the environment.” (*ibid.*, 248) Although he does not explicitly tease out this implication, the nexus is clear: the human right to a healthy environment is one of the ways to empower “the preservation and enhancement of the quality of human life.” (*ibid.*, 248) Like with all human rights, the universality of a right to a healthy environment speaks to a historically concrete and specific interpretation of the human: the modern subject. Although Sen later qualifies this statement, indicating that one may attach importance to the preservation of other species for reasons other than “enhancing our own living standards,” their protection empowers human beings to do what they view as valuable: “development is fundamentally an empowering process, and this power can be used to preserve and enrich the environment, and not only to decimate it.” (*ibid.*, 249)

It is not otherwise with so-called “green growth,” which is at the heart of the “European Growth Model” proposed by the European Commission as part of its “European Green Deal.” As succinctly defined by the OECD, green growth consists in “fostering economic growth and development, while ensuring that natural assets continue to provide the resources and environmental services on which our well-being relies.”⁸⁵ Development and growth are premised on overcoming the resistance of the environment to the subject’s self-activity. Sustainability and greenness qualify development and growth as necessary conditions for the continuation of self-activity. Indeed, development must be sustainable, and growth must be green if the continued self-activity of the subject is to be possible. What is sustained in development and green growth is the subject. Both are recent avatars of the modern concept of security.

So, too, Habermas’s theory of communicative action. Having disparaged the Romantic “resurrection of nature,” he champions a “cognitive instrumental relation” to nature as the material condition required for human existence.⁸⁶ This relation takes shape via scientific development, “productive labor of the second order,” as it creates new and more powerful forces of production. And there is the productive process itself, productive labor of the first order, which Habermas interprets as the emancipatory transformation of nature that renders it fit for human purposes.⁸⁷ Yet again, labor is conceptualized in

⁸⁵ OECD, “[Green growth and sustainable development.](#)” (last accessed on July 12, 2023); European Commission, “[European Growth Model: Towards a green, digital and resilient economy: our European Growth Model.](#)” (last accessed on July 12, 2023).

⁸⁶ Jürgen Habermas, *Knowledge and Human Interests* (Boston: Beacon Press, 1971), 32-33; Jürgen Habermas, “A Reply to my Critics,” in John B. Thompson and David Held, eds., *Habermas: Critical Debates* (Cambridge, MA: MIT Press, 1982), 243-45.

⁸⁷ Habermas, *Knowledge and Human Interests*, 34ff; Jürgen Habermas, *Theory and Practice*, translated by John Viertel (Cambridge: Polity Press, 1986).

terms of overcoming resistance to the subject's self-activity. This gloss evokes, of course, Marx's characterization of labor in *Capital*, namely, "changing the form of matter."⁸⁸ Arguing that the "production paradigm" is incapable of yielding social unity, Habermas assigns to communicative action the task of determining the ends to which production is to be assigned, such that all those who are the object of the legal norms positing those ends can also view themselves as the authors of the norms: collective self-legislation by a human polity located in a natural environment. The disclosure of nature as the material condition required to secure the continued self-activity of the subject underwrites and joins together instrumental-cognitive and communicative action.

Habermas' distinction between instrumental-cognitive and communicative action effectively depoliticizes labor by placing politics on the side of communicative action. Habermas stands shoulder to shoulder here with Arendt. Suturing what Habermas and Arendt have severed is at the core of Emiliios Christodoulidis' recent, particularly incisive and courageous contribution to political constitutionalism. He seeks to "rehabilitat[e] the anthropological concept of non-alienated labour as a *constitutively co-operative endeavour*. The meaning of labour is in this constitutively tied to the process of *collective self-realisation*."⁸⁹ As concerns the "meaning" of labor, Christodoulidis cites the *Grundrisse*, in which "labour is living, form-giving fire," a characterization that reappears in *Capital*, and which Christodoulidis shares with Habermas.⁹⁰ But, against Habermas, Christodoulidis aims to recover labor's collective character, unmasking "the alienation of labour propitiated by the market capture of politics, and, responding to its injustice, exploring how constitutional theory could contribute to the emancipation of labor in the mode of *autogestion* or "workers' self-management [as] the basis of the self-governing republic."⁹¹ Collective self-legislation in the mode of *autogestion* is a variation on the presupposition that law concerns a human polity located in a natural environment. Christodoulidis' searing indictment of political and economic theories that abet the market capture of constitutionalism—which would include all of the aforementioned contributions, including Keynes'—reveals the homology that conjoins labor and praxis as modalities of the modern drive to secure the subject against what resists its self-activity. However critical of those theories, his contribution to political constitutionalism shares with them the insurrectional ontology of agency driving a subject that secures itself against the vagaries of nature by levelling it down to the status of the merely given, rendered available for human self-realization.

Thus, to conclude this section, the Anthropocene challenges the presupposition that lawmaking is about human polities located in a natural environment. It does so by challenging the presupposition that (a) the subject is a form-giving agent dependent on what must be given to it and which it cannot supply from itself, where (b) dependency means no more than that the given, when it resists the subject's self-activity, can be levelled down to the material condition for a transformative process oriented to securing the subject's continued existence. If, negatively, nature harbors resistance to the subject's

⁸⁸ See footnote 58 above for the full citation from *Capital*.

⁸⁹ Emiliios Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* (Cambridge: Cambridge University Press, 2021), 74.

⁹⁰ Karl Marx, *Grundrisse: Foundations of the Critique of Political Economy* (London: Penguin Books, 1973), Notebook III/IV.

⁹¹ Christodoulidis, *The Redress of Law*, 484

continued self-activity, ultimately as the subject's death, nature—both nature without and nature within—is the positive condition for a transformative process that secures the subject's continued self-activity. This ontology of agency is the common thread running through all the foregoing contributions to modern constitutionalism, and many others as well. Overcoming the *nihil* is the forgotten spring driving modern constitutionalism's disclosure of nature as the determinable of a determining process. Heidegger would no doubt characterize each of the aforesaid contributions to modern constitutionalism—those of Rawls, Sen, Habermas, and Christodoulidis—as illustrations of *Ge-stell*: nature as standing reserve.

The implication of this reconstruction of modern security is clear. Although I very much agree with Christodoulidis that the market capture of constitutionalism must be resisted, this is, on its own, not enough to address the challenge of the Anthropocene. Another concept of labor is required, different to the concept of labor underpinning what might broadly be called the political economy informing the disclosure of nature as the material condition for the subject's self-activity. Heidegger, returning to my reading of his critique of the modern subject in §1, would be justified in protesting that the Capitalocene cannot capture the full breadth of the Anthropocenic challenge. No less than in capitalism, the concept of labor underpinning Marx's critique of capital and defense of communism discloses nature as "cheap nature," to borrow Jason Moore's formulation.⁹² The reconceptualization of lawmaking demanded by geoconstitutionalism must go hand in hand with a reconceptualization of labor and its correlate: nature.⁹³

In the same vein, while acknowledging its important contribution to a critique of constitutional formalism, it is not enough to recover a Marxist theory of material constitutionalism for a theory of authoritative lawmaking in the Anthropocene if it continues to rely on the concepts of labor and nature the Anthropocene calls into question. Reconceptualizing the ontology of labor and nature undergirding modern constitutionalism requires reconceptualizing the materiality of the material constitution.⁹⁴

§7. Embodied Interdependency

It is tempting, at this point, to jettison altogether the ontology informing reflexive agency. Many others have done so. I will not. As we have seen, reflexive agency is central to Latour's politics of nature, regardless of the problematic account of representation he endorses. As we shall see in §§8-9, it reemerges as indispensable to Haraway's defense of sympoiesis. And I will show, in Part III, why Karen Barad's agential realism cannot economize on it either, other than at the price of relinquishing the possibility of understanding how lawmaking in a geopolity is at all possible. No less importantly, the task at hand is not to deny the importance of security. The authors of a recent study on labor note that

⁹² See Jason W. Moore, "The Rise of Cheap Nature," in Jason W. Moore (ed.), *Anthropocene or Capitalocene? Nature, History and the Crisis of Capitalism* (Oakland, CA: PM Press), 70-115.

⁹³ Bert van Roermund proposes a phenomenology of labor as joint labor, identifying to this effect the following three functions: labor as the disclosure of reality, as socio-political ordering, and as the pursuit of a better life. I return to these functions in Part IV. See Bert van Roermund, *Law in the First Person Plural: Roots, Concepts, Topics* (Cheltenham: Edward Elgar, 2020), 174-184.

⁹⁴ Marco Goldoni and Michael Wilkinson, "The Material Constitution," in *Modern Law Review* 81 (2018) 4, 567-597; Marco Goldoni and Michael Wilkinson. "The Tradition of the Material Constitution in Western Marxism," in Marco Goldoni and Michael Wilkinson (eds.), *The Cambridge Handbook on the Material Constitution* (Cambridge: Cambridge University Press, 2023), 25-44.

“precarious work is, in one way or another, insecure, and precariousness is an anxiously inhabited situation of uncertainty, instability, and fragility that arises from this lack of security.”⁹⁵ Instead, the task is to critically reconsider whether security is a specifically human feature of reflexive agency, to the exclusion of other-than-human forms thereof. Thus, I will stay with the conceptual trouble, exploring in due course whether the notion of dependent spontaneity might offer cues for an alternative, more radical, reading of the dependency of dependent existence, of *sum*, one which rethinks security in terms of the interdependency of humans and other-than-humans.

The cue for such a reading is to be found in contemporary analyses of vulnerability and precarity as the target of a transformative politics. In a riff on Judith Butler, the modern subject is a precarious subject, exposed to “a primary vulnerability to others.”⁹⁶ Her insistence on vulnerability as a constitutive feature of human existence literally *embodies* dependency. In Kant, dependent spontaneity goes no further than an ego that must be affected through the senses if it is to act. But the embodied character of affectivity and sensibility—of agency as *embodied agency*—remains unthematized in what I would call Kant’s “Analytic of the Subject.” For it is as bodies that we are and can be affected. Indeed, embodying dependent spontaneity is crucial: I will die because I am a body. Death has a place in the basic constitution of the subject because the subject is an embodied being. *Ego sum*: I am a vulnerable body. “We all live with this particular vulnerability, a vulnerability to the other that is part of bodily life, a vulnerability to a sudden address from elsewhere that we cannot preempt.” (*ibid.*, 29) In this sense, embodiment speaks to the constitutive *powerlessness* of the ego.⁹⁷ Yet the radicalization of dependency as embodied vulnerability also plays out in the embodied spontaneity of the ego. *Ego cogito*: I can act—and *only* can act—because I am an embodied being. A “life of the mind,” giving a twist to Arendt’s expression, is only possible if embodied and *as* embodied being-toward-the-world-with-others. This means, on the one hand, that *ego cogito* is embodied thinking, such that *all* forms of human agency, even the most abstractive, are embodied. On the other, embodiment is the primordial site of *power* in the mode of an “I/we can.” Emancipatory agency that assumes responsibility for the world as it is and that seeks to transform it is ultimately anchored in this bodily “I/we can.”

Indeed, and writing in the aftermath of September 11, 2001, Butler notes that the violent acts visited upon the United States interrupted its complacent self-sufficiency. To take responsibility for this event—to *act*—is not to “securitize” a collective by destroying those who injure us. Although Hobbes already knew, in his depiction of the social

⁹⁵ Christophe Dejours, Jean-Philippe Deranty, Emmanuel Renault, and Nicholas H. Smith, *The Return of Work in Critical Theory: Self, Society, Politics* (New York, NY: Columbia University Press, 2018), 34. The authors offer a particularly sensitive and comprehensive account of labor as a specific manifestation of the subject’s self-preservation. They indirectly engage with the relation between labor and nature, when noting that “the subject . . . has to sustain itself over time in the midst of environments, not just natural but also social environments (from the family to the school yard, from the office to the profession and the general public), that provide essential resources but also intrinsic challenges.” *Ibid.*, 79

⁹⁶ Judith Butler, *Prekarious Life: The Powers of Mourning and Justice* (London: Verso, 2020), xiv. See also Martha Albertson Fineman and Anna Grear (eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (London: Routledge, 2013). In my reading of the modern subject, vulnerability is *not* a new ethical foundation for law and politics, but, rather, a reformulation of the condition of dependent existence as the proper focus of political and legal agency in modernity.

⁹⁷ I return to examine the body as the object of power in Part II, when discussing the lived body as normed and norming.

contract, that the security of the subject was contingent on its recognizing and embracing a condition of *shared* insecurity, Butler lays out the ethical and political stakes of self-preservation as embodied existence, namely, the recognition and affirmation of a condition of shared vulnerability. Once again, the dynamic of relationality is central to self-preservation, but now in the form of a shared vulnerability. Recognizing our irreducible inter-vulnerability is the point of departure for “taking stock of our world, and participating in its social transformation in such a way that non-violent, cooperative, egalitarian international relations remain the guiding ideal,” although “we” cannot know in advance where social transformation will lead us. (*ibid.*, 17, 21) Agency begins as the recognition of our irreducibly inter-vulnerable condition and seeks to create the conditions under which we could recognize each other in freedom and equality. “Vulnerability takes on another meaning at the moment it is recognized, and recognition wields the power to reconstitute vulnerability (*ibid.*, 43)

As noted earlier, the dependency of the subject means that it always already finds itself on this side of a happening or occurrence without which it cannot sustain itself, and which it cannot explain or render intelligible from itself. Butler reformulates this condition of radical passivity as follows: “Although I am insisting on referring to a common human vulnerability, one that emerges with life itself, I also insist that we cannot recover the source of this vulnerability: it precedes the formation of ‘I.’” (*ibid.*, 31) On the other hand, to be responsible is to transform the norms of recognition that perpetrate violence and domination because they include and secure some forms of vulnerability within the domain of the common and exclude others. “To ask for recognition, or to offer it, is precisely not to ask for recognition for what one already is. It is to solicit a becoming, to instigate a transformation, to petition the future always in relation to the Other.” (*ibid.*, 44) Hers is an insurrectional ontology that “struggle[s] for autonomy in many spheres, yet also considers the demands that are imposed upon us by living in a world of beings who are, by definition, physically dependent on one another, physically vulnerable to one another. . .” (*ibid.*, 27) Self-recognition, in the sense of recognition of my/our constitutive vulnerability, demands recognition of the Other’s vulnerability—recognition-with—and vice versa. By breaking out of the “struggle to the death” between master and slave, reciprocity appears, once again, as the reciprocal affirmation of life in light of a shared condition of mortality. It is perhaps not exaggerated to affirm that reciprocal recognition as the response to interdependent mortality reveals modernity’s insurrectional ontology to be an insurrection against death.

In sum, I take the title of Butler’s book—precarious life—to be a particularly incisive and precise reformulation of the modern insight that subjectivity is dependent spontaneity, and of what this entails for ethics and politics. She evokes an ontology of agency in which the body is the jointure of passivity and agency, of vulnerability and creativity, of death and life.

Paul Ricœur, perhaps more than any other philosopher of the 20th century, has made of the twofold condition of vulnerability and capability, of powerlessness and power, the core of an exploration into the ontology of agency animating the modern subject, an ontology he summarizes with the expression “self-maintenance” (*maintien de*

soi).⁹⁸ If, on the one hand, Ricœur insists on the constitutive and irreducible fragility of human being, a condition he also calls vulnerability, on the other hand he vindicates the embodied subject as capable in the modes of an “I speak,” “I act,” “I narrate,” and “I can be held responsible,” each of which is a variation on the fundamental motif of power: “I can.”⁹⁹ Ricœur explicitly connects these two dimensions of embodied subjectivity when noting that “[a]ll forms of suffering reach me in the whole range of my capacities, of my ‘power to be’ (*pouvoir d’être*) and not only of my ‘power to do’ (*pouvoir de faire*).”¹⁰⁰ In an article on the notion of legal subjectivity as the presupposition and horizon of judiciary practices, Ricœur points to a paradox joining together vulnerability and capability:

It is the same man who is one and the other, but from different points of view. Moreover, the two terms are not merely opposed to each other; they are also correlative to each other (*se composent entre eux*): autonomy is the autonomy of a fragile, vulnerable being. And fragility would be only a pathology if it were not the fragility of a being called on to become autonomous, because it has always been such in a certain way.¹⁰¹

On the one hand, autonomy evokes the relation between affirmation and power; this relation “commands all the reflexive forms in which a subject designates itself as the one who can.” (*ibid.*, 88-89) Whereas self-affirmation can be expressed in terms of power—which Spinoza characterized, correlatively to *conatus*, as *potentia*, not as Machiavelli’s and Hobbes’ *potestas*—vulnerability, on the other, speaks to powerlessness. “[I]t is in [the vocabulary] of powerlessness, or of a lesser power, that human fragility primarily expresses itself.” (*ibid.*, 89) Psychoanalysis has shown that the subject’s power, including the power to designate itself as the one who speaks, who acts, who narrates, and who holds itself responsible for what it says and does, is always menaced and limited. The subject is never fully transparent to itself when affirming itself; the exercise of power is never fully its own.

In brief, both Butler and Ricœur’s late interpretations of subjectivity root dependent spontaneity in human embodiment as the site of vulnerability and of agency. Moreover, they interpret the subject’s dependency as necessarily *relational*: subjectivity is intersubjectivity; dependency is interdependency. Yet, however sapient, Ricœur’s interventions, and to a lesser extent Butler’s, underplay the interdependency and inter-vulnerability conjoining humans and other-than-humans as a properly *political* problem that concerns the concept of a *polity* as such. Despite her acknowledgment of vulnerability as extending beyond interhuman relations in *Notes Towards a Performative Theory of Assembly*, it would appear that, for Butler, securing “a new basis for humanism” continues to provide the impetus for political and ethical agency.¹⁰² And so, too, for Ricœur, when

⁹⁸ Paul Ricœur, *Soi-même comme un autre* (Paris: Seuil, 1990), 143. For a comprehensive exploration of this theme see Marc de Leeuw, *Paul Ricoeur’s Renewal of Philosophical Anthropology: Vulnerability, Capability, Justice* (Lanham, MD: Rowman & Littlefield, 2021).

⁹⁹ Ricœur, *Soi-même comme un autre*. In a late work, he notes that self-recognition takes place when a person recognizes “that he or she is in truth a person ‘capable’ of different accomplishments.” See Paul Ricœur, *The Course of Recognition*, translated by David Pellauer (Cambridge, MA: Harvard University Press, 2005), 69.

¹⁰⁰ Paul Ricœur, “Entretien avec Éric Plouvier,” in *Politis*, October 7, 1988.

¹⁰¹ Paul Ricœur, “Autonomie et vulnérabilité,” in Paul Ricœur, *Le Juste 2* (Paris: Esprit, 2001), 85.

¹⁰² Butler, *Prekarious Life*, 42. Judith Butler, *Notes Towards a Performative Theory of Assembly* (Cambridge, MA: Harvard University Press, 2015), 118 ff.

he adds, immediately after the cited passage, “[b]ecause man is, *ex hypothesi*, autonomous, he must become such.”¹⁰³

Might corporeality, in the form of an inter-corporeality that relates humans and other-than-humans as interdependent, provide the basis for understanding how the emergence of geopolitics is at all possible? I address this question in Parts III and IV.

§8. Organismic Self-Maintenance

I have argued that self-preservation summarizes the ontology of agency prevalent in modernity. In the course of reconstructing this ontology, I dedicated considerable effort to showing how Latour, in spite of his relentless and bold critique of the human/other-than-human divide operative in modern constitutionalism, remains a modern thinker in exploring the interdependencies that constitute a geopolity. In so doing, I seek to caution against readings of modern subjectivity that unwittingly reenact what they claim to have left behind. For Latour’s politics of nature remains firmly anchored in the armature of the modern principle of self-preservation, even if realizing collective autonomy now “composes” humans and other-than-humans in relations of interdependency. If, then, we are looking for a more radical reading of a “turn” to the other-than-human in law, one which can fully embrace such interdependencies, this endeavor perhaps demands a far more drastic strategy, a rupture with modern constitutionalism that drops reflexive agency altogether, thereby opening up a space for reimagining lawmaking other than as collective self-legislation.

I take my cue from Haraway’s rejection of human exceptionalism, namely, “the premise that humanity alone is not a spatial and temporal web of interspecies dependencies.”¹⁰⁴ To this effect, she outlines a critique of reflexivity in the systems-theoretical mode of autopoiesis. Her caustic thesis, “[n]othing makes itself; nothing is really autopoietic or self-organizing,”¹⁰⁵ gives short shrift to reflexivity and prepares the way for a theory of agency the linchpin of which is the biological notion of sympoiesis. Haraway understands what might be called the symbiotic or symbiogenetic turn in biology as opening a pathway to interpreting dependency as the interdependency of humans and other-than-humans. “Sympoiesis is a simple word; it means ‘making with’ . . . It is a word for worlding-with, in company.” (*ibid*) It distills “approaches tuned to ‘multi-species becoming-with’ [that] better sustain us in staying with the trouble on earth.” (*ibid.*, 63)

“Making” and “becoming” have a very old history in European thinking; they elicit the question about the ontological purport of agency as the power to call forth something into being. This history continues to resonate in Haraway’s thinking, not least when linking sympoiesis to “response-ability.” “The task is to become capable, with each other in all of our bumptious kinds, of response.” (*ibid.*, 2) As we have already seen when briefly discussing Sen and Ricœur, capability is a privileged term for the fundamental meaning of power, which already manifests itself in a bodily “I can” or “we can.” Yet a certain ambiguity is visible in Haraway’s approach to autopoiesis and its relation to sympoiesis. On some occasions she views the two as incongruent, as when noting that “[i]n my view,

¹⁰³ Ricœur, *Le Juste* 2, 86.

¹⁰⁴ Donna J. Haraway, *When Species Meet* (Minneapolis, MN: The Minnesota University Press, 2008), 11.

¹⁰⁵ Donna J. Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (Durham, NC: Duke University Press, 2016), 58.

Margulis and Sagan's symbiogenesis is not really compatible with their theory of autopoiesis . . ."106 On others, while granting primacy to sympoiesis, she is prepared to concede a certain role to autopoiesis: "[a]s long as autopoiesis does not mean self-sufficient 'self-making,' autopoiesis and sympoiesis . . . are in generative friction, or generative enfolding, rather than opposition."¹⁰⁷

What "generative enfolding" might concretely mean remains unanswered; no less importantly, despite this concession autopoiesis, and reflexive agency more generally, remains a strictly residual category in Haraway's thinking. Indeed, what autopoiesis might be if it is not a self-sufficient self-making—a biological avatar, as it were, of Heidegger's *causa sui*—remains unclarified. After all, the foregoing sections shows that the modern subject is *not* self-sufficient, whatever one wants to make of the vilipended "liberal" subject. To the contrary: the reflexivity of self-preservation entails a condition of dependency, a vulnerability that dwells in the modern subject. This question is all the more germane because, Blumenberg notwithstanding, self-preservation is not only, and perhaps not even primarily, a concept of human rationality.¹⁰⁸ Insofar as what preserves itself is existence, existence, for biology, is *life*. As a biological principle, self-preservation entails that reflexivity is constitutive for *all* life and its manifold manifestations of agency. This is one of the implications of Spinoza's generalization of self-preservation as *conatus*: "Everything, in so far as it is in itself, endeavours to persist in its own being."¹⁰⁹ Along these lines, the reflexivity of lawmaking would be rooted in the reflexivity of life itself. More pointedly, lawmaking is a modality of *living*, in the gerundial.

This, I take it, is the position of autopoietic theory in biology. It is certainly the position espoused by Lynn Margulis, who, drawing on and radicalizing the work of Humberto Maturana and Francisco Varela, argues that life is self-maintenance, the very expression used by Ricœur, when describing subjectivity as *le maintien de soi*. "Autopoiesis refers to life's continuous production of itself . . ."110 Cells, in her view, are the minimal unit of life; viruses do not live because they fall below the threshold of the kind of agency proper to living beings: metabolism. "We are persuaded that viruses . . . are not alive since outside living cells *they do nothing*. Viruses require the metabolism of the live cell because they lack the requisites to generate their own. Metabolism, the incessant chemistry of self-maintenance, is an essential feature of life."¹¹¹ Jonas refers in this context to life, beginning with metabolism, as the exception to and negation of an "ontology of death." Self-preservation, in his reading, is the endeavor to hold at bay the ever-present threat of death.¹¹²

¹⁰⁶ Haraway, *When Species Meet*, 32-33.

¹⁰⁷ Haraway, *Staying with the Trouble*, 61. See also Haraway, *When Species Meet*, 317.

¹⁰⁸ In Blumenberg's words, self-preservation "is not only a new rational principle among others, but the principle of modern rationality itself." See Blumenberg, "Self-preservation and inertia," 218.

¹⁰⁹ Baruch Spinoza, *The Ethics*, translated by R.H.M. Elwes (New York, NY: Dover Publications, 1955), Part III, Proposition 6.

¹¹⁰ Lynn Margulis and Dorian Sagan, *What is Life?* (London: Weidenfeld and Nicolson, 1995), 23-26. And elsewhere: "[t]he bacterial cell, today's minimal unit of life, self-maintenance . . ." Lynn Margulis, *Symbiotic Planet. A New Look at Evolution* (New York, NY: Basic Books, 1998), 71.

¹¹¹ Margulis, *Symbiotic Planet*, 62. (italics added)

¹¹² "All modern theories of life are to be understood against this backdrop of an ontology of death, from which each single life must coax or bully its lease, only to be swallowed up by it in the end." Jonas, *The Phenomenon of Life*, 15.

Would the effort or striving of *conatus* as self-maintenance speak to life, human and other-than-human, as *work*, a category that is more general than labor, such that to *live is to work* in the sense of a striving to maintain/affirm oneself in existence? And would not working to maintain/affirm oneself in existence speak to *effort* and the expenditure of energy—to its entropic dissipation, as thermodynamics has it? To be sure, whereas effort is an experiential, first-person concept, the expenditure of energy is a third-person concept. Work speaks to discontinuity no less than to continuity across modes of being. I will argue, in Part II, that this discontinuity/continuity is constitutive for the lived body, which Husserl and Plessner call a *Leibkörper*. Be it as it may, these considerations suggest that lawmaking is a modality of work in a sense that remains unexplored by modern constitutionalism, and which geoconstitutionalism needs to approach as one of its master categories. I return to these issues in Part IV.

For the moment, which notion of reflexive agency is operative in *self-maintenance*? A recent article provides a minimalistic interpretation of autopoietic agency sufficient for our purposes: “a system doing something by itself according to certain goals or norms within a specific environment.”¹¹³ To be sure, this characterization of reflexive agency elides the key problem of individuation, namely, how individuals come into being in the first place. I return to this in Part III, when discussing collectivity as always and only emergent. For the moment, however, it pays to dwell on this characterization as it stands, which analyzes reflexive agency into three interlocking aspects. The first is *individuality*, namely, “[t]he identity of an agent as an individual distinguishable from its environment.” (*ibid.*) The second is *interactional asymmetry*. On the one hand, “an agent is a source of activity, not merely a passive sufferer of the effects of external forces.” (*ibid.*, 370) On the other, “an agent as a whole drives itself, breaking the symmetry of its coupling with the environment so as to modulate it from within.” (*ibid.*) The third is *normativity*: agents “actively regulate their interactions and this regulation can produce failure or success according to some norm.” (*ibid.*, 372)

Notice that the possibility of failing to adequately regulate their interaction with the environment inscribes vulnerability into organismic agency. The ultimate expression of failure in regulating the boundary between itself and its other is the organism’s death. From the perspective of autopoiesis, the precarity of the modern subject is but a specification of the organism’s constitutive vulnerability. The living body—the grieving, injured, mortal body—reappears in a discussion of biological reflexivity, but now in the guise of an organism. “I am a precarious body that acts” returns in the raiment of “I am a vulnerable organism that strives to maintain itself.” Along these lines, the precarity of the

¹¹³ Xabier E. Barandiaran, Ezequiel Di Paolo, and Marieke Rohde, “Defining Agency: Individuality, Normativity, Asymmetry, and Spatio-temporality in Action,” in *Adaptive Behavior* 17 (2009) 5, 367–386, 369. This paper offers a good summary of the core thesis of what has come to be called autopoietic enactivism, namely, that “organisms are not passive ‘objects’ that represent and compute the world internally but rather autonomous agents (living beings of all kinds and not humans alone) that ‘enact’ or ‘bring forth’ intrinsically meaningful and significant worlds through dynamic patterns of embodied interaction with the environment.” Paulo De Jesus, “From enactive phenomenology to biosemiotics enactivism,” in *Adaptive Behavior* 24 (2016) 2, 130–146, 130. Biosemiotics, for its part, posits life and signs as co-extensional, while also introducing an important distinction between phenomenal and non-phenomenal modes of sign-exchange between an organism and its *Umwelt*. This difference points to different modalities of intentionality and agential reflexivity beyond the human. See e.g., Jesper Hoffmeyer, *Biosemiotics: An Examination into the Signs of Life and the Life of Signs* (Scranton, PA: The University of Scranton Press, 2009).

modern subject is a specific instance of biological reflexivity, understood as “concernful self-affirmation,” that is, “an entity for whom its own continuation is an issue.”¹¹⁴ Butler’s “problem of a primary vulnerability to others” is a *pars pro toto* for all forms of life, human and other-than-human, not despite but *because* life deploys a reflexive dynamic.¹¹⁵ The body as the jointure of passivity and agency, of death and life, of vulnerability and creativity, is the general structure of the organism, by no means the reserve of the human species. The title of her book should be taken literally, and as expressing a biological pleonasm: precarious life. As Di Paolo eloquently puts it,

life would not be better off without precarious conditions; it would simply not be life at all. It would be indifferent permanence . . . Precariousness presents us with a view of life as inherently restless more fitting to our experience of life; a sort of “frustrated suicide”, never fully safe and constantly buying time for itself.¹¹⁶

Moreover, that an agent “drives itself” entails that reflexivity is constitutive for agency as such, whether human or other-than-human: self-preservation in the sense of “self-activity.” Indeed, what Kant calls dependent spontaneity is, for systems theory, but a specification of this more general concept of agency, namely, one in which self-consciousness, as a modality of proprioception, is constitutive of human existence as a modality of the general process of biological self-maintenance.

Finally, this account of reflexive agency sheds new light on normativity. Inasmuch as agents regulate their interaction with their environment according to some norm, normativity is constitutive of the reflexivity of agency. It is not, therefore, an exclusive feature of human agency. There are other-than-human forms of normativity. Thus, the category distinction between is and ought, whereby the domain of normativity is aligned with human forms of interaction, and the other-than-human domain with natural laws that describe necessity, does not hold water. Yet more pointedly, it cannot be taken for granted that the reflexive *transformation* of the rules that govern an agent’s interaction with its environment are the exclusive bailiwick of human agency. Biological self-maintenance and evolution theory suggest that this capacity is, in principle, co-extensive with life itself. Hans Jonas puts it as follows: “our contention is that even metabolism, the basic level of all organic existence, exhibits [freedom]: that it is itself the first form of freedom.”¹¹⁷

Helmut Plessner, for his part, refers to the *positionality* of life, i.e., the normatively guided process of boundary-setting that joins an organism to and separates it from its environment. This process specifies organisms vis-à-vis things, which only have contours that mark where they end and something else begins. “The thing-body is enclosed within its contours, its edges [*Ränder*], and is determined as this thing—or what is the same, its

¹¹⁴ Ezequiel Di Paolo, “Autopoiesis, adaptivity, teleology, agency,” in *Phenomenology and the Cognitive Sciences* 4 (2005), 429-452, 433. Notice that Di Paolo’s formulation resonates with the characterization of Dasein as “[t]hat Being which is an *issue* for this entity in its very Being,” perhaps aiming to challenge Heidegger’s exclusion of life from his ontological inquiry. Heidegger, *Being and Time*, 68; 71-77.

¹¹⁵ Nonetheless, biological vulnerability takes on different forms: whereas species become extinct, individual organisms die.

¹¹⁶ Ezequiel Di Paolo, “Extended Life,” in *Topoi* 28 (2009), 9-21, 16.

¹¹⁷ Hans Jonas, *The Phenomenon of Life: Toward a Philosophical Biology* (Evanston, IL: Northwestern University Press, 2001), 3. Very much in line with Margulis and Blumenberg, Jonas adds that “the minimum left to the original essence of life is just self-preservation.” (*ibid*, 46)

contours and edges determine the thing as this thing.”¹¹⁸ Organisms, too, have contours, insofar as they are things. But, Plessner argues, their contours are also their *boundaries*, such that regulating them in a recursive process is central to organismic self-maintenance. An organism’s contour becomes a boundary through a reflexive, first-person perspective on an environment: a “nonreversible boundary relation between an exterior and an interior” emerges through which the organism positions itself as a *whole*, not merely as the unity of a form (*Gestalt*). (*ibid.*, 97) Normatively, that an organism positions itself means that it *has* a boundary, that it claims a boundary as its *own*. In contrast to thing-bodies, which are simply closed or sealed off by their contours, the organism incessantly “crosses” (*ibid.*) its boundaries. More forcefully, the organism *is* this crossing—this *transcending*, as one might call it—that includes and excludes an environment. Conversely, the boundary between an interiority and an exteriority only makes sense from the positional, first-person perspective of a living being. Accordingly, the positionality of organisms entails that they are not only “in” space and time. In the properly verbal sense of the terms, that organisms evolve means that they *space and time*.

But is life the cut-off point of normativity? Can a distinction can be made between life’s intrinsic normativity and lifeless matter, as Jonas and Plessner assume, thereby introducing a new ontological split in the process of extending—and limiting—reflexivity to life as such? Might the rejection of human exceptionalism give way to a new form of exceptionalism that one might call “bio-exceptionalism,” i.e., of life as an ontological exception with respect to inert matter? If reflexive agency is normative in the sense of norm-producing, might matter itself be normative because self-organizing? This would mean that the normativity of law is rooted in the normativity of life insofar as the normativity of life is rooted in the normativity of matter.¹¹⁹ Is this, ultimately, where a radicalization of the *sum* of *ego cogito sum* takes us, namely, to *sum* as the materiality of existence, which Kant calls the “material condition” of *ego cogito*? If so, then the reflexivity folded into “I think” means that *matter thinks itself*, i.e., that thinking is one of the ways in which matter is self-organizing. Significantly, Margulis, like Lovelock, situates organismic life in the reflexivity of Gaia. “Gaia, as the interweaving network of all life, is alive, aware, and conscious to various degrees in all its cells, bodies, and societies. Analogous to proprioception, Gaian patterns appear to be planned but occur in the absence of any central ‘head’ or ‘brain’.”¹²⁰

¹¹⁸ Helmut Plessner, *Levels of Organic Life and the Human: An Introduction to Philosophical Anthropology*, translated by Millay Hyatt (New York, NY: Fordham University Press, 2019), 96.

¹¹⁹ Margaret Davies pursues this line of inquiry in a recent and important contribution to the philosophy of law. See Margaret Davies, *EcoLaw: Legality, Live, and the Normativity of Nature* (Milton Park: Routledge, 2022). I return to it later, when defending the view that Davies’ move to posit a strong continuity across all forms of reflexivity, organic and anorganic, runs into significant difficulties in differentiating them and their corresponding modes of being.

¹²⁰ Margulis, *Symbiotic Planet*, 126. Lovelock: “One of the most characteristic properties of all living organisms, from the smallest to the largest, is their capacity to develop, operate, and maintain systems which set a goal and then strive to achieve it through the cybernetic process of trial and error. The discovery of such a system, operating on a global scale and having as its goal the establishment and maintenance of optimum physical and chemical conditions for life, would surely provide us with convincing evidence of Gaia’s existence.” James Lovelock, *Gaia. A New Look at Life on Earth*, 2nd ed. (Oxford: Oxford University Press, 2016), 45-46. Further inquiry into organismic self-maintenance would approach life and death in terms of the entropy of a thermodynamic system, hence the passage from order to disorder. This raises important

I leave an answer to these questions in suspense, returning to them in Part IV. For the moment, notice that self-maintenance remains a self-centered account of agency, the self-activity of an organism *qua* individual. Jonas' characterization of biological self-maintenance could not be more revealing: organisms are self-unifying "in virtue of themselves, for the sake of themselves, and continually sustained by themselves. Here wholeness is self-integrating in active performance."¹²¹ Achieving autonomy is presented as the telos of organismic agency, even if, as evolution teaches us, it has the form of purposiveness without a purpose, to borrow a Kantian formulation. Human autonomy, for Jonas, is rooted in organismic autonomy, and so, too, for Plessner.

§9. Sympoiesis, Holobionts, and Reflexive Agency

Not surprisingly, therefore, the critical purport of sympoiesis begins as a critique of the individual, i.e., of an agent with an identity that distinguishes it from its environment. The holobiont, or so Haraway opines, gives the lie to the idea of an individual as a *bounded unit* in space and time. Her critique addresses the tripartite structure of autopoietic agency as such, even if explicitly directed against its first structural element. For if the holobiont gainsays bounded unity, it must also gainsay agency as *self-activity*, namely, the asymmetrical process whereby an organism draws the boundaries that join it to and separate it from its environment, in accordance with a norm. Biologically speaking, this process is metabolism. The minimal biological modality of a boundary is the cellular membrane: "[m]embranous structures are the *sine qua non* of life. Today the membrane-bounded entities with identity and integrity are cells. Life arose in its cellular wholeness."¹²²

Is the holobiont something other than an individual? And does it instantiate a non-reflexive notion of agency, as Haraway seems to suggest?

At first glance, her view gains stout support from an article she cites as exemplary for the symbiogenetic turn in biology. The article concludes with the lapidary sentence, "[f]or animals, as well as plants, there have never been individuals."¹²³ A late echo of Latour's lambent "We have never been moderns!" As the article observes,

[a]nimals can no longer be considered individuals in any sense of classical biology: anatomical, developmental, physiological, immunological, genetic, or evolutionary. Our bodies must be understood as holobionts whose anatomical, physiological, immunological, and developmental functions evolved in shared relationships of different species. Thus, the holobiont, with its integrated community of species, becomes a unit of natural selection whose evolutionary mechanisms suggest complexity hitherto largely unexplored." (*ibid.*, 334)

philosophical questions about the nexus between different modalities of reflexivity, inasmuch as, on the one hand, organismic *experiences* of order/disorder are irreducible to the conservation and loss of energy/order in thermodynamic systems, yet, on the other hand, those experiences are, *physically* speaking, specific manifestations of entropy. Furthermore, the question arises whether there is life where there is reflexivity in the form of self-regulation by feedback systems, including artificial intelligence. Lovelock is, it seems, agnostic on this issue, viewing his references to Gaia as "a living planet" as metaphorical. See Lovelock, *We Belong to Gaia*, 14, 50.

¹²¹ Jonas, *The Phenomenon of Life*, 79.

¹²² Margulis, *Symbiotic Planet*, 80.

¹²³ Scott F. Gilbert, Jan Sapp, and Alfred I. Tauber, "A Symbiotic View of Life: We Have Never Been Individuals," in *The Quarterly Review of Biology* 87 (2012) 4, 325-341, 336.

Immediately hereafter, its authors cite Lewis Thomas, who delivers, it seems, the *coup de grâce* to reflexivity, and not only as a biological category: “The whole dear notion of one’s own Self—marvelous, old free-willed, free-enterprising, autonomous, independent, isolated island of a Self—is a myth.”¹²⁴ If God had to die so that the modern subject could install itself on Earth, it seems that the modern subject had to die so that, retrospectively, we could understand that symbiogenesis gave rise to life on Earth in the guises of the holobiont—not least the human chimera—and a non-reflexive modality of agency.¹²⁵

As Gilbert, Sapp, and Tauber note, immunity belies the notion of individuals with an “essential identity”: “there is no circumscribed, autonomous entity that is *a priori* designated ‘the self’. What counts as ‘self’ is dynamic and context-dependent.”¹²⁶ Tauber radicalizes this insight in his philosophical revision of the concept of immunity. He is at pains to show that, although not an essentialized identity, “the self” remains an entity in mainstream accounts of immunity: the “self-as-entity.”¹²⁷ He adds: “‘self’ refers reflexively to an entity, *qua* that entity, underscoring that it is circumscribed, separate, (quasi) autonomous, or of singular quality, unique existence, or uniform essence.” (*ibid.*, 130) Self-as-entity is the Cartesianism operative in mainstream immunology, namely, the self as a thing (*res*). Tauber follows up on this by showing how the correlate of self-as-entity in mainstream immunology is its representationalism, namely, the assumption that immunity simply reproduces a given essence or unity. (*ibid.*, 137-146)

This may explain why Haraway has astoundingly little to say about immunity. Although she briefly contributes to the discussion about the biopolitics of bodies that plays out in the immune system discourse, she satisfies herself with a perfunctory reference to an article that foreswears the self/nonself-model of immunity—a point also made at length by Gilbert, Sapp, and Tauber.¹²⁸ Here, she and Tauber stand close to Karen Barad, who claims that “reflexivity is nothing more than iterative mimesis.”¹²⁹

Part III discusses the relation between representation and reflexivity. For the moment, it suffices to note that the reification of selfhood accruing to the model of self-as-entity does not entail foreswearing reflexivity as such. As Ricœur pointed out, explicitly distancing himself from philosophies of the *cogito* which equate ego to self, “to say *self* (*soi*) is not to say *I* (*je*). The *I* posits itself (*se pose*) — or is deposed (*dépose*).”¹³⁰ Immunologically speaking, Ricœur’s hermeneutic of self entails that ipseity is *not* the individual,

¹²⁴ Lewis Thomas, *The Lives of a Cell: Notes of a Biology Watcher* (New York: Viking Press, 1974), 142.

¹²⁵ See Aryn Martin, “The Chimera of Liberal Individualism: How Cells Became Selves in Human Clinical Genetics,” in *Osiris*, 22 (2007) 1, 205-222.

¹²⁶ Gilbert, Sapp, and Tauber, “A Symbiotic View of Life,” 333.

¹²⁷ Alfred I. Tauber, *Immunity: The Evolution of an Idea* (Oxford: Oxford University Press, 2017), 89. See also Alfred I. Tauber, “[The Biological Notion of Self and Non-self](#),” in the *Stanford Encyclopedia of Philosophy*, first published on May 21, 2002, substantively revised on May 9, 2012. (Last accessed on April 27th, 2023); Alfred I. Tauber, “Moving beyond the immune self?,” in *Seminars in Immunology* 12 (2000), 241-248.

¹²⁸ See Haraway, *When Species Meet*, 316 fn43; Donna J. Haraway, “The Biopolitics of Postmodern Bodies: Determinations of Self in Immune System Discourse,” in Donna J. Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (New York, NY: Routledge, 1991), 205-230, 251-254.

¹²⁹ Barad, *Meeting the Universe Halfway*, 88.

¹³⁰ Ricœur, *Soi-même comme un autre*, 30. He takes issue, here, with all versions of the transcendental ego, which, even if no longer the Cartesian *res*, remain Cartesian insofar as they posit the ego as an absolute source of formal agency outside of the world. In this, he follows Heidegger’s and Merleau-Ponty’s critique of Husserlian phenomenology’s reappropriation of the transcendental ego, a critique I embrace.

not self-as-entity; ipseity plays out as a process of self-individuation or self-identification.

The crux of the matter lies in the “cheaters,” namely, those parts of the holobiont which proclaim their autonomy, multiplying to the detriment of its other parts. Cancerous cells and pathogens more generally are cases in point. Here is where immunity comes into the picture:

The problem of ‘cheaters’ . . . has to be solved in such a way that associates in a symbiotic relationship are under the social control of the whole, the holobiont. This strong socializing and unifying force is found in the immune system . . . [which has] an *outward*-looking limb that defines the organism as that which is to be protected from foreign pathogens, and an *inward*-looking arm that looks for potential dangers arising from within the organism itself.¹³¹

In its systems-theoretical interpretation, immunizing agency is tantamount to a “continuous negotiation of numerous interactions between the organism and its biotic environment—both ‘internal’ and ‘external.’” (*ibid*) In a remarkable turn of phrase, Gilbert, Sapp, and Tauber refer to this process of organismic boundary-setting with the expression “*e pluribus unum*.” We stumble upon an analog of the dynamic of relationality first articulated by Hobbes as right reason: the self-maintenance of an organism demands self-maintenance and the maintenance of the other within the unity of a holobiont, which maintains itself by recursively establishing which organisms count as its participant agents, and how they are related to each other, when engaging with its environment. Organismic boundary-setting through the immunity system finds its analog in authoritatively mediated boundary-setting in which lawmaking posits the boundaries that join together and separate the members of a “we” from its environment: *e pluribus unum*.¹³²

Tauber nuances the article’s too sharp contrast between inside and outside, noting that in immunity the boundaries that join and separate an organism from its environment “function as sieves to allow material exchange.”¹³³ Analogously, contemporary discussions about migration refer to “porous” state borders, whether to rue or to celebrate this state of affairs. From this perspective, immunity involves a spectrum of activities, of which protection is only one function:

Protection represents only a particular aspect of immunity; tolerant exchange displaces *autonomy* as a central theoretical motif . . . In the context of consortia as a biological unit [i.e., a holobiont, HL], *individuality* becomes an enigmatic designation because instead of an agent that possesses some essential characteristics and definable identity, dynamic, shifting relationships provide a more comprehensive account of organismic identity. (*ibid.*, 9)

Explicitly indicating that this reading of immunity amounts to a revision of biological agency, Tauber points out that “autoimmunity becomes a normal function that reflects stabilized symbiosis.” (*ibid.*, 14) Instead of immediately attacking what is perceived as “foreign,” the immune system tolerates it insofar as it contributes to symbiotic and cooperative relationships in a holobiont, giving rise to what Tauber, in a wonderfully terse turn of phrase, calls the “endogenous ‘other’.” (*ibid.*, 110) Conversely, the immune system

¹³¹ Gilbert, Sapp, and Tauber, “A Symbiotic View of Life,” 332.

¹³² Tauber elsewhere refers to “the ‘social contract’ among . . . cells.” Tauber, *Immunity*, 105. The two-way crossover between political and biological concepts in the cited paper and other related contributions is remarkable: if Gilbert, Sapp, and Tauber describe the immune system as tolerant, Derrida, Esposito, and Agamben decry the politics of autoimmunity.

¹³³ Tauber, *Immunity*, 8.

also attacks the holobiont's own elements, such as senescent cells, when these endanger the holobiont's self-maintenance.

Thus, Haraway is right to assert that the operation of the immunological system gives the lie to the assumption that individuality is a bounded unity *with a pre-given and fixed identity*. Likewise, the workings of immunity also reject the simple model of competitive interaction, as presupposed by mainstream immunology. For even if competitive struggles between antibodies and foreign intruders are part of immunizing agency, a symbiotic reading must also focus on immunity as fostering intimate cooperation between species in the constitution of a holobiont. But, against Haraway, this novel concept of immunity does not reject *bounded unity as such*. To the contrary: "immunity becomes a process for both *establishing* the bounds of integration and *maintaining* the integrity of the organism through immune arbitration." (*ibid.*, 10) Holobiontic self-maintenance; *co-natus*.

Haraway in fact acknowledges that holobionts are individuals, when noting that symbioses lead to "increasingly complex levels of good-enough quasi-individuality."¹³⁴ For what does the qualifier "quasi" add to individuality that is not already contained in "good-enough"? The question becomes even more urgent in light of a recent conversation in which Haraway calls a holobiont a "good-enough whole."¹³⁵ In what sense is a "whole" different from the bounded unity of a first-person perspective? Moreover, is not "good-enough" shorthand for the insight that the unity of a holobiont is provisional and vulnerable? It means that the holobiont is up to the task of maintaining itself in existence until such time as a challenge triggers a norm-governed process of setting boundaries that seeks to determine anew what counts as the holobiont's identity. Reflexivity is baked into the qualifier "good enough"; holobiont is a reflexive concept. Haraway is no doubt right to assert that holobionts are "never fully bounded or fully self-referential entities"; but this does not absolve us from seeking to understand why and in what sense holobionts are *at all* self-referential, even if incompletely bounded, unities.¹³⁶

Along these lines, as regards holobionts, the priority Haraway assigns to sympoi-esis over autopoiesis, as regards holobionts, gets *inverted*: symbiogenesis concerns the emergence of an individual that engages in a norm-governed and recursive process of self-identification by drawing the boundaries that separate it from and join it to its environment: self-maintenance. This is the position championed by Margulis throughout her oeuvre. A case in point is the central chapter of *Symbiotic Planet*, titled "Individuality by incorporation." It begins by noting that "symbiogenesis . . . refers to the formation of new organs and organisms through symbiotic merges . . . As they merged, many lost what we

¹³⁴ Haraway, *Staying with the Trouble*, 60.

¹³⁵ See Dominique Koch, "[Holobiont Society](#)" (Video installation and sound installation, 33 minutes, 2017), featuring conversations with Scott Gilbert, Donna Haraway, and Maurizio Lazzarato (last accessed on April 27th, 2023) I am grateful to Koch for authorizing the citation of her conversation with Haraway, and to Marie Petersmann for bringing this conversation to my attention as part of the transdisciplinary event, "[Becoming Common, Ecological Resistance, Refusal, Reparation](#)," she hosted at the Istituto Svizzero di Roma on May 17-18, 2023.

¹³⁶ Haraway, *When Species Meet*, 32. This question also arises regarding her defense of a cyborg feminist "we": "What kind of politics could embrace partial, contradictory, permanently unclosed constructions of personal and collective selves and still be faithful, effective—and, ironically, socialist-feminist? . . . Cyborg feminists have to argue that 'we' do not want any more natural matrix of unity and that no construction is whole." Donna J. Haraway, "The Cyborg Manifesto," in Donna J. Haraway, *Manifestly Haraway* (Minneapolis, MN: The University of Minnesota Press, 2016), 21.

in retrospect recognize as their former individuality.”¹³⁷ Evolution, beginning with the first cell on Earth (itself a symbiont), is a symbiogenetic process that leads to ever more complex life-forms. Symbiogenesis can go in different ways. But “if symbionts merge entirely, if they fuse and form a new kind of being, the new ‘individual,’ the result of the merger, by definition, evolved through symbiogenesis.” (*ibid.*, 34-35) The consequences of this insight for Haraway’s argument should not be underestimated: becoming-a-holobiont-with-others means *becoming-an-individual-in-reflexive-action-with-others*.¹³⁸

Thus, as concerns holobionts, *symbiogenesis is the genesis of autopoiesis*, of reflexive agency as the basic dynamic of life—of self-maintenance. The holobiont, which Margulis and Sagan also call a “multiple being,” is the biological analog of what Margaret Gilbert calls a “plural subject.”¹³⁹ Neither is an individual in the sense of indivisibility. Both are individuals in the sense of a reflexively constituted, even if constitutively vulnerable and thus never fully realized, plural unity. Likewise, the symbiogenesis of holobionts suggests that the notion of a first-person perspective is not limited to human collectives, however differently this perspective and the world it opens are structured when comparing, say, a plant to a university.¹⁴⁰ In ontologically differentiated ways, organisms are not only individuals in terms of what Peter Strawson dubs “basic particulars”; they also deploy the reflexive perspective he attributes to personhood.¹⁴¹ Strictly speaking, there are no individuals; there is only a process of self-individuation—and self-deindividuation.

Going yet further, if auto- and sympoiesis offer a useful point of reference for theorizing lawmaking, it is because they show that the provisional unity of holobionts and politics is *authoritatively mediated*: “To use an anthropomorphic analogy, the immune

¹³⁷ Margulis, *Symbiotic Planet*, 33.

¹³⁸ Concordant with Haraway, Margaret Davies privileges sympoiesis over autopoiesis as concerns lawmaking: although both play a role in the emergence of legalities, “[i]n law as in biology sympoietic co-becoming is historically, materially, and conceptually fundamental—the unity of any law, such as it is, is contingent upon and situated within the normative, always emerging, pluralities that characterize life and nonlife on Earth.” Although Davies’ is a more nuanced analysis of this conceptual pair than Haraway’s, similar concerns can be raised about her gloss of sympoiesis. See Davies, *EcoLaw*, 103.

¹³⁹ Lynn Margulis and Dorion Sagan, “The beast with five genomes,” in *Natural History Magazine* June (2001), 38-41; Margaret Gilbert, *On Social Facts* (Princeton, NJ: Princeton University Press, 1992); Margaret Gilbert, *A Theory of Political Obligation* (Oxford: Oxford University Press, 2008).

¹⁴⁰ Florence Burgat posits an ontological split between animals and plants: “[t]o live, simply to live, is not yet, and in fact not at all, to exist,” because existence involves a reflexive transcending towards a world—an enworlding—available to animals but not to plants. The former are mobile, occupying a contingent place to which they have to relate in one way or another. The latter, by contrast, are destitute of movement, such that “fixed life is one with its way of being.” As a result, “[a]nimals forge a sense of self in the face of a hostile world, and the simple vitality of plant life is replaced by a sense of uncertainty.” Yet recent biological studies radically question the interpretations of “fixity” and reflexive transcending presupposed by Burgat. Indeed, “[p]lants were traditionally seen as rather passive actors in their environment, interacting with each other only in so far as they competed for the same resources. In the last 30 years, this view has been spectacularly overturned, with a wealth of evidence showing that plants actively detect and respond to their neighbours. Moreover, there is evidence that these responses depend on the identity of the neighbour, and that plants may cooperate with their kin, displaying social behaviour as complex as that observed in animals.” See Florence Burgat, *Une autre existence: La condition animale* (Paris: Albin Michel, 2012), 14; Florence Burgat, *Qu’est-ce qu’une plante? Essai sur la vie végétale* (Paris: Seuil, 2020), 12; Roza D. Bilas, Amanda Bretman, and Tom Bennett, “Friends, neighbours and enemies: an overview of the communal and social biology of plants,” in *Plant Cell Environment* 44 (2021), 997-1013, 997.

¹⁴¹ To be sure, Strawson limits his account of personhood to forms of self-conscious individuation: “Each of us distinguishes between himself and states of himself on the one hand, and what is not himself or a state of himself on the other.” Peter F. Strawson, *Individuals* (London: Methuen, 1984), 87.

system is not merely the body's 'armed forces.' It is also the passport control that has evolved to recognize and welcome those organisms that help the body."¹⁴² Notice the use of yet another political term in this passage: recognition. In immunity no less than in politics, recognition is both cognitive and normative, insofar as the immune system discerns those entities which can be included, because they foster cooperative relations within a holobiont, from those which must be excluded as detrimental to its self-maintenance.¹⁴³ Self-recognition is recognition-with—*and-without*.

The analogy between the reflexivity of holobionts and of human collectives becomes apparent in Haraway's conversation with Koch. Having asserted that "[t]he deepest level of the living world is not composed of individuals and collectives. . .," Haraway adds that "each time we have together to figure out with each other how to cultivate the capacity to respond to the urgency, to the trouble. To be engaged in worlding for flourishing and not for extinction."¹⁴⁴ As this statement suggests, "flourishing" plays a central role in Haraway's thinking. If, in the wake of Darwin and the theory of evolution, the Aristotelian distinction between *dynamis* and *energeia* can no longer account for what it means for something to flourish (or to wither), can Haraway avoid appealing to self-preservation for its conceptualization? Haraway will no doubt argue that flourishing is flourishing-with. But this is nothing other than self-preservation as preservation-with. In her insistence that we must, together, cultivate the capacity for the affirmation of life, rather than its extinction, Haraway celebrates power in its most elemental manifestation: we can (flourish together).¹⁴⁵

Hers is a philosophy of empowerment that imperceptibly moves into the reflexive, first-person plural perspective of what Margaret Gilbert calls collective action: "we together."¹⁴⁶ Indeed, after Haraway summons us to resist and take back the world (together), Koch asks whether she means "collectively." Haraway responds, "Yes, as a movement, not as individuals, I mean as people." But the shift in wording that goes from individuals to people, and from collective to movement, will not do, for, as the *Britannica* entry on social movements points out,

[a] social movement is a collectivity or a collective enterprise. Individual members experience a sense of membership in an alliance of people who share their dissatisfaction with the present state of affairs and their vision of a better order. Like a group, a social movement is a collectivity with a common goal and shared values.¹⁴⁷

A social movement is a variety of the first-person plural perspective of a "we" *qua* (provisional and contestable) collective unity of participant agents, that is, an individual composed of individuals engaged in a transformative self-activity in response to a challenge that exposes its condition of radical vulnerability.

¹⁴² Gilbert, Sapp, and Tauber, "A Symbiotic View of Life," 333.

¹⁴³ Margulis refers to recognition as well, when noting among others that the fusion of sperm and egg nuclei of animals and plants in sexual reproduction is "reminiscent of cyclical symbiotic mergers: partners recognize each other." Margulis, *Symbiotic Planet*, 88.

¹⁴⁴ Koch, "Holobiont Society."

¹⁴⁵ The same question arises with respect to Barad, when she states, that "[i]ntracting responsibly as part of the world means . . . being responsive to the possibilities that might help us flourish." Barad, *Meeting the Universe Halfway*, 396.

¹⁴⁶ Gilbert, *On Social Facts*, 168.

¹⁴⁷ Online *Britannica*, "[Social Movement](#)," (last accessed on April 27th, 2023)

Accordingly, Haraway's invitation to join together and to act now spurs us to engage in reflexive agency. Her depiction of coming together to act as a movement is the political analog of sympoiesis as the genesis of autopoiesis. Haraway's is a call to insurrection: in the face of extinction as the ultimate challenge to the vulnerable and interdependent existence of humans and other-than-humans, she enjoins us to resist, affirming ourselves as a more-than-human collective, such that its participant agents can flourish in mutual response-ability. Her call for resistance against what threatens collective existence summons us to recognize ourselves as what we have always already been, but to which human exceptionalism has blinded us: we are—as transpires *après coup*—more-than-human collectives. Importantly, on various occasions she characterizes becoming-with as “reciprocal induction.”¹⁴⁸ Reciprocity, which Haraway, like Latour, now extends to the emergence of more-than-human collectives, is modernity's answer to the question how normativity could be grounded when the passage to intransitive conservation bids farewell to a pre-given telos or essence that determines the course of human agency. Once again: *self*-preservation is preservation-*with*. And yet again: is the notion of reciprocity available to human polities adequate to make sense of the normativity of the relations tying together humans and other-than-humans in a geopolity?

These considerations suggest that Haraway's reappropriation of the word “critter” as an ontological category harks back to the phase of European metaphysics that begins with the qualification of an earthbound being as a creature, namely, an irreducibly dependent *ens creatum*. If the transitive conservation of all dependent existents, human and other-than-human, by an *ens increatum* is the Scholastic response to the problem of the *nihil*, “inducing reciprocity” between dependent, hence vulnerable, human beings who live and who die together becomes the practical imperative of intransitive conservation in modernity, even if hitherto limited to a social contract for human collectives. The same logic of reciprocity now joins together humans and other-than-humans as Earthbound, mortal critters. Thus, Haraway's “critter” ties together both strands of European metaphysics, and in so doing reappropriates the challenge of the *nihil*. Affirming the irreducible interdependency and inter-vulnerability of all critters on a damaged earth—amongst others through the legal “composition” of beings—demands that we, human critters, recognize the capacity of other-than-human critters to engage with “us” in the relations of reciprocity from which we had unjustifiably excluded them. In this, Haraway generalizes, without abandoning, the ontology of agency prevalent in modern metaphysics. Hers is a novel modern reappropriation of what Hobbes called “right reason.” It is thus that I interpret her rejection of both human exceptionalism and posthumanism. (*ibid.*, 12) It is thus that Haraway remains a thoroughly modern thinker.

No less importantly, Haraway's response to Koch calls forth the kinds of questions that bedevil a politics of the first-person plural perspective. These are questions Haraway's conceptual framework is ill-equipped to address, certainly as regards lawmaking, because the first-person plural perspective is tightly bound up with reflexive agency. Yet reflexive agency is, as noted, a residual and unthematized category in Haraway's thinking. Here are some of those questions: Who gets to belong to the “we,” as an individual collective? Is not “figuring out with each other” what counts as “flourishing” an abridged formulation for a more or less disputatious process that aims to determine what we hold in

¹⁴⁸ Haraway, *Staying with the Trouble*, 40, 119.

common? Are these determinations of commonality not self-representations that invite “us” to recognize ourselves as a collective? Given the urgency of responding to extinction, do not these conflicting self-representations of who we are and what we stand for demand authoritative mediation if we, as a movement, are to act at all, rather than be paralyzed by conflict? As transpires from these questions, some self-representations will be included and others excluded, even when the collective’s “good enough” unity is the outcome of a compromise.

Let me conclude this section with a rejoinder to Haraway’s apothegm, “[w]e become-with each other or not at all.” (*ibid.*, 4) I would say: becoming-with is always also a *becoming-without*; response-ability, a *response-inability*. The reflexivity of becoming-a-more-than-human-collective-with-other-critters is an irreducibly ambiguous achievement. It entails that there is no unification without pluralization; no entangling without an untangling; no commoning without a “de-commoning”; no caring without indifference; no “worlding” without a “deworlding.”

§10. Decentering Collective Self-Legislation

I initiated this inquiry with the claim that assessing the prospects of authoritative lawmaking for collectives composed of humans and other-than-humans demands reconsidering the drive to collective and individual autonomy that undergirds modern constitutionalism’s interpretation of authoritative lawmaking. For Heidegger, this drive amounts to a secularization of the Scholastic *causa sui*, such that realizing collective autonomy by way of lawmaking is one of the manifestations of European nihilism. Agency, as distilled in the *cogitare* of *ego cogito*, is a pre-senting that renders the presented (the *cogitatum*) available for the presenting subject: “I think” means I pre-sent, *Ich stelle vor*.

Against the secularization theorem, Blumenberg shows that self-preservation is a reoccupation of the Scholastic problem of the *nihil*. “I think,” as a mode of agency, stands for representation *qua* form-giving activity conditioned by, and operating on, the materiality of an existence the ego cannot supply from itself, and which resists its self-activity. Thus, instead of commandeering the position of an absolute and unshakeable ground of truth, as averred by Heidegger, self-preservation is a response to the subject’s constitutively precarious and dependent existence. Butler and Ricœur offer particularly incisive accounts of the ontologically unstable condition of human being as dependent spontaneity—a vulnerable subject.

Latour, Haraway, and their epigones stand within the horizon of the experience of constitutive dependency and vulnerability proper to the modern subject’s contingent existence. But in different ways, they seek to radicalize this experience, evincing the contingency of the human/other-than-human cleavage itself and opening a space from which to conceptualize the emergence of geopolities that affirm the interdependency of humans and other-than-humans.

As I have sought to show, neither of these initiatives turns its back on a reflexive concept of agency. Latour’s politics of nature explicitly embraces collective self-legislation as the imperative driving practices of political representation by a parliament of things. History becomes the progressive self-centering of the Earthbound when the notion of an actant is coupled to a totalizing reading of representation. Collective autonomy remains the norm of a historical process when history becomes terrestrial rather than

territorial. At first glance, Haraway's defense of sympoiesis is a frontal critique of reflexivity in the modality of autopoiesis. Her battle cry, "nothing makes itself," can be read as a contemporary reappropriation of Heidegger's critique of the modern subject as a secularized *causa sui*. Closer consideration of her work shows, however, an inversion of the relation between sympoiesis and autopoiesis. As concerns holobionts, sympoiesis is the emergence of autopoiesis: becoming-an-individual-in-reflexive-action-with-others. Crucially, Haraway's assumption that autopoiesis can be written off because it simply means "making oneself" blocks a systematic inquiry into the first-person plural perspective of "we" and its relation to reflexivity. No inquiry into the conditions governing the emergence of a geopolity can avoid addressing this issue head on.

We are at a crossroads. My reading of Latour and Haraway suggests that the conceptual and normative strategy of excising reflexivity and the first-person plural perspective from a political and legal vocabulary of authoritative lawmaking for more-than-human collectives is self-defeating: it forfeits the possibility of accounting for geopolities and, as a result, for lawmaking in such polities.

Yet, as Haraway insists time and again, reflexivity is a self-centered and self-centering reading of agency. Hans Jonas, perhaps more than any other philosopher, exposes the problems confronting modernity's reflexive reading of an ontology of agency. The very first sentences of "On the Subjects of a Philosophy of Life," the inaugural essay of *The Phenomenon of Life*, set the stage for all that follows:

[a] philosophy of life comprises the philosophy of the organism and the philosophy of mind. . . [This] statement of scope expresses no less than the contention that the organic even in its lowest forms prefigures mind, and that mind even on its highest reaches remains part of the organic.¹⁴⁹

What Jonas gives, by extending reflexivity to all other-than-human forms of life, he immediately claws back, first by introducing an ontological dichotomy between life and nonlife, then by establishing a hierarchical relation between modes of life which places human rationality and autonomy at its pinnacle. That "the minimum left to the original essence of life is just self-preservation" means nothing other, for Jonas, than that self-preservation "culminate[s] in the thinking of man."¹⁵⁰ His contribution to ethics, in particular an ethics of responsibility towards future generations, is governed by this set of fundamental decisions.¹⁵¹

By contrast, Margulis' account of self-maintenance resists any hierarchization of beings, while acknowledging the ontic differentiation of species. So, too, Plessner, who resists any teleological reading of the "levels" of organic life. Von Uexküll is particularly interesting in this respect because he explicitly warns against an anthropocentrism that would establish hierarchies among animals based on the bodily structure of human

¹⁴⁹ Jonas, *The Phenomenon of Life*, 1.

¹⁵⁰ *Ibid*, 46, 2. Jonas is here the good pupil of Heidegger, his doctoral supervisor. Despite his relentless critique of the modern subject as a secularization of the Scholastic *causa sui*, Heidegger endorses an anthropocentric hierarchization of beings in his well-known thesis: "1. The stone (materiality) is *worldless*; 2. The animal is *world-poor*; 3. human being is *world-forming*." Martin Heidegger, *Die Grundbegriffe der Metaphysik: Welt – Endlichkeit – Einsamkeit* (Frankfurt: Vittorio Klostermann, 1983), 263.

¹⁵¹ For a powerful critique of how self-preservation determines Jonas's ethics of responsibility towards human generations, see Ferdinando Menga, *Etica intergenerazionale* (Brescia: Morcelliana, 2021), 115-128.

engagement with its *Umwelt*.¹⁵² Whereas human beings experience the world primarily through sound and sight, scent is crucial for moths, touch for the star-nosed mole, magnetoreception for loggerhead turtles.¹⁵³ The morphology of human embodiment governs our perceptual access to the world and the beings that populate it. The capabilities and incapacities of a human “I can” and “I cannot” are but a specification of a more general phenomenon: “[a] species is constrained in some ways and liberated in others.” (*ibid.*, 7) This is one—arguably the decisive—modality of the *materiality* of empowerment and disempowerment operative in being-towards-the-world, as von Uexküll was keenly aware of when differentiating how animal species relate to their *Umwelts*. Van Dooren draws out the anthropological implication hereof: “[t]he experiential worlds of [other] animal subjects are invariably difficult, and to some extent impossible, for us to grasp, in part at least because our access must occur through our specifically hominid embodiment.”¹⁵⁴

I return to this in Part II. For now, it may suffice to note that, faithful to the inveterate tradition leading back to the Greek term *logos*, Jonas, like so many philosophers before (and after) him, takes for granted that the kind of rationality made available by human speech and sight justifies a hierarchy of beings the acme of which is human being. Against this tradition, taking seriously the embodied character of human-being-in-and-towards-the-world enjoins acknowledging the *asymmetries* governing both interhuman relations and what Haraway calls “interspecies encounters,” asymmetries which preclude the totalization of unity, and which a theory of alterity must resolutely embrace if it would do justice to such encounters as they play out in lawmaking for geopolitics.¹⁵⁵ Self-maintenance, as a rational principle, falls apart into *logoi*, in the plural, each appropriate to how an organism relates to its environment, not a celebration of human *logos*, in the singular. Thus, Jonas is important for our inquiry by showing that extending the scope of self-preservation to other-than-humans does not necessarily evict anthropocentrism from an ontology of agency; it can be its fullest realization.

A second point of concern emerges from my reconstruction of the modern ontology of human agency as dependent spontaneity. I am of the view that Blumenberg’s thesis about the reoccupation of radical contingency offers a far more plausible account of modern subjectivity than Heidegger’s use of the secularization theorem. In Blumenberg’s reading, the Scholastic world that is continuously in danger of slipping back into the *nihil* is stabilized in its existence in the passage to intransitive conservation. Once stabilized, transforming it to secure the conditions for the continued existence of vulnerable human beings becomes the object of agency. But does the methodological point of privileging reoccupation over secularization undo the substantive point of what Heidegger calls the subject’s *Herausforderung* of the world as *Ge-stell*? Had he written today, Heidegger would surely have argued that, paradoxically, the subject’s will to power reaches completion and comes to an end in the radical *destabilization* of a stable world: the

¹⁵² See Jakob von Uexküll, *Umwelt und Innenwelt der Tiere* (Berlin: Springer Verlag, 2014), 22, 235; Jakob von Uexküll, “The Theory of Meaning,” in *Semiotica* 42 (1982) 1, 25-82, 72.

¹⁵³ Ed Yong, *An Immense World: How Animal Senses Reveal the Hidden Realms Around Us* (London: Bodley Head, 2022), 29; 161-5; 306-8.

¹⁵⁴ Thom van Dooren, *Flight Ways: Life and Loss at the Edge of Extinction* (New York, NY: Columbia University Press, 2014), 68.

¹⁵⁵ Vinciane Despret has made a related point with great sensitivity and acuteness, when discussing the interaction between scientists’ bodies and the animals they observe. See Vinciane Despret, “Responding Bodies and Partial Affinities in Human-Animal Worlds,” in *Theory, Culture & Society*, 30 (2013) 7/8, 51-76.

Anthropocene. In this, Heidegger stands close to the diagnosis of Horkheimer and Adorno, for whom, paradoxically, the drive for self-preservation flips over into the destruction of the world and so, too, into human self-destruction. “The essence of the Enlightenment is an alternative, the inevitability of which is domination. Human beings always have to choose between their subjugation to nature or that of nature to the self.”¹⁵⁶ Paradoxically, by separating itself from and disavowing itself *as* nature, the subject ends up subjugating and ultimately destroying itself: the dialectic of Enlightenment. Blumenberg indirectly takes up this motif when indicating that in the wake of an ontology of agency in which reality is the “result of a realization,” a second modality of the real confronts modernity, namely, the “experience of resistance. In this concept of reality . . . reality [appears] as what does not obey the subject, [as that] which resists it . . . ultimately in the logical form of the paradox.”¹⁵⁷ The logical paradox has an existential counterpart: when radicalized, the affirmation of life against death becomes the affirmation of death against life.

The constitutive role of vulnerability, ultimately of death, for the modern concept of self-preservation points to yet a third problem confronting the modern concept of subjectivity. Indeed, one may ask whether this is not a strongly reductive interpretation of what is at stake in the notion of dependency. As noted earlier, the first of Kant’s *Critiques* takes up the notion of dependency in terms of affectivity. But surely, the significance of affectivity is not exhausted by vulnerability and death as threats continuously confronting the ego, and against which it must assert its existence. That the bodily subject, as noted in §5, is unavoidably exposed to the world and the beings that populate it means that it is transformed by them in ways that are constitutive rather than contingently related to its existence. Husserl intimates as much in *Ideas II*:

[i]t is remarkable that I find myself determined by things in so many ways . . . that [thing] there *steers my regard* onto itself; its special form “*strikes me*.” I chose the fabric for the sake of its beautiful color or its smoothness. The noise in the street “irritates” me; it makes me close the window.¹⁵⁸

Is being affected by something that steers, strikes, seduces, or irritates me ever only a matter of an intervention which discloses me as a vulnerable being and that demands that I strive to overcome and reassert my existence? This observation suggests that bodily affectivity is never only exposure in the sense of the subject’s vulnerability to the other but also a *solicitation*, an *address* by the other, human and other-than-human, which invites me to realize a meaning and a perspective that are never only my own. To this extent, I agree with Renaud Barbaras, who emphatically rejects Jonas’ thesis about the “ontological domination of death over life.” Although he acknowledges that death needs to be accounted for in an ontology of life, Barbaras takes issue with the thesis that

¹⁵⁶ Horkheimer and Adorno, *Dialektik der Aufklärung*, 55.

¹⁵⁷ Blumenberg, “Wirklichkeitsbegriff und Möglichkeit des Romans,” 13-14. As is well-known, Heidegger’s response to what he diagnoses as the modern subject’s will to power is *Gelassenheit*, a letting-go and a letting-be as attunement to other beings and being itself that releases humans from willing as the mode of being proper to self-preservation and self-empowerment. See Martin Heidegger, *Gelassenheit*, 10th ed. (Pfullingen: Neske, 1992).

¹⁵⁸ Edmund Husserl, *Ideas Pertaining to a Pure Phenomenology and to a Phenomenological Philosophy, Book II*, translated by Richard Rojcewicz and André Schuwer (Dordrecht: Kluwer Academic Publishers, 1989), 148.

the living being (*le vivant*) [is] a sort of ontological exception, thus as constantly exposed to the risk of its own death in the form of a return to the laws of inert matter. It follows that life is understood as the active negation of this ultimately ineluctable negation that is its own disappearance into the inert, in short, self-preservation, maintaining life through the struggle against external menaces and the selection of that which, in exteriority, can in some way sustain this struggle.¹⁵⁹

To be sure, Barbaras' reading of self-preservation as a strictly biological principle is itself reductive. And while claiming to offer a "neutral" concept of life that counters ontological anthropocentrism, his account remains tied to the hierarchization of modes of life defended by Jonas. (*ibid.*, 265) An alternative to both Jonas and Barbaras is a phenomenological elucidation of *affectivity*, which Kant, as we have seen, associates to the *sum of cogito sum*. What is required, therefore, is to query how affectivity might be a cypher of the subject's radical contingency without collapsing existence into the mere negation of death.

Dependent spontaneity yields yet a fourth fundamental problem in the ontology of agency accruing to the modern subject. Although the ego depends on an existence that must be given to it as the material condition for its activity, the ego functions in dependent spontaneity as the *absolute* beginning of a form-giving agency. In this minimal but crucial sense, the secularization of *actus purus*, and not only its reoccupation, takes place in the passage from transitive to intransitive conservation. All versions of the transcendental ego are burdened with this mortgage inherited from the Scholastic dichotomy between created and uncreated being. Relatedly, dependent spontaneity, as articulated by Kant, not only distinguishes but also introduces an ontological split between activity and passivity, and between form and matter, assigning them to two different, irreducible domains.¹⁶⁰ This split is, of course, at the heart of the mind/body, meaning/physical carrier and, ultimately, culture/nature dichotomies. Kant has been of central importance in the foregoing analyses because the notion of dependent spontaneity reveals in all clarity a certain interpretation of the constitutive features of the ontology of reflexive agency underpinning modern subjectivity, while also laying bare its problematic presuppositions. Might a more careful analysis suggest, contra Kant, that there is an irreducible passivity in activity, and a no less irreducible activity in passivity? And that the emergence of being resists any simple dichotomy between form and matter, such that the subject, *qua* form-giver, is the sole foundation of meaning? As I will suggest in Part II, recovering the entwinement of activity and passivity, and of form and matter, in concrete experience is one of the key moves required to make sense of the interdependency of humans and other-than-humans.

These issues come to a head in a fifth problem confronting the ontology of agency underpinning dependent spontaneity: it limns reflexivity as a feature distinctive of

¹⁵⁹ Jonas, *The Phenomenon of Life*, 12; Renaud Barbaras, *Introduction à une phénoménologie de la vie* (Paris: Vrin, 2018), 257.

¹⁶⁰ Part II discusses Merleau-Ponty's rejection of the simple opposition between form (*morphè*) and matter (*hylè*), an issue later taken up by Gilbert Simondon in what he calls "hylomorphism." See Maurice Merleau-Ponty, *Phenomenology of perception*, translated by Donald A. Landes (London: Routledge, 2012), 427 ff; Maurice Merleau-Ponty, *Le primat de la perception et ses conséquences philosophiques* (Grenoble: Éditions Cynara, 1989), 41-42; Gilbert Simondon, *L'individuation à la lumière des notions de forme et d'information* (Paris: Millon, 2021), 39-66.

human agency. Yet, as we have seen, reflexive agency extends far beyond the human realm. In fact, the autopoietic reading of agency in biology, enactivism, and biosemiotics suggest that reflexivity includes all organismic agency. Reflexive agency extends into the anorganic domain, and perhaps is coextensive with the Earth System itself—the Gaia thesis, as conceived and explored by James Lovelock, Lynn Margulis, and their colleagues. Spinoza’s *conatus* is the first attempt by modern philosophy to posit reflexivity as *the* constitutive feature of beings *qua* beings, and in this strong sense as constitutive of a general ontology.

The generality of reflexivity is crucial for geoconstitutionalism in at least two ways. First, its broad compass entails, as noted earlier, that there are other-than-human modes of normativity. This insight radically challenges the simple dichotomy between “is” and “ought,” between human normativity and other-than-human factuality, which underpins the presupposition that law is a feature of human collectives situated in a natural environment. Second, it suggests that the encounter between humans and other-than-humans is *eo ipse* normative, and in such a way that, no less than humans, the non-human Other can raise a normative claim that questions who “we” are/ought to be. It is thus that I read Haraway’s reference to “reciprocal induction” and Latour’s characterization of representation, even if we need not accept his totalizing reading thereof. If the Anthropocene poses a radical challenge to the interpretations of reflexive agency and the first-person plural perspective that have governed modern constitutionalism, it is because the demands of other-than-humans can no longer be ignored, and precisely as *demands*.

I take these five urgent problems confronting the reflexive turn in an ontology of agency to be the unexceptionable core of Latour’s interpretation of more-than-human collectives and Haraway’s concerns about autopoiesis and her robust defense of sympoiesis. But instead of purging reflexivity from our legal and political vocabulary, and with it a politics of boundaries that includes and excludes from a first-person plural perspective, I would like to redirect the critical impetus of sympoiesis. Taking autonomy to be the gravamen of Haraway’s critique, I want to explore how *heteronomy* might be an ingredient element of an ontology of lawmaking that resists any *a priori* ontic hierarchization, while also insisting, against Latour, on the irreducible variety of beings *qua* beings. Put differently: how empowerment-by-the-other is constitutive for self-empowerment.

By these lights, geoconstitutionalism calls for a more complex reading of political reflexivity and the first-person plural perspective. The first task for geoconstitutionalism is to *decenter* collective self-legislation and the first-person plural perspective, not to eschew them. More pointedly, radicalizing the critique of anthropocentric readings of lawmaking demands critiquing *centrism* as such. It is the first of geoconstitutionalism’s tasks because, as noted at the outset of this book, by destabilizing the first of modern constitutionalism presuppositions, i.e., individual and collective autonomy, it paves the way for a second decentration, the decentration of “human exceptionalism,” the second of modern constitutionalism’s core presupposition, namely, that law is about human polities situated in a natural environment.

While I have sought to show that the subject’s relation to self must pass through other-than-subject if it is to preserve itself, autonomy nevertheless entails a progressive self-centering by way of ever more inclusive relations within a unity. Autonomy is the injunction to achieve in-dependence by transforming what had been a dependent relation

on an exteriority the (collective) subject does not control into a fully internal relation in which difference can be modulated and affirmed in terms of its capacity to maintain the unity of the whole: *e pluribus unum*. The Other is the not-yet-we; whatever resistance it poses to its inclusion within the “we” is merely provisional. Within the logic of self-preservation, there is provisional resistance but not refusal to join the “we.” More generally, it means that ordering processes have *limits* that can be expanded ever further, because resistance is the not-yet-ordered-but-orderable, but not *fault lines* that exceed the possibilities of what can be integrated into a given order: the unordered and unorderable for a given order.¹⁶¹ Latour’s politics of nature is a case in point. The increasingly inclusive collective demanded by a politics of nature goes hand in hand with progressively overcoming difference, hence overcoming dependency on other-than-we, ultimately dependency on a form of otherness—the strange—that eludes control by dint of refusing integration into the totalizing circle of reciprocity. My concern about the dynamic of self-centering also extends to all versions of ecocentrism. For no polity can emerge in the absence of the inclusion and exclusion of values and interests deemed to be common to “us,” even when a polity understands itself as “nature-centered.”¹⁶² The holism promised by ecocentrism is fractured as soon as it is implemented as the governing principle of a polity.

Certainly, the injunction to realize unity is constitutive for reflexivity; it is part and parcel of a reflexive concept of agency. Such, I take it, is the truth of the drive to realize an autonomous existence. But the conditions that govern reflexive agency also preclude totalization: the conditions that govern closure bring about an opening *because* they effect closure into a unity. They entail that no polity is possible without an outside—a plurality more radical than, and irreducible to, the holobiontic *e pluribus unum*, an exteriorization/pluralization wrought *by* reflexive integration/unification. Reflexive agency gives rise to an *outside within* which obdurately resists accommodation in the whole of which it is deemed part, and which gives the lie to jejune invocations of “everything is related to everything.” Here, I stand shoulder to shoulder with Haraway, for whom “[n]othing is connected to everything; everything is connected to something.”¹⁶³

In sum, at stake is an account of lawmaking in the Anthropocene that avoids trading in one centrist reading of lawmaking for another. How?

I propose to outline an ontology of collective agency operative in lawmaking that decenters subjectivity by reconceptualizing passivity, agency, and their interconnection. I noted, when reconstructing Kant’s dependent spontaneity, that the understanding depends on—is conditioned by—something that affects sensibility, and that, as such, precedes the subject’s spontaneity. How to make sense of the precedence of what “affects” the subject through sensibility, such that the subject is dependent on a happening or occurrence without which it cannot sustain itself nor can fully explain nor render intelligible from itself? The answer to this question turns on *bodily responsivity*. Let me push Kant to say something he did not say and perhaps would not want to say: I think = I respond.

Yet even this *décalage* is not enough, for it assumes that there is an “I” that precedes a response. Instead, I aver that acknowledging the precedence of affectivity as the

¹⁶¹ I introduce the distinction between limits and fault lines in Hans Lindahl, *Fault Lines of Globalization* (Oxford: Oxford University Press, 2013).

¹⁶² Cormac Cullinan, *Wild Law – A Manifesto for Earth Justice* (Cambridge: Green Books, 2011).

¹⁶³ Haraway, *Staying with the Trouble*, 31.

condition for “I think” demands a certain *inversion* of the concept of agency, which, in the tradition of Cartesian thinking, has the transcendental ego as the absolute initiator of action. This inversion means that action comes second, not first; it is a re-action, or more precisely a response, and in such a way that by being ascribed to an agent, the ascription of agency retroactively creates the agent that responds. I will argue in Part II that *responsivity is embodied agency without a prior agent*, one figure of which is the inter-corporeality Merleau-Ponty associates with anonymous reflexivity. A responsive reading of agency suggests that the “making” of lawmaking begins earlier than with a “we,” hence that lawmaking *co-responds* to the Other, thereby destabilizing the simple dichotomy between form and matter that governs Kant’s interpretation of subjectivity and of embodiment—an issue I have postponed by speaking, still very much in the Kantian vernacular, of the body as the “jointure” of activity and passivity, of vulnerability and creativity, of life and death. See here, perhaps, the end of “self-as-entity” and of the subject as absolute initiator of form-giving agency, on the one hand, and the point of departure for geoconstitutionalism as a theory of lawmaking *qua* decentered collective self-legislation, on the other.

Thus, *whatever meaning reflexivity and subjectivity can retain in an ontology of agency undergirding lawmaking for geopolitics will follow from how one interprets bodily responsivity, not the other way around*. Likewise, and returning to the opening comments of this text, because a decentered reading of lawmaking does not simply abrogate collective self-legislation, it suggests that *there is a second—alternative—reading of a modern ontology of agency that could underpin lawmaking for geopolitics*. I call it “lawmaking in the accusative”: ~~collective self-legislation~~. It is with this alternative reading of reflexivity in mind that I have been careful to refer to self-preservation as the ontology of agency *prevalent* in modernity, not as its ontology of agency *tout court*. “Geoconstitutionalism” is the name I give to this alternative reading of modern constitutionalism.

The decentration I envisage radicalizes the notions of responsivity present in each of the accounts of agency discussed heretofore. Haraway, as we have seen, understands response-ability as the ability of an agent to be responsive: “The task is to become capable . . . of response.” (*ibid.*, 2) Margulis also points to this feature as constitutive of autopoiesis: “My claim is that . . . humans are not the work of God but of thousands of millions of years of interaction among highly responsive microbes.”¹⁶⁴ For Tauber, “the relationships demanding response and reciprocity capture the dynamics of an organism conceived as a holobiont.”¹⁶⁵ Interactional asymmetry, the second structural element of the minimalistic account of autopoiesis sketched out in §8, implicitly refers to the responsivity of agency. While the “doing” of agency is asymmetrical in that it modulates the agent’s relation to its environment, agency is asymmetrical in a second sense as well: to modulate interaction is to respond to challenges of the environment. And long before the symbiogenetic turn in biology, von Uexküll identified questionability and responsiveness as key features of organismic agency, even if drawing on an outdated conceptual apparatus: “external groups of stimuli present themselves to the animal subject in the form of *questions* . . . the

¹⁶⁴ Margulis, *Symbiotic Planet*, 4.

¹⁶⁵ Tauber, *Immunity*, 14.

organism uses the other half of the brain cells . . . which impart the animal subject's *answers* to the outside world.¹⁶⁶

If responsivity speaks to passivity, it also speaks to agency, which Kant summarizes in the canonical “I think,” *ego cogito*. As is well-known, *cogitare* functions as a placeholder for a broad spectrum of acts, volitive, emotional, etc., which are not limited to “thinking” in the strict sense of judgment, and all of which, like judgment, presuppose the embodiment of agency. Two of these dimensions of embodied agency surfaced repeatedly in our previous considerations: representation and recognition, even though we have not paused to discuss their dynamic. Against common conceptions of representation and recognition that view them as merely “mental” modes of agency in line with the Cartesian mind/body dichotomy, we can already conjecture that representation and recognition are dimensions of embodied agency through and through, that is, of bodily orientation in and towards a world. A third was evoked indirectly, when referring to the subject’s bodily affection through sensibility: perception. My conjecture is that the work of lawmaking already has begun in perception, prior to any explicit representational or recognitive acts, hence prior to law as *posited* law. Clearly, however, a critical reconceptualization of these dimensions of legal agency is required. In effect, decentering reflexive agency demands decentering these three responsive dimensions of lawmaking. Contemporary phenomenological philosophy, when yoked to a critical reappropriation of theories of collective action of analytical provenance, offers a reading of embodied, technologically mediated, responsivity across these three dimensions. In so doing, a phenomenology of lawmaking in the accusative also casts new and critical light on the processes of individuation, identification, and unification that have been at the center of modern constitutional thinking about collective self-legislation.

In brief, Parts II and III work through the decentration of collective self-legislation in terms of what I will call the *heterogenesis* of collectivity. While lawmaking invokes and refers to the first-person plural perspective of a “we,” the first-person plural perspective comes second, not first. It is always and necessarily adventitious. All polities emerge as a response to a summons, a solicitation, by the other. This holds for human polities located in a natural environment. It also holds for the first-person plural perspective of a “we” composed of humans and other-than-humans. Like a human polity, the first-person plural perspective of a geopolity comes second, not first. No less than in the human polities of modern constitutionalism, lawmaking in geopolities will remain lawmaking in the accusative. This is why I discuss this first sense of decentration in Parts II and III, postponing till Part IV the second sense of decentration noted at the outset of this book. This is, politically speaking, what Haraway calls “human exceptionalism,” which, constitutionally speaking, consists in the presupposition that law is about human polities situated in a natural environment. In this second sense, responding to the Anthropocene by decentering collective self-legislation means decentering human polities through the emergence of geopolities composed of humans and other-than-humans, joined together in relations of interdependency.

¹⁶⁶ Jakob von Uexküll, *A Foray into the Worlds of Animals and Humans*, translated by Joseph D. O’Neil (Minneapolis, MN: Minnesota University Press, 2010), 47. (italics added)

Part II

Bodily Lawmaking

Transitioning from the analyses of Part I to a theory of lawmaking in the accusative is no easy matter. For, how to decenter collective self-legislation without simply jettisoning the first-person plural perspective of a “we” in collective action? How to segue into a theory of lawmaking in the accusative in a way that critically questions the modern thesis about lawmaking as a modality of collective autonomy, without defenestrating collective self-legislation?

The difficulty is twofold. On the one hand, we are, on the face of it, dealing with very different fields of inquiry. It is one thing to unpack the meaning of *cogito sum*, discussing notions such as passive agency, dependent spontaneity, affectivity, embodiment, relationality, and vulnerability. It is something altogether different, or so it seems, to engage with lawmaking, which typically evokes acts such as treaty-making, legislation, judicial rulings, contracts, and testaments, enacted by parliaments, administrative officials, corporations, natural persons, and so forth. A second hurdle appears: even if one agrees that there is a distinctive ontology of reflexive agency prevalent in modern constitutionalism, how might it be decentered and how could this clear the way to making sense of the emergence of geopolitics as collectives composed of humans and other-than-humans in relations of interdependency?

I propose to address these issues by focusing on the preconditions, structure, and dynamic of judgment. For the one, judgment has been at the core of Western metaphysics from Greek philosophy in antiquity to modernity. The common thread of that long arc of thinking is the problem of the human relation to reality, itself the conceptual node of European philosophical reflection on what counts as human reason. For the other, legal judgment has received the sustained attention of legal theory. The reader will be acquainted, amongst others, with formal analyses of legal reasoning using the tools of deontic logic; with legal realism and predictive theories of judgment; with hermeneutic analyses of judgment, which focus primarily on the question about judicial discretion. Likewise, treatises on judicial rulings are legion in modern constitutionalism. They include endless and bitter debates about whether judicial activism and the judicial review of legislation are consistent with collective self-legislation.

However important, these approaches and their internal debates are ancillary to the question about what defines a legal judgment as a mode of *agency* in general, and of *legal agency* in particular. What is the common structure shared by, say, judicial rulings that grant legal personhood to a river basin, that declare a corporation bankrupt, that grant legal standing to animals held in captivity for human consumption, or that establish right of way through a property? And what would they share with an administrative decision that determines the income tax of a given person for a certain year, or with a contract of sale or a testament?

A first approach suggests that in each of these examples to judge is to enact an individualized legal norm. The legal scholar will perhaps protest at the broad scope of this preliminary characterization of a judgment, for it goes well beyond the legal usage of

the term, which is usually reserved for judicial rulings. But this broad characterization allows me to bridge philosophical and legal approaches to judgments, bringing to light a general feature of legal judgments, *qua* mode of agency, that remains more or less concealed in scholarly accounts of judicial rulings.

I draw to this effect on Hans Kelsen, to my mind by far the most interesting and radical Western legal philosopher of the 20th century, even though the debate between H.L.A. Hart and Ronald Dworkin, carried forward in splendid insularity and ever greater irrelevance by their epigones and epi-epigones, has lionized the attention of much of contemporary Western legal theory. As will transpire in the following sections, Kelsen's uncompromising contribution to the philosophy of law has the double advantage of exposing key presuppositions that have blocked the theorization of bodily lawmaking, while also offering a genetic account of legal orders that opens up a pathway to lawmaking in the accusative. For the moment, it suffices to note that Kelsen provides a precious clue about the general structure of legal judgment that links it to more general philosophical discussions about judgment, even though, in line with legal scholarship, his example concerns a judicial ruling.

When a judge establishes as a given a concrete material fact (say, a delict), his cognition . . . becomes legal at the point at which he brings together the material fact he has established and the statute he is to apply; that is, his cognition becomes legal when he interprets the material fact as "theft" or "fraud".¹⁶⁷

At its bare minimum, and regardless of content, agents, and procedure, a legal judgment, in the broad sense I privilege hereafter, refers a predicate to a subject. Something is qualified as having this or that legal meaning: theft, a legal person, bankruptcy, legal standing, contract, testament, and so forth. The judgment's task, *qua* mode of agency, is to disclose something as having this or that legal meaning.

This characterization of judgment, elemental to the point of triviality, has a very old history, leading back to Aristotle, for whom to judge is to assign a predicate to a subject, such as *s is P* or *s is not P*. "The first single statement-making sentence is the affirmation, next is the negation . . . An *affirmation* is a statement affirming something of something, a *negation* is a statement denying something of something."¹⁶⁸ Certainly, judicial rulings and other modes of lawmaking that posit individualized norms, such as administrative decisions or contracts, do not exhaust the scope of lawmaking. But the enactment of general norms—be they statutes, constitutions, treaties, standards, indicators, best practices, and the like—amounts to a suspended modality of judgment, such that the reference of meaning to reality is anticipated but held in abeyance. Whether reference is actualized, as in a judicial ruling, or is held in suspense, as in statutes, lawmaking discloses "something as something."

¹⁶⁷ Kelsen, *Introduction to the Problems of Legal Theory*, 11 (emphasis added) For other ramifications of Kelsen on judgment, see Hans Lindahl, "Dialectic and Revolution: Confronting Kelsen and Gadamer on Legal Interpretation," in *Cardozo Law Review*, 24 (2003) 2, 769-798; Hans Lindahl, "Intentionality, Representation, Recognition: Phenomenology and the Politics of A-Legality," in Thomas Bedorf and Steffen Herrmann (eds.), *Political Phenomenology. Experience, Ontology, Episteme* (Abingdon: Routledge, 2019), 256-276.

¹⁶⁸ Aristotle, *De interpretatione*, in *The Complete Works of Aristotle*, edited by Jonathan Barnes (Princeton, NJ: Princeton University Press, 1985) vol, 1, 17a25-6.

But different historical epochs and different ontologies of agency go from Aristotle's characterization of judgment to that of Kelsen, even if they coincide in the minimalistic formula, "something as something." Kelsen and all of modern constitutionalism are on this side of an epochal threshold in which a theory of lawmaking sets itself the task of articulating the conditions under which a judgment can be ascribed to a polity as its own act, that is, when disclosing "something as something" is not only a reflexive act but an act that *must* be reflexive if the judgment is to be authoritative. But were a legal judgment merely one of the manifold modalities of collective self-legislation, we would not be able to advance beyond the ontology of agency prevalent in modern constitutionalism. From the very start, the attempt to decenter collective self-legislation would be either specious or nugatory. Yet the opposite move of dropping the minimalistic formula—disclosing "something as something"—is also barred, as doing so would rob our inquiry of any descriptive purchase. Emphatically: Kelsen is right in pointing out that legal judgments disclose something as having this or that legal meaning.

Redescription is the way out of this dilemma by revealing deficiencies and lacunae of contemporary descriptions of legal judgment, and by showing why the legal qualification of "something as something" is only possible as decentered collective self-legislation. For, strictly speaking, "in the accusative" is not a qualification or modality of lawmaking, such that there might be non-accusative modes of lawmaking. Lawmaking *is* lawmaking in the accusative. The expression serves to clarify what lawmaking is, not to specify it. Crucially, the "re" of redescription does not only repeat what is already there: redescription also describes judgment *otherwise*. As such, it has a critical function in my inquiry: it aims to evince what is quite literally a contingent "[way] of seeing and even [a way] of making the world that [goes] unnoticed without a sustained practice of critical reflection," and to unearth an alternative reading of lawmaking foreclosed by the description of legal judgment prevalent in modern constitutionalism.¹⁶⁹

My wager is that describing legal judgment as a mode of *intentionality* is the key to elucidating lawmaking in the accusative. More precisely, what I have in mind is a *phenomenology* of legal judgment. Intentionality, for phenomenology, names the bodily directedness of access to the world. Lawmaking in general, and legal judgment in particular, is one of its modalities. Intentionality lends itself to two distinct but interlocking phenomenological approaches. The first concerns the structure of intentionality: something appears as something to someone within a pre-given and co-given world. The second approaches intentionality genetically, evincing what Maurice Merleau-Ponty calls a "genealogy of being."¹⁷⁰ Whereas the former analyzes intentionality into its interconnected components, clarifying how they contribute to making orientation towards and engagement with the world possible, the latter focuses on intentionality in the gerundial, that is, as an appear-ing, describing how something becomes—comes to appear and be disclosed as—this or that, e.g., as contract, testament, bankruptcy, legal standing, legal person, income tax, etc.

¹⁶⁹ Lisa Guenther, "Critical Phenomenology," in Gail Weiss, Ann V. Murphy, and Gayle Salamon (eds.), *50 Concepts for a Critical Phenomenology* (Evanston, IL: Northwestern University Press, 2020), 11-16, 12.

¹⁷⁰ Maurice Merleau-Ponty, *Phenomenology of perception*, translated by Donald A. Landes (Abingdon: Routledge, 2012), 55.

Accordingly, phenomenology reappropriates Aristotle's enduring characterization of judgment, whereby something appears as something. But the "re" of reappropriation stands for more than simple continuity; it also evinces a novel ontology of human agency irreducible to the understanding of human agency deployed in Greek thinking. In effect, a phenomenology of judgment takes us into and beyond the domain of reflexive agency. "Into" its realm, because Husserl's account of intentionality elucidates the ontology of human agency that reaches philosophical expression in the *cogito*. "Beyond" its realm, in that Merleau-Ponty and Bernhard Waldenfels decenter reflexive agency by way of a *responsive* reading of intentionality. Crucially for my inquiry, they approach intentionality as *bodily* responsiveness, carrying forward and radicalizing Husserl's phenomenology of embodied agency. Although legal theory has largely neglected exploring legal judgment as a modality of bodily responsiveness, it is precisely this approach to legal judgment which is essential to decentering collective self-legislation in the two senses noted earlier: the decentration of reflexive agency as such and the decentration of human polities situated in a natural environment.

So, fleshing out my wager further, Part II focuses on a phenomenology of legal judgment as a modality of *bodily* responsiveness, leaving legal judgment as a modality of bodily *responsivity* for Part III. Taken together, Parts II and III outline the main contours of lawmaking in the accusative, the first of the two modes of decentration noted earlier. To be sure, partitioning bodily responsiveness into embodiment and responsiveness is no more than an analytical strategy that allows me to approach a unitary phenomenon from two distinct angles. Indeed, the strong thesis that will transpire when setting out the main contours of lawmaking in the accusative is that embodiment is responsive, and responsiveness embodied. The second sense of decentration—of a human polity situated in a natural environment—is taken up in Part IV.

Part II unfolds in three cumulative steps. The first, in §§11-14, is propaedeutic. It locates a phenomenological account of judgment in the broader framework of Western onto-epistemologies; it offers a reconstruction of legal judgment as a modality of reflexive agency along the lines of Edmund Husserl's phenomenology of judgment; and it concludes by exploring why the body has been largely missing from the account of legal judgment prevalent in modern constitutionalism. A second step, in §§15-22, draws on insights derived from the phenomenology of the lived body to elucidate the embodied character of legal judgment. I successively discuss the passage from "I/we think" to "I/we can," an interlude, bodily (dis)empowerment, (im)perceptibility, bodily normativity, the technological body, the (ir)reflexivity of the *Leibkörper*, and intercorporeality. The third step, in §§23, pulls together the threads of the forgoing analyses to consider how the redescription of lawmaking as a bodily process contributes to the decentration of collective self-rule.

§11. Judgment and the Onto-Epistemologies of Western Metaphysics

I noted heretofore that a remarkable continuity/discontinuity characterizes philosophical and legal thinking about judgment. A continuity, insofar as Kelsen and all of modern constitutionalism share with Aristotle the minimalistic characterization of judgment as the disclosure of "something as something." A discontinuity, because very different understandings of the "as" joining together the subject and the predicate of a judgment go

from Aristotle to modern legal and political theorists, for whom the authoritativeness of qualifying human behavior as legal or illegal turns on being able to ascribe a judgment to a polity as its own act. “We,” the collective, are bound by a legal judgment issued by an official “we” have authorized to determine for the case at hand, and under certain conditions, what we stand for as a collective, i.e., what in this concrete situation we qualify *as* legal or illegal behavior. Disclosing something as possessing this or that legal meaning must be an act of collective self-legislation if the judgment is to be authoritative, claims modern constitutionalism. Why is this interpretation of a legal judgment and the debates it calls forth situated within the province of *modern* constitutionalism? Why is the question about the authoritative disclosure of something as legal or illegal ultimately a question about what modern constitutionalism has called *reason*?

Addressing these questions requires reconstructing key transformations in the concept of judgment in European metaphysics, although I will have to drastically abridge this reconstruction by leapfrogging from Aristotle’s *De interpretatione* to Kant’s three *Critiques* and then on to Husserl’s *Experience and Judgment*. In line with my earlier observation about the redescriptive purport of this book, my interest in engaging the philosophical history of the concept of judgment in European thinking is not that of the antiquarian; my interest is to understand the present, looking for alternative possibilities and perspectives it might conceal. This is, admittedly, an arcane and arduous exercise for legally trained scholars. I promise that their patience in following the argument of this section and the following one will be rewarded in §13, which explains the argument’s relevance for the reflexive reading of legal judgments prevalent in modern constitutionalism.

The transformation in the concept of judgment leading from Greek thinking to modernity becomes clearer when we look at the “as” joining together the subject and the predicate of a judgment. For Aristotle, the disclosure of something as something has no ontological productivity of its own; the “as” is a subjective achievement only in the sense that the judgment can be true or false depending on whether it is faithful to how reality gives itself of itself. In contemporary jargon, Aristotle’s “as” is representationalistic—the articulation of what, real in and of itself, gives itself directly to cognition. Aristotle’s epistemology follows his ontology because human agency functions as an efficient cause of what comes into being, whereas the formal and material causes of something constitute it as a being. Aristotle understood that judgment is the focal point of what today would be called an onto-epistemology. In the words of the *Metaphysics*, “as each thing is in respect of being, so is it in respect of truth.”¹⁷¹ Aristotle does not stand alone in his interpretation of onto-epistemology. For antiquity at large, the “as” joining together the subject and its predicate presupposes “that the real as such presents itself of itself and exists incontestably in the immediacy of [its] presence (*im Augenblick der Präsenz*).”¹⁷² The disclosure of something as something means for antiquity that reality, as it exists, is binding for human agency.

It would take us too far afield to discuss medieval onto-epistemology in any detail. Suffice it to note that, like in antiquity, the conceptualization of judgment in Scholastic philosophy remains tied to a reality that gives itself directly to cognition, even if now as a direct intentional unity between the cognizer and the cognized. But this continuity hides

¹⁷¹ Aristotle, *Metaphysics*, in *The Complete Works of Aristotle*, vol. 2, 993b30.

¹⁷² Blumenberg, “Wirklichkeitsbegriff und Möglichkeit des Romans,” 10-11.

a drastic discontinuity: the thematization of the “as” in “something as something” comes to stand in the shadow of the transitive conservation of being by an omnipotent God. In contrast to the confidence of Greek philosophy that reality gives itself of itself to human cognition, the veracity of judgment—the expression of the human capacity to know the real—comes to depend, in medieval thinking, on a divinely “guaranteed reality.” (*ibid.*, 11) In tandem with being, knowledge requires a guarantee human beings cannot provide from themselves, as becomes retrospectively clear in the divine guarantee Descartes continues to invoke in the *Meditations*, when discussing human cognition of external reality.¹⁷³ “Retrospectively,” I say, because this was not yet a problem for Aquinas and the Thomist tradition, which insisted on God’s reliability and therewith the reliability of a world-order directly accessible to human cognition. Everything changes when, in the hands of Nominalism, divine omnipotence was deemed incompatible with a reliable world-order, since a divine guarantee would limit God’s freedom to create whatever world He might envisage, or to change the existent world-order at whim. The experience of epistemological precarity initiated by the Nominalist doctrine of radical contingency in late Scholasticism, not the “fear of mob rule” ascribed by Latour to Plato’s *Gorgias*, is at the root of the modern problem of reference that plays out in the “as” of “something as something.” The modern concept of *method* reoccupies the answer position that became vacant when the divine guarantee of being and knowledge no longer was a plausible response to the problem of radical contingency inherited from the crisis of late Scholasticism. Latour’s description of the Amazon experiment as the methodologically secured pathway that seeks to guarantee the reference of a scientific judgment to reality—this as an advancing forest line—is an excellent example of the onto-epistemology governing the modern understanding of the “as” in “something as something.”

Arguably, this novel onto-epistemology obtains its initial expression in Kant. As is well known, Kant takes judgment to be the paradigm of thinking. In the words of the first *Critique*, “the faculty of judgment . . . is the same as the faculty of thought.”¹⁷⁴ Judgment, he adds, is “the mediate knowledge of an object.” (*ibid.*, A68/B93) Like Aristotle some two thousand years before him, Kant understands mediation as assigning a predicate to a subject, disclosing something as something. He calls this act of mediation a *representation* (*Vorstellung*). But in contrast to antiquity’s self-assurance that the real gives itself of itself to human cognition, the mediateness of judgment in Kant points to a different ontology of agency. In the Kantian sense, judgment as a representation is a taking up and working through of what is given. As he notes in the *Anthropology*, “to bring order into the manifold” is to “combine [the manifold] according to a rule of thinking.”¹⁷⁵ Representation now acquires an ontological productivity of its own, a productivity that finds its contemporary echoes in epistemological constructivism and, more generally, in all critiques of representationalism. For Kant, the “as” in “something as something” is a subjective

¹⁷³ “And when I consider the fact that I have doubts, or that I am a thing that is incomplete and dependent, then arises in me a clear and distinct idea of a being who is independent and complete, that is, the idea of God . . . And now, from this contemplation of the true God, in whom all the treasures of wisdom and the sciences lie hidden, I think I can see a way forward to the knowledge of other things.” Descartes, *Meditations of First Philosophy*, 37 (AT-VII-53).

¹⁷⁴ Kant, *Critique of Pure Reason*, A81/B106; also: “[w]e can reduce all acts of the *understanding* to judgments, and the understanding may therefore be represented as a *faculty of judgment*.” (*ibid.*, A69/B94)

¹⁷⁵ Immanuel Kant, *Anthropologie in pragmatischer Hinsicht*, in Kant, *Werke*, edited by Wilhelm Weischedel (Darmstadt: Wissenschaftliche Buchgesellschaft, 1983), Vol. 10, BA31.

achievement in a strong, ontological sense, namely, as determining a determinable, the forming of matter: an agency that lends formal reality to appearances, such that what appears, appears as this or that being.

Thus, an onto-epistemology once again: Kant would have no difficulty in endorsing Aristotle's thesis, "as each thing is in respect of being, so is it in respect of truth," even though understanding it in a radically different way than Aristotle. For this reason, Heidegger observes that in contrast to Descartes, for whom *cogitare* remains within the orbit of *repraesentatio* as a mental reproduction of the real, thinking, in Kant, acquires an essentially different meaning. "What, then, does Kant's 'I think' mean? So much as: I present something as something."¹⁷⁶ Both Aristotle and Kant would agree on the following equivalence: judging = disclosing something as something. And yet, although the terms of the equivalence are the "same," the equivalence speaks to two radically different ontologies and epistemologies—ultimately two different concepts of reason.

Heidegger correctly notes that judgment has a fundamentally different meaning for Kant than it does for either antiquity or Scholastic philosophy. Yet, with Blumenberg and against Heidegger, the modern subject is *not* the secularization of the Scholastic *causa sui*, precisely because the subject, in contrast to a *causa sui*, speaks to a *dependent* form of agency. So, too, Kant's notion of judgment, which is shorthand for dependent spontaneity. Judging that something is this or that—a cat, a mountain, or whatever—demands, according to Kant, that something be given to the subject via sensibility, to which the priori categories of the understanding can be applied. On one side we find passivity and affectivity, as something must be sensibly given to the subject for it to be able to judge: *ego sum*. On the other we find agency and its creativity, as the subject's judgment represents—that is, synthesizes, objectifies—by bestowing a form—a meaning—on what is given in time and space, the a priori forms of sensibility: *ego cogito*. As interpreted by Kant, the canonical formulation, "something as something," is emblematic for the concept of reason that obtains its first formulation in Descartes' cogito principle. That epistemology follows ontology means, for Kant, that appearances have an ontological purport insofar as they are the outcome of a realizing process in which the subject forms matter. "To this act [of combination] the general title "synthesis" may be assigned as indicating that we cannot represent to ourselves anything as combined in the object which we have not ourselves previously combined."¹⁷⁷ This, stripped down to the essential, is what Kant means by an ontology of appearances.

To be sure, Kant contrasts reflective judgment in the third *Critique* to the determinative judgments of the first and second *Critiques*. Furthermore, he situates legal judgment squarely within the precinct of practical determinative judgments. But regardless of their differences, both modalities of judgment share the same basic structure. Although determinative judgment goes from the general to the particular, and reflective judgment from the particular to the general, both disclose something (the particular) as something (the general). Kant is important for our inquiry upstream, not downstream, from the fork

¹⁷⁶ Heidegger, "Entwürfe zur Geschichte des Seins als Metaphysik," in *Nietzsche II*, 461.

¹⁷⁷ Kant, *Critique of Pure Reason*, B130.

at which determinative and reflective judgments go their separate ways. At issue is making ontological sense of the “as” that unites them as modalities of judgment.¹⁷⁸

§12. Husserl on the Reflexivity of Judgment

For this, I turn initially to Edmund Husserl’s contribution to a phenomenology of judgment in *Experience and Judgment*.¹⁷⁹ The book takes its point of departure in the concept of judgment first articulated by Aristotle, namely, “a ‘substrate’ (*hypokeimenon*), about which something is affirmed, and that which is affirmed of it (*katēgoroumenon*).” (*ibid.*, 14) But like Kant, and against Aristotle, Husserl understands himself as extracting a novel concept of reason from judgment: a “phenomenological clarification of logic” aims “to attain [a] comprehensive concept of logic and . . . *logos*.” (*ibid.*, 13). In a formulation very close to Kant’s insight that something must be given to the understanding if it is to do its work—an original passivity that precedes and conditions the ego’s agency—, Husserl sets the stage for his inquiry into judgment with the lapidary statement, “all thinking presupposes pregiven objects.”¹⁸⁰ Similarly, “[a]ffection is always prior to grasping (*Erfassen*).” (*ibid.*, 24, translation modified). But he clarifies the structure and dynamic of judgment through a phenomenological exploration that differs in decisive ways from Kant’s reappropriation of the cogito principle in the first *Critique*. For, he argues in various works, it is precisely the intentional structure and dynamic of judgment that eludes Kant’s ontology of appearances, and which Husserl aims to recover in the framework of what he calls “a phenomenology of the origin of the judgment and . . . a phenomenological genealogy of logic in general.” (*ibid.*, 18)

I approach *Experience and Judgment* as *pivotal* in the strict sense of the term. On the one hand, and looking back to Part I, his theory of judgment remains within the orbit of a reflexive concept of agency. This is helpful to our inquiry because Part I discussed the ontology of reflexive agency in general, without engaging with lawmaking in particular. Husserl’s account of judgment allows me to transition from those general considerations to modern constitutionalism’s interpretation of authoritative lawmaking as collective self-legislation. On the other hand, and looking forward to the following sections of Part II, Husserl offers a genealogy of judgment that takes a first step toward rooting it in *bodily* access to and engagement with the world, leading back the “I think” to an “I can,” hence from representational acts to the bodily appearance and disclosure of something as

¹⁷⁸ Arendt, of course, has explored the significance of reflective judgment for political judgment in her book on Kant’s political philosophy. See also Alessandro Ferrara’s books, *Reflective authenticity: Rethinking the project of modernity* (London: Routledge, 1998), *Justice and Judgment: The Rise and the Prospect of the Judgment Model in Contemporary Political Philosophy* (London: Sage Publications, 1999), and *The Force of the Example: Explorations in the Paradigm of Judgment* (New York: Columbia University Press, 2008). For a debate with Ferrara about the ontological significance of the “as” in reflective judgment, see the special section dedicated to my *Authority and the Globalisation of Inclusion and Exclusion*, in *Etica & Politica*, 21 (2019) 3, 371-381; 432-436.

¹⁷⁹ Edmund Husserl, *Experience and Judgment*, edited by Ludwig Landgrebe, translated by James Spencer Churchill and Karl Ameriks (Evanston, IL: Northwestern University Press, 1975). I will ignore philological questions oriented to unravelling what was written by Husserl himself and what by his collaborators, taking the text as it stands as exemplary for a Husserlian approach to a genealogy of judgment. See also Edmund Husserl, *Formal and Transcendental Logic*, translated by Dorion Cairns (The Hague: Martinus Nijhoff, 1977).

¹⁸⁰ *Ibid.*, 19. Strictly speaking, as is later noted, what is given in original passivity is not yet an object; “objectification is . . . always an active achievement of the ego.” (*ibid.*, 62, 77 fn 1)

something. This amounts to a phenomenological radicalization of the *sum* of *ego cogito ego sum*. That affectivity and sensibility are necessary conditions for the *appearance* of something as something we already know from Kant, as discussed in §3. In this, Kant takes *ego sum* beyond Descartes. By insisting that judgment is rooted in perception, Husserl goes an important step further, bringing to the fore what, as we saw in §7, remained implicit and unexplored in Kant's account of affectivity and sensibility, namely, *embodiment* as constitutive for the possibility of a predicative judgment, such as "this is a contract" or "that is theft." Yet it is with Maurice Merleau-Ponty's critique of "intellectualism," which has Kant as its main target, and his radicalization of Husserl's "operative intentionality" (about which more later), that the shift to the lived body as the core of an phenomenological elucidation of *ego sum* is fully realized, an elucidation that goes hand in hand with a reconceptualization of *ego cogito*: "Consciousness is originally not an 'I think that,' but rather an 'I can' . . . consciousness is being towards the thing through the intermediary of the body."¹⁸¹ Along these lines, the "I/we think," in the sense of a legal judgment, such as "this is theft," is ultimately rooted in bodily intentionality, as distilled in the formula, "I/we can."

I reserve a fuller engagement with the bodily structure of intentionality for later. For the moment, and looking back to Part I, I hazard a very selective reading of Husserl's text, tracking how his account of bodily intentionality carries forward the ontology of reflexive agency informing the principle of self-preservation and its thematization of human dependency. This account is a prelude to the discussion, in the following section, of modern constitutionalism's elucidation of legal judgment as an act of collective self-legislation.

The key to Husserl's reappropriation of the principle of self-preservation lies in his description of the different modalities of certainty, progressing from a situation of belief, to doubt, to possibility, and, finally, to certainty. In his words,

as a rule an interest in confirmation [of what is experienced] will develop only where the simple certainty of belief has already been challenged for whatever motive, where it has perhaps given place to doubt, and where it is now a question of arriving at certainty from the doubt, of resolving it by a *decision*, and of taking a stand (*Stellung zu nehmen*) with regard to what has become doubtful.¹⁸²

It pays to briefly follow Husserl's description of the trajectory leading from belief, as the situation of an initial, "simple certainty," to a decision that establishes what counts as certain in response to doubt about a percept. In normal situations—e.g., when, ambling along a street, I look at goods on display in shopwindows—, perception has an anticipative structure in which a percept appears in an "unobstructed process of intentions. The object . . . stands before us in a simple certainty of belief as existing and as being such and

¹⁸¹ Merleau-Ponty, *Phenomenology of Perception*, 139-140. Referring to intellectualism, he notes that, with the entry of the cogito into modern philosophical discourse, "every signification was simultaneously conceived as an act of thought, as the operation of a pure 'I'; if intellectualism easily won out over empiricism, it itself remained incapable of accounting for the variety of our experience, for the regions of non-sense in our experience, and for the contingency of its contents. The experience of the body leads us to recognize an imposition of sense that does not come from a universal constituting consciousness, a sense that adheres to certain contents." (*ibid.*, 182-183)

¹⁸² Husserl, *Experience and Judgment*, 272. The following draws and expands on Hans Lindahl, "Law and (Dis)empowerment: On Ricœur's Phenomenology of Judging," in Marc de Leeuw, George H. Taylor, and Eileen Brennan (eds.), *Reading Ricœur Through Law* (New York: Rowman & Littlefield, 2021), 187-204.

such.” (*ibid.*, 87) Notice how perception, as bodily engagement with the world, is already built into this description of cognitive processes. But perception can be interrupted, either when the percept appears otherwise than as expected—e.g., that side of the ball is green, not red—or when it becomes doubtful whether I see one thing or another: Is that a human being or a mannequin standing in the shopwindow? In Husserl’s words, a “conflict” (*Widerstreit*) arises between two meanings—green/red, human being/mannequin—settled through a decision that takes a stand on the percept as having *this* (not that) meaning.¹⁸³ The experience of a perceptual obstruction (*Hemmung*) and the ensuing conflict of meanings to which it gives rise are the pre-predicative origin of the logical categories of negation and possibility, namely, $s \neg P$ and $s \diamond P$. Perceptual obstruction is obstruction of the “as” in the ongoing process of perceiving something as something. It is *resistance* to our bodily being-in-and-towards-the-world-with-others.

Thus, Husserl’s genealogy of judgment makes good on the claim that “the phenomenological elucidation of the origin of the logical reveals that its domain is far more extensive than traditional logic has dealt with hitherto.” (*ibid.*, 12-13) Formal logic has its inception in the broad realm of perceptual experience and its bodily orientation towards the world. Bodily intentionality has already done its work and conditioned predicative judgments there where these are most abstract and apparently far removed from perception, namely, in formal logic and its symbolic syntax. I would add that this insight includes the application of deontic logic and its symbolic syntax to legal reasoning, as when OA is taken to mean “it is obligatory that A (or it ought to be (the case) that A),” or when PA is taken to mean “it is permitted (or permissible) that A,” defined, symbolically, as “ $PA \equiv \neg O \neg A$.”¹⁸⁴ For instance, the symbolic notation OA has its origins in bodily anticipations about how something will appear in perception, and which, when disappointed, call forth an “it *ought* to have appeared thus, and not otherwise.”

Husserl’s description of the interruption of the simple certainty of perception is of considerable interest for our inquiry. A first point concerns freedom, or rather its curtailment: when obstructed, the perceptual process “is no longer free.” (*ibid.*, 291) Husserl makes clear that it is not only the perceptual process which is hindered; it is the *subject*, who, having perceived freely under normal conditions, becomes unfree. The obstruction of perception, and the ensuing uncertainty about my capacity to adequately perceive something as something, are, for Husserl, the primordial experience of a loss of cognitive freedom. This is coevally a loss of bodily freedom: my gaze is arrested; it continues to dwell, even if only momentarily, on what I had taken to be a fully red ball or a human being.

Notice that the obstruction of perception reenacts the motif of insecurity as *resistance* to the subject’s self-activity elucidated in §5. Power, in the sense of “‘I can’, ‘I have the power to’, ‘I am capable of,’” gives way to the experience of powerlessness, of “‘I cannot.’”

In experience . . . the “I can” is distinct from the “I cannot” . . . There is a resistanceless of doing things . . . and there is a doing as an overcoming of resistance, a doing that has its “against which,” and a corresponding consciousness of an ability to overcome the resistance . . . [But

¹⁸³ *Ibid.*, 88; see also Husserl, *Formal and Transcendental Logic*, 235.

¹⁸⁴ “Deontic logic,” in *Wikipedia* (accessed on August 29, 2023).

t]he resistance can become insurmountable; in that case we come up against the “it won’t budge,” “I cannot,” “I do not have the power.”¹⁸⁵

No less importantly, an obstruction bursts the twofold unity of the perceptual process. On the one hand, “[t]he ego is affected by [the obstruction]; it itself, as ego, and in its *own* way, is disunited with itself, is divided . . .” (*ibid.*, 290) If the *subject* of the world becomes disunited, divided, with respect to itself, so also the *world* of the subject: “Every modalization of a certainty concerns the subject of the world; this concerns at the same time the entire system of certainty.” (*ibid.*, 291)

The experience of an obstruction is the experience of pluralization: “there emerges a consciousness of otherness.” (*ibid.*, 88) Likewise, the experience of obstruction and pluralization interrupts the self-relation—the reflexivity—deployed in relating to the world in normal perception. Importantly, Husserl points to the affective character of intentionality when describing how the obstruction of perception is experienced by the ego: “instead of the fulfillment of the intentions of anticipation, a *disappointment* enters it.” (*ibid.*, 88)¹⁸⁶ For a flash, and with greater or lesser intensity, the self-assurance that I truly perceive the world, i.e., that the world is as I perceive it, is shaken. The resistance of the percept to perception sparks a moment of self-doubt, of uncertainty, exposing me to my contingent existence and the precariousness of veridical access to the beings of the world I inhabit.

When confronted with the pluralization of experience, the ego strives to “re-establish” the unity of experience and therewith its unity and that of its world: “[i]f the unanimity of the perception is reestablished, if a single perception again unfolds in normal form, then the internal conflict of the ego with itself is resolved.” (*ibid.*, 291) By reestablishing the unity of experience, the subject overcomes the otherness of what is given in perception, recovering its cognitive freedom and, with it, the relation to self—the reflexivity—interrupted by the obstruction of normal perception. My gaze moves on, once again unhindered after I had stopped to peer at the shape in the shop window, trying to

¹⁸⁵ Husserl, *Ideas II*, 270-71. In terms of the genealogical inquiry of *Experience and Judgment*, a bodily “I cannot” is the experiential origin of necessity in modal logic as well as in all practical domains. In the same way that necessity as a modal category originates in a bodily “I cannot,” so also the critique of false necessity has its inception in the bodily surmountability of what is given in my practical doings: “I can.” Notice that the motif of resistance to the subject’s cognitive activity is strictly homologous with Marx’s description of labor and praxis, as discussed in §5, which seek to overcome the resistance of, respectively, nature and capitalism to the unhindered self-activity of the subject. Dejours and his co-authors put it very well as concerns labor, which “represents a confrontation with the real, where the real is understood, in a simple sense, as that which resists the attempts of workers to apply the prescriptions that define the work task.”¹⁸⁵ In response to this obstruction, labor as the self-activity of the subject requires transforming these prescriptions, rendering them fit for the task at hand. “When work obstacles are overcome, through the trial of ‘real work’, the self can grow in strength. The sense of identity, that is, the power of the self over itself and its internal operations, is secured and enhanced.” Dejours *et al.*, *The Return of Work in Critical Theory*, 85, 81.

¹⁸⁶ Husserl’s extensive discussion of affectivity and the emotionally charged character of intentionality gives the lie to Latour’s lurid claim that phenomenology creates a split between “a world of science left entirely to itself, entirely cold, absolutely inhuman; and a rich lived world of intentional stances entirely limited to humans, absolutely divorced from what things are in and for themselves.” As to the claim that phenomenology only considers human intentionality, I can only surmise that Latour has not read, among others, the sections on animal intentionality, human and other-than-human, in Husserl’s *Ideas II* and Merleau-Ponty’s *Nature*. Latour, *Pandora’s Hope*, 9; Husserl, *Ideas II*, 96-180; Maurice Merleau-Ponty, *Nature: Course Notes from the Collège de France*, translated by Robert Vallier (Evanston, IL: Northwestern University Press, 2003), 167-200.

figure out whether it is a human being or a mannequin. Thus, Husserl avers that the experience of alterity is the experience of resistance. *Alterity is what hinders the subject's self-activity* and in so doing calls the self-centered subject and its world into question, confronting it with and soliciting a response to its precarious existence. The experience of alterity, in Husserl's description of the interruption of the perceptual process, is the experience of decentration.

Faced with a situation of cognitive insecurity, triggered by the experience of negativity in which what appears disappoints my expectations of what will appear and how it will appear, the process leading to a predicative judgment aims to overcome this situation and secure the subject's continued self-activity by reestablishing the continuity of cognition. This demands transforming the norm that governs how the subject relates to the percept. In effect, norms are congealed expectations, as one might put it. If the subject had anticipated that the ball is red, recovering the unity of experience demands adjusting the norm that governs anticipations about the color of the ball in the ongoing process of perception, and which had led me, in the past, to anticipate the ball's color as red.

The transformed unity of perception is temporal as much as it is normative. When the obstruction of the perceptual process interrupts the appearance (in the present) of what I had expected would appear (arriving from the future) as a red ball or a human being, and which has ceased to appear (receding into the past) in the ordinary course of perception, recovering the unity of experience involves reconfiguring the lived time of past, present, and future, such that these are once again joined together as the temporal dimensions of an experiencing subject. This process, if successful, reconfigures the *temporal identity* of the subject, who is, once again, the selfsame subject over time.

Likewise, as the interruption of perception by what is unexpected implies a loss of control over the reality of what appears, the subject regains cognitive control of appearances by modifying the norm that governs how it experiences reality. In the face of an initial condition of heteronomy sparked by negativity and doubt, in which not the subject but what appears governs the terms of appearance, the subject reformulates the norm that governs what should appear and how, such that reality is once again intelligible for the subject and placed under its cognitive control because it meets the subject's expectations about what will appear and how. In a word, the subject is once again cognitively *autonomous*, free; its norms again successfully determine how something will appear. Here again, cognitive freedom is rooted in bodily freedom: having settled that the figure in the window display is a mannequin, I now expect that the figure will display such and such general features proper to mannequins, which I could confirm were I to take a couple of steps sideways to look at it from another perspective.

In light of the above, it should come as no surprise to the reader that Husserl characterizes the recovery of cognitive freedom in terms of *self-preservation*. "Striving for consistency of judgment and for certainty is thus a characteristic which is part of the general striving of the ego for self-preservation. The ego preserves itself when it can abide by its acts of position-taking, its 'validations,' its 'This is actually so,' 'That is valuable, good'."¹⁸⁷ Earlier in the book, Husserl describes this striving as a "will to knowledge": overcoming the self-doubt to which the experience of an obstruction gives rise yields "a specific feeling of satisfaction in this enrichment [of perception] and, in relation to this horizon of

¹⁸⁷ Husserl, *Experience and Judgment*, 291, italics omitted.

expanding and heightening enrichment, a striving ‘to come ever closer’ to the object, to take possession of its ‘self’ ever more completely.” (*ibid.*, 86) In taking possession of the percept, the ego takes possession of itself. Mastering the world is a self-mastering and vice versa. As Husserl describes it, perception is a *totalizing* process: by reestablishing the unbroken unity of the perceptual world, interrupted by what disappoints the ego’s expectations, cognition expands the ego’s knowledge of the world ever further, although the world in itself, the world in its totality, is the terminus of an open-ended and infinite process of totalization.

The echoes of the early modern experience of the *nihil* are unmistakable in these passages. As noted in §2, the Scholastic doctrine of transitive conservation of the world by an omnipotent God entailed that the world would fall back into the abyss of nothingness, were divine concursion to be withdrawn. With the passage into modernity, transitive conservation no longer was needed to hold the world in existence. To the contrary, the world’s continued existence was stabilized as the normal state of affairs. Not sustaining the world but rather transforming it when it opposes the subject’s self-activity becomes the task of self-preservation.

Both aspects of the passage from transitive to intransitive conservation reappear, in a new guise, in Husserl’s genealogy of judgment. Initially, the stabilization of the world’s continued existence at the epochal threshold leading into modernity is reoccupied, in Husserl’s genealogy of judgment, by a world in principle accessible to the cognizing subject as the normal state of affairs. Husserl qualifies this as an initial condition of “simple” perceptual certainty. Subsequently, the interruption of normal perception—something is not what the ego had taken it to be—and the ensuing situation of uncertainty about the reality of what appears and about the ego’s capacity to render intelligible what appears, reoccupies the experience of radical contingency that accompanies the loss of a reliable world-order in late Scholasticism. This experience of negativity, of cognitive powerlessness, sparks, finally, a “striving for knowledge,” that is, “the effort to formulate in a judgment what and how the existent is.” (*ibid.*, 19)

Husserl’s genealogy of predicative judgment is, most fundamentally, a celebration of the *will to cognitive power*, or more precisely, of the will to self-affirmation of the knowing subject, in response to an experience of self-doubt and more or less intense existential precarity in the face of resistance to its embodied self-activity: *I can* know ever more fully, overcoming otherness and plurality, and reestablishing the “unbroken unity” of the perceptual world. (*ibid.*, 290) Husserl’s description of the ego’s striving for knowledge sparked by the experience of powerlessness, its effort—its work—to affirm itself in the face of a situation of uncertainty and finitude, is a late echo of Spinoza’s *conatus*: “Each thing, as far as it can by its own power, strives to persevere in its being.”

This genealogy of judgment and this concept of reason govern Husserl’s reappropriation of what Aristotle calls affirmative and negative judgments: “[a]n *affirmation* is a statement affirming something of something, a *negation* is a statement denying something of something.” The continuity in this apparently trivial characterization of judgment going from Aristotle, on the one hand, to Kant and Husserl, on the other, hides an epochal break of the greatest consequence, not only as concerns what counts as “thinking” but, more generally, the self-interpretation of human agency prevalent in modernity—including, as we shall now see, modern constitutionalism’s insistence that judgment must be a

reflexive act if it is to be authoritative. Indeed, the “as” deployed in lawmaking is, for modern constitutionalism, a reflexive “as.”

I conclude this section by noting that for Heidegger, Husserl’s reappropriation of the Aristotelian characterization of judgment in terms of the will to knowledge is surely exemplary for European nihilism and its will to unencumbered cognitive and practical power. Hobbes once again, but now in tandem with Nietzsche, as concerns the will to power: “I put for a general inclination of all mankind, a perpetuall and restlesse desire of Power after power, that ceaseth onely in Death.” I return to this in the final section of Part III, when elucidating the concept of lawmaking in the accusative as a non-totalizing mode of bodily responsiveness, and in Part IV, when discussing its implications for authoritative lawmaking in the Anthropocene.

§13. Judgment as Collective Self-Legislation

To be sure, Husserl’s genealogy of judgment is the account of a solitary ego’s self-preservation. But, as he acknowledges, this is an abstractive exercise. It brackets the intersubjectivity of experience to articulate the conditions under which evidence in the sense of the self-giveness of what appears is at all possible. Husserl’s defense of evidence as the “principle of all principles” of cognition, that is, of what gives itself of itself in an original, immediate presence, has been sharply challenged; it is a late echo of the modern attempt to posit an ultimate foundation for thinking that can overcome the challenge of the *nihil* inherited from Scholastic philosophy: *nihil est sine ratione*.¹⁸⁸ I bracket this discussion for the moment, returning to it in §18, when discussing motor intentionality and the lived body as both normed and norming. For the moment, it suffices to cite what is perhaps the most lacerating of all rejoinders to Husserl: “contrary to what phenomenology—which is always a phenomenology of perception—has tried to make us believe, contrary to what our desire cannot not be tempted to believe, the thing itself always withdraws (*se dérobe*).”¹⁸⁹

Of interest in this section are the constitutionalist implications of Husserl’s reappropriation of the ontology of reflexive agency. The legally trained reader will be non-plussed by this statement. For what Husserl has to say about bodily intentionality and the passage from simple certainty in perceptual processes to tested certainty in a predicative judgment seems far removed from the constitutional scholar’s understanding of legal judgment and how it relates to collective self-legislation. Not at all. Having requested these scholars to follow Husserl’s genealogy of predicative judgments, let me now reward their patience by showing how it casts light on the claim of modern constitutionalism that legal judgments must be the expression of reflexive agency if they are to be authoritative. In effect, a genealogy of legal judgments as the exercise of collective self-legislation and Husserl’s genealogy of cognitive judgments are strictly homologous. Certainly, a full justification of the homology demands a phenomenology of *collective* intentionality as it plays out in legal judgment and, in fact, in all of lawmaking, showing how it runs parallel to intentionality in Husserl’s genealogy of judgment by perceiving subjects. I hold a

¹⁸⁸ Husserl, *Ideas I*, §24.

¹⁸⁹ Jacques Derrida, *Voice and Phenomenon: Introduction to the Problem of the Sign in Husserl’s Phenomenology*, translated by Leonard Lawlor (Evanston, IL: Northwestern University Press, 2011), 89. (translation modified)

discussion of collective intentionality in reserve, focusing, for the time being, on describing the parallel between the two modalities of judgment.

In the same way that Husserl's genealogy of judgment begins with a freely flowing process of normal perception, such as when I look at window displays when walking down a shopping street, so also a constitutionalist genealogy of a judicial ruling would begin with everyday situations in which mutual expectations that participants in collective action entertain with respect to one another about who ought to do what, where, and when are borne out by their behavior. They are deemed to act *freely*, as when A and B draw on applicable law to determine the conditions of a rental or a mortgage contract. The limits laid down by the legal order in the form of the obligations that bind together participants in a polity are strictures to which participants are assumed to have assented in their daily interaction. Parallel to Husserl's "simple" perceptual certainty, these limits are deemed the expression of practical freedom, i.e., of what one might call *presumptive* freedom and the *presumptive* authority of a legal order.

The emergence of conflict about what counts as mine and thine interrupts the normal course of intersubjective relations, as when A and B disagree about the performance of their rental or mortgage contract, giving rise to a twofold experience of pluralization strictly parallel to Husserl's phenomenology of the obstruction of perception. On the one hand, the interruption of mutual normative expectations "divides," "disunites," the collective with respect to itself, as Husserl would put it: conflict bursts asunder the presumptive unity of a "we." On the other hand, conflict interrupts the presumptive unity of the legal order because plaintiff and defendant can no longer agree on which rights and obligations ought to be allotted to whom. Conflict announces itself as a moment of negativity and of the obstruction of freedom for both parties: for the plaintiff, due to what they view as the misrecognition of their rights; for defendant, because plaintiff's demand for the recognition of a right encroaches on what they take to be their rightful capacity to carry on with their affairs. The acting out of collective agency is interrupted, suspending the "as" in the matter of course realization of something as something. Once again, the motif of insecurity as resistance to the subject's continued self-activity comes to the surface, now as demanding a judicial decision that would settle the conflict. And like for Husserl, the experience of alterity is the experience of resistance to self-activity—the experience, to borrow Butler's phrase, of precarious life.

As such, conflict sparks collective *self-doubt*, usually limited to the case at hand, but sometimes involving the broader community in cases which expose deeply divisive issues and confront it with burning questions, such as when evicted tenants and homeowners took to the streets in Spain during the financial crisis of 2008 to protest against the laws governing tenancy and mortgage: ¡*Basta ya!* Resistance by the *Movimiento de los indignados* raises the question, "Are 'we' a collective and, if so, what joins us together?" Their indignation at the injustice visited upon them attests, in collective form, to the emotion manifest in what Husserl refers to as the "disappointment" of expectations:

We the unemployed, the poorly paid, the subcontracted, the precarious, the young . . . we want a change and a decent future. We are fed up with antisocial reforms, with being left unemployed, with the banks that caused the crisis raising our mortgages or taking our homes, with

laws that limit our freedom for the benefit of the powerful. We accuse the political and economic powers of our precarious situation and demand a change of course.¹⁹⁰

From the perspective of a phenomenology of (collective) intentionality, to call self-preservation a principle of reason is by no means to factor out emotions from lawmaking and from reason; to the contrary: it is to acknowledge that they are rooted in the embodied condition of the subject and its constitutive condition of dependency.

The indignation of the protestors who took to the Plaza Mayor, in Madrid, challenges a strictly reflective account of reason, if by that one means an account of reason the node of which is a predicative judgment, oral, written, or otherwise. As if he were speaking directly to the *indignados* and myriad other social movements, Ricœur hints at the bodily character of reason when stating that “[o]ur first entry into the region of law [is] marked by the cry, ‘It’s unjust!’”¹⁹¹ The cry, as a cry, speaks to an initial affective response to a bodily experience of negativity that first reaches language as “its unjust!” Only then does reflection kick in, attempting to articulate in what sense an experience is negative, and how to deal with it—the reflective domain that modern constitutionalism equates with reason, and reason with the pursuit of justice. Against this reductive reading, the cry, “*¡Basta ya!*,” makes manifest that reason in general, and lawmaking in particular, begins with affectivity and the affects because reason is, without exception, bodily reason.

In the face of a condition of initial uncertainty sparked by conflict about the law, the double finality of the act of judging comes into view: by deciding what is yours and what mine, a judge lifts uncertainty, taking a stand regarding what counts as certain for the case at hand. In the same way that, as Husserl notes, the interruption of perception leads to “a *decision*, and . . . taking a stand with regard to what has become doubtful,” so also legal proceedings mark the progression from a situation of uncertainty towards legal certainty. In a situation of conflict about the facts and the norms applicable to the case at hand, the judge’s ruling decides, takes a stand, definitively qualifying something as having this or that legal meaning. *Res judicata*; legal certainty obtains.

The interruption of legal normality confronts the parties in conflict with a condition of heteronomy, as each loses practical control of the situation, becoming beholden to the other. In the face of this state of conflict, which is in effect the state of nature writ small, the judgment endeavors to overcome heteronomy and deliver anew a condition of presumptive collective autonomy. If a struggle for the recognition of a right which has been threatened or violated marks an initial experience of *disempowerment*, as experienced in the flesh by the *indignados*, the ultimate finality of the act of judging is to *empower* the individuals in conflict and the collective as a whole by “reestablishing” the “unbroken unity” (Husserl) of a “we” and its legal order. In reestablishing the unbroken unity of the collective, a judicial ruling claims to reestablish the reflexivity of collective agency, such that the members of a polity should once again be able to look each other in the eyes and say, “this is who we are; these are the legal norms to which we (as their subject) are bound (as their object).” By deciding about the legal meaning of something, the act of judging endeavors to overcome the negativity of conflict, such that plaintiff and defendant

¹⁹⁰ Manifiesto of “[¡Democracia real ya! No somos mercancía en manos de políticos y banqueros,](#)” (last accessed on December 20, 2023)

¹⁹¹ Paul Ricœur, *Le Juste 1* (Paris: Éditions Esprit, 1995), 11.

can recognize each other *as* free and equal members of the collective in the “as” by which a ruling determines something *as* something. This, precisely, is what it means that, for modern constitutionalism, the “as” of something as something is the expression of reflexive agency.

The interruption of collective unity is temporal as much as it is normative: conflict arrests the passage of the polity’s future into the present because mutual expectations of who ought to do what are disappointed, and from the polity’s present into the past as expectations which, having been discharged, are left behind in the course of our everyday interactions. By disclosing the *sub judice* matter as having this or that legal meaning, the judge anticipates how the legal norm should be applied in the future, that is, how the norm governs what we are legally entitled to expect from each other. By applying the legal norm to the case at hand, the judge also claims to do no more than articulate what, in the past, we were entitled to expect of each other for the case at hand. By invoking the past and the future in the present application of a norm that discloses something as legal or illegal, the judicial ruling claims to reestablish the unity of the past, present, and future of the polity—its temporal identity. By *working* to reestablish the unity of a polity weakened by internal strife, the act of judging attests to a collective will to practical power, to the power of a polity to act as one: *we can* recognize each other as free and equal agents within the unity of a legal order. “Yes, we can” (rule ourselves). For this reflexive reading of legal judgment, the telos of legal judgments, like of all lawmaking, is to *totalize*, even if totality—universality—remains the terminus of an open-ended and infinite process. The “as” of lawmaking, if it is to be authoritative, must be driven by and obey the “injunction to complete inclusion.”¹⁹²

In this collectivized reading of Husserl’s phenomenology of judgment, the emergence of a situation of reciprocal recognition between free and equal individuals, in response to the obstruction of collective action, is nothing other than the root condition of practical freedom as articulated in social contract theory and all its later permutations: I am free to do everything that does not obstruct the freedom of the Other. The judicial ruling aims to secure citizens by overcoming the resistance they raise to each other’s self-activity. By aspiring to surmount the experience of political plurality by reconciling conflicting interests in the unity of a legal order, the judicial disclosure of something as something claims to be an act of collective self-legislation. Succinctly, the judicial ruling, when read through the lens of Husserl’s phenomenology of judgment, collectivizes the ontology of reflexive agency initially articulated in Descartes’ *ego cogito ego sum*. Husserl would hold that a genealogy of collective self-legislation reaches completion in the predicative judgment by which a judge, acting on behalf of the polity, settles a conflict by representing something as a legal person, a contract, legal standing, bankruptcy, theft, etc., and in so doing affirms who “we” are as a collective in joint action.

Husserl’s phenomenology of judgment illuminates how modern constitutionalism’s account of the concepts of legal judgment in particular and lawmaking more generally reappropriates the passage from transitive to intransitive preservation. There is, prior to lawmaking, an initial situation of presumptive freedom and authority as the *normal* state of affairs; this situation reoccupies the stabilization of the world’s existence,

¹⁹² Jürgen Habermas, *The Postnational Constellation*, translated by Max Pensky (Cambridge: Polity Press, 2001), 148.

here in the guise of the *social* world. Subsequently, the obstruction of collective action creates a condition of uncertainty about the mutual expectations that participants in joint action ought to entertain with respect to each other. Finally, an act of lawmaking, whether individualized, as in a judicial ruling, or general, as in a statute, determines anew what counts as binding mutual expectations, that is, what counts as collective in collective action. Accordingly, Husserl's genealogy of judgment elucidates modern constitutionalism's interpretation of the authoritativeness of judicial rulings as a modality of collective self-legislation.

Importantly, his genealogy shows, in terms of collective self-legislation, that the social contract is not a one-shot deal, as political and legal theorists are wont to depict it. It is shorthand for lawmaking as a *recursive* process in which the terms of sociality must be established anew, whether in general, via statutes or other such legal norms, or in particular, via judicial rulings, administrative decisions, and the like, each time that resistance emerges regarding how a legal order has posited what counts as free and equal relations among its subjects.

Likewise, Husserl's genealogy of judgment shows that the "state of nature" does not stand for an original condition of unsociality in a hypothetical past but rather for the threat of a *dissolution of sociality* that reaches "us" from the future. Indeed, the state of nature speaks to an experience of negativity—"not in my/our name!"—that calls into question, more or less forcefully, what "we" had taken to be the terms of collectivity to which "we" are legally bound. The state of nature is the name of those situations that challenge the presumptive commonality implied in agency as *collective* agency. In a word, the state of nature speaks to the interruption of collective *self*-legislation, of the capacity of a polity's participants to identify and recognize themselves as a "we" in joint action. Thus, the state of nature does not mean that the original human condition is one of isolated individuals who exist and can exist in a pre-relational and pre-social setting, as new materialists and other critics of political liberalism never cease to bewail. Whatever one may want to make of the oft-excoriated "liberal subject," the state of nature, when read through the lens of Husserl's genealogy of judgment, means that subjectivity is only possible as the provisional outcome of an ongoing process of transforming intersubjectivity and interdependency in response to the fundamentally precarious human condition.

There is an excellent reason for this. As noted in §3, in contrast to the agency of a *causa sui* transcendent to the world it creates, human agency, as dependent existence, is *immanent* to the world in which and on which it acts. The principle of self-preservation entails that human agency as being-in-the-world is always already *being-in-the-world-with-others*. This is precisely what is meant by the *historicity* of human agency in self-preservation and therewith of critique as immanent critique. The cry of the *indignados* about the injustice visited upon them holds the Spanish polity to account for betraying its core constitutional values and principles. Theirs is an exercise in immanent critique. In this vein, the interruption of collective agency is the interruption of a *presumptive intersubjectivity*, the laying bare of conflict about whether "we" are and what "we" are as a polity, and to which the social contract is a response: the renegotiation and reenactment of that specific modality of intersubjectivity called institutionalized and authoritatively mediated collective agency: a modern polity. It is in *this* sense that the social contract models lawmaking as reflexive agency. At issue is the recursiveness of emergent legal intersubjectivity, that is, of becoming-with: *becoming a legal subject is becoming a*

participant in institutionalized and authoritative mediated collective agency with other subjects—once and again.

To conclude, Husserl's "comprehensive concept of logic and *logos*" casts light on what modern constitutionalism has called "reason," such as when a judicial ruling authoritatively discloses "something as something." Husserl and the reflexive reading of legal judgment prevalent in modern constitutionalism reappropriate the maxim Kant tucks away into a footnote of a famous essay: the "maxim of the self-preservation of reason."¹⁹³ When positing that legal judgment is authoritative if the exercise of collective self-legislation, modern constitutionalism takes up and reformulates the maxim as follows: reason *is* self-preservation. Although transposed to concrete decisions taken by a parliament of things, I daresay this maxim underpins Latour's politics of nature, the task of which is to bring about the progressive self-centering of terrestrial beings, gathered together in relations of individual and collective autonomy.

§14. The Missing Body in Modern Constitutionalism

As noted at the outset, Part II aims to decenter the reflexive reading of lawmaking prevalent in the constitutional imaginary of modernity without rejecting it out of hand: ~~collective self-legislation~~. Looking back to Part I, decentering lawmaking demanded that we first grasp what a self-centered reading of lawmaking is about. Such was the task of §§11–13. But the reconstruction of collective self-legislation along the lines of Husserl's genealogy of judgment also hinted at the constitutive role of embodiment in lawmaking. As the decentration of collective self-legislation begins by focusing on *bodily* responsiveness, a final aspect of this propaedeutic phase of Part II consists in understanding why the body has been largely absent from how modern constitutionalism conceptualizes legal judgments and lawmaking more generally. Such is the aim of the present section.

In effect, modern constitutionalism has largely focused on what Husserl would call predicative forms of lawmaking, such as the enactment of treaties, constitutions, statutes, administrative decisions, judicial rulings, contracts, testaments, and so forth. This follows from the modern insistence that law is positive law and, as such, the explicit performance or act of a subject. In its struggle against natural law, modern constitutionalism insists that "[t]he law is valid only as positive law, that is only as law that has been issued or set . . . Particular norms of the legal system . . . must be created by way of a special act issuing or setting them."¹⁹⁴ Kelsen's characterization of a legal judgment at the outset of Part II is a good example of positive law as a predicative act: a judicial ruling *posits* that a material fact is theft or fraud. The same occurs when two merchants refer to each other as buyer and seller, and to their act as a contract of sale, or when someone says to a notary public, "Here is my testament." Even a custom, usually viewed as an exception to posited law, gets incorporated into an order of positive law by way of an act, often judicial, that *declares* it to be customary law.

In brief, for modern constitutionalism the question about the authoritativeness of lawmaking presupposes that lawmaking is law-setting, but where setting the law is a

¹⁹³ Immanuel Kant, "What is Orientation in Thinking?", in *Critique of Practical Reason and Other Writings in Moral Philosophy*, translated and edited by Lewis White Beck (New York: Garland Publishing, 1976), 305.

¹⁹⁴ Kelsen, *Introduction to the Problems of Legal Theory*, 56.

reflective or thematic performance. Law is positive law, and law is positive if an act that predicates something of something. Thus, it is no coincidence that modern constitutionalism has an uncomfortable relationship with custom, which is effectively a mode of habitual collective agency in which the disclosure of something as something is pre-reflective, yet endowed with a normativity of its own. Relatedly, it is not surprising that modern constitutionalism focuses on representation when unpacking the structure and dynamic of lawmaking. For representation is the vehicle of lawmaking as a reflective performance, in a word, as *posited* law. As a result, Husserl's genealogy of judgment suggests that modern constitutionalism *begins too late*, forgetting an inquiry into its origins in the bodily character of lawmaking.

Universalizing versions of modern constitutionalism go further, not merely forgetting the body of lawmaking but advocating the *progressive disembodiment* of reason. Habermas' theory of communicative action is particularly revealing in this respect, when elaborating on the dual nature—ideal and real—of the validity claims and counterclaims raised by discussants who disagree with each other about what ought to be done by whom. In his words, “validity claims have a Janus face: [on the one hand,] the transcendent moment of universal validity bursts every provinciality asunder; [on the other,] the obligatory moment of accepted validity claims renders them carriers of a context-bound everyday practice.”¹⁹⁵ He adds in a remarkable passage: “The validity claimed for propositions and norms transcends spaces and times, ‘blots out’ space and time; but the claim is always raised here and now, in specific contexts.” (*ibid.*, 323). The verb Habermas uses in this passage, *tilgen*, is translated as “blot out.” But as defined by *Duden*, the authoritative German dictionary, the verb means “to abolish entirely as deficient, no longer valid, as undesirable.” To interpret lawmaking as a universalizing process is to assert that, if things go well, its rationality turns on the capacity of lawmaking to progressively free itself from the blemish of spatio-temporal contextuality, even if full decontextualization must be postponed indefinitely. Striving to decontextualize lawmaking, seeking to overcome its spatio-temporality, amounts to gradually ridding legal orders of bodies that exist and only can exist *concretely situated* in space and time; theirs are always situated knowledges and practices.¹⁹⁶ Although authoritative lawmaking never succeeds in entirely “purifying” itself of its “contamination” by the placiality and temporality of situated bodies, such is its *telos* in a universalist reading of its rationality.¹⁹⁷

Kelsen's theorization of legal judgment is particularly instructive for those who seek to understand why the body is absent from modern theories of lawmaking. Among all contributions to the constitutionalist imaginary of modernity, the Pure Theory of Law stands closest to and furthest from a phenomenology of legal embodiment. It is for this reason that I chose to begin Part II with Kelsen's observation that a legal judgment discloses something as something. For it both opens up and closes down an approach to

¹⁹⁵ Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures*, translated by Fredrick Lawrence (Cambridge, MA: MIT Press, 1990), 322.

¹⁹⁶ Here I join forces with Donna Haraway, “Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective,” in *Feminist Studies*, 14 (1988) 3, 575-599.

¹⁹⁷ Habermas, *The Philosophical Discourse of Modernity*, 323 (translation altered). Habermas uses the terms *gereinigt* and *verunreinigt* when referring to the ideal and contextual dimensions of discourse. The English version of the book incorrectly translates the latter term as ‘unpurified’. The Cartesian split between body and mind is unmistakable in this passage, a split Habermas renders in distinctly Christian hues.

lawmaking as *bodily* responsivity. I take his account of lawmaking to be a “revealer,” in the photographic sense of the term, of fundamental dichotomies governing modern constitutionalism’s forgetfulness of the body in lawmaking. For, phenomenologically speaking, a legal judgment is the outcome of a process that begins earlier, where “earlier” does not point to prior phases of a legal procedure culminating in the predicative judgment, “this is theft” or “this is a contract.”

Here, then, is my question: how might bodily intentionality be both revealed and concealed in Kelsen’s interpretation of legal judgments as predicative acts that disclose something as something?

Kelsen comes closest to and is furthest removed from a phenomenology of bodily intentionality when, in the very first pages of the second edition of the *Pure Theory of Law*, he seeks to clarify the nature of an act—he often refers to the “natural act”—and its legal meaning. The passage is long, but worth quoting in full:

If you analyze any body of facts interpreted as ‘legal’ or somehow tied up with the law, such as a parliamentary decision, an administrative act, a judgment, a contract, or a crime, two elements are distinguishable: one, an act or series of acts—a happening occurring at a certain time and in a certain place, perceived by our senses: an external manifestation of human conduct; two, the legal meaning of this act, that is, the meaning conferred upon the act by the law. For example: People assemble in a large room, make speeches, some raise their hands, others do not—this is the external happening. Its meaning is that a statute is being passed, that law is created . . . A man in a robe and speaking from a dais says some words to a man standing before him; legally this external happening means: a judicial decision was passed. A merchant writes a letter of a certain content to another merchant, who in turn answers with a letter; this means they have concluded a legally binding contract. Somebody causes the death of somebody else; legally, this means murder.¹⁹⁸

Kelsen, the phenomenologist, invites his readers to follow him in a genealogy of the legal act—a genealogy that interrogates what precedes the interpretative act whereby something appears and is disclosed as having this or that legal meaning. He begins by requesting his readers to take up the first-person perspective of a witness to a series of acts, seeing and hearing what unfolds in their presence. The genealogy proceeds in three stages. The first identifies a range of legal acts, which the reader is presumed to know what they mean in advance of the genealogical exercise: a parliamentary decision, an administrative act, etc. This is the jurist’s or legal point of view. In a second step, Kelsen describes the series of acts from the perspective of someone nescient of the law, for whom what unfolds before their eyes is unintelligible in its legal meaning. The regressive move gives way to a third, progressive step that reinstates law’s empire to render events legally intelligible: this, “as” the passing of a statute; that, “as” a judicial decision; this, “as” a contract; that, “as” murder. By contrasting the two situations, Kelsen argues that legal interpretation *qua objectivating* process, for the one, and taking up the legal point of view, for the other, are two ways of saying the same thing.

Phenomenologically speaking, Kelsen’s exercise shows that a legal order, in which, as he puts it, certain acts are intelligible “as ‘legal’ or somehow tied up with the law,” is

¹⁹⁸ Kelsen, *Pure Theory of Law*, 2.

what Husserl calls a *Sonderwelt*—a particular world.¹⁹⁹ In the same way that science is an “idealizing” process that generates a *Sonderwelt* populated by objects and subjects not found in concrete experience, so, too, a legal order generates a world populated by legal subjects and the objects of their legal relations, a world that stands at a considerable remove from everyday experience. Here is where sociological critiques of the “juridification” of sociality find their point of entry. These transformations are also the point of entry for critiques of the rights of nature, insofar as juridification involves a certain *humanization* of agency, as we shall see in Part IV. Kelsen takes this phenomenological insight a step further, pointing out that a legal *Sonderwelt* is institutionally mediated and sustained: while individuals can attach a legal meaning to an act, theirs remains a subjective interpretation until such time as its meaning is authoritatively settled by a competent official.

But what is the experiential world that appears to Kelsen’s reader-witness when legal order has been suspended? What is prior, genealogically speaking, to the predicative judgment that qualifies something as having this or that legal meaning?

His answer in the long passage cited earlier is the following: “a happening occurring at a certain time and in a certain place, perceived by our senses: an external manifestation of human conduct.” He repeats this idea twice, each time with a slightly different formulation: “the legal meaning of an act, as an external fact, is not immediately perceptible to the senses—such as, for instance, the color, hardness, weight, or other physical properties of an object can be perceived.” (*ibid.*) And a page later: “The external fact whose objective meaning is a legal or illegal act is always an event that can be perceived by the senses (because it occurs in time and space) and therefore a natural phenomenon determined by causality.” (*ibid.*, 3)

Accordingly, reality lends itself to two modes of interpretation, one normative, the other causal. Both speak to lawfulness, to the orderly appearance of things and events. There is the lawfulness of nature, of what *is*; and there is the lawfulness of society, of what *ought* to be. There is necessity and there is freedom. Whereas the very meaning of legal norms as “prescriptions (that is, commands, permissions, authorizations)” implies an order of free agency, “one of the many definitions of nature identifies it as an order of things, or a system of elements, that are linked as cause and effect, which means they are connected according to the principle of causality.” (*ibid.*, 74, 75) Kelsen is aware of the problems that would arise were he to sunder reality into two ontological realms, society and nature. Society, he hastens to note, is a part of nature, even if it is more and other than a natural phenomenon:

an opposition between nature and society is not possible without further ado because society, understood as the actual living together of human beings, may be thought of as part of life in general and hence of nature, and because law . . . seems at least partly to stand in nature and to have a natural existence. (*ibid.*, 2, translation altered)

On the face of it, his distinction is epistemological rather than ontological, namely, a contrast between two modes of scientific cognition. “If we differentiate between natural and

¹⁹⁹ “For Husserl, a *Sonderwelt* is a separate realm that is constituted and closed off by a specific purpose or a guiding purposive idea—regardless of whether it is a practical or theoretical purpose, an individual or a communal purpose.” Werner Marx, *Vernunft und Welt: Zwischen Tradition und anderem Anfang* (The Hague: Martinus Nijhoff, 1970), Phänomenologica series, Vol 36, 63.

social sciences, and thereby between nature and society as two distinct objects of scientific cognition, the question arises whether the science of law is a natural or a social science" (*ibid.*).

Despite this caveat, the phenomenologist's initial enthusiasm swiftly fades, giving way to disappointment at the outcome of Kelsen's purportedly genealogical enterprise, as it turns out to be something other than a genealogy of the legal act. His exercise is a *description of the passage from one Sonderwelt to another*: from law and normative cognition to science and causal cognition—and back. Kelsen's analysis oscillates between the jurist's and the scientist's point of views. There is no "return" to a primordial sphere of concrete experience for Kelsen, no leading back from predicative judgments to a bodily mode of intentionality—to a bodily directedness towards what Husserl calls the lifeworld in which both science and law have their source. Yet unless there is this more fundamental mode of worldly orientation, how would a passage from one *Sonderwelt* to the other at all be possible? In the result, how can Kelsen avoid splitting reality into two ontological domains irreducible to each other: nature and society? Likewise, and crucially in the framework of our inquiry, how to avoid splitting the legal act, and human agency more generally, into two ontological domains irreducible to each other: body and mind?

Closer consideration of the long passage cited heretofore shows that it is organized around a set of dichotomies. It opposes perception to thinking; exteriority as spatio-temporality to interiority as the mental act of referring a legal meaning to something; causality to normativity; physical qualities of things, events, and persons to meaning; reality to ideality; matter to form; transcendence to immanence; nature to society, necessity to freedom.²⁰⁰ It is not difficult to see the Cartesianism undergirding these dichotomies: the body, for Kelsen the metaphysician, is an extended being that stands over against a thinking being.

These considerations shed new light on the epochal character of Kelsen's characterization of a legal judgment:

When a judge establishes as a given a concrete material fact (say, a delict), his cognition . . . becomes legal at the point at which he brings together the material fact he has established and the statute he is to apply; that is, his cognition becomes legal when he interprets the material fact as "theft" or "fraud".

When reread in the context of the inaugural dichotomies that govern the Pure Theory of Law, Kelsen's account of legal judgment acquires a specific historical significance, despite its apparently trivial and ahistorical character. To judge, to ascribe a legal meaning to a "material fact," is to *form matter*. In turn, that judgment forms matter means that body and mind, reality and ideality, nature and society, transcendence and immanence, and necessity and freedom are mutually exclusive terms. These dichotomies determine the meaning of the "as" in judging something to be something for Kelsen.

But how, then, can the attribution of one legal meaning rather than another to what is given to Kelsen's normative cognition be anything other than arbitrary fiat? How would it be possible to establish "as a given a concrete material fact," both as "given" and

²⁰⁰ As regards the perception/thinking opposition, Kelsen notes that "[t]he qualification of a certain act as the execution of the death penalty rather than as a murder—a qualification that cannot be perceived by the senses—results from a thinking process: from the confrontation of this act with the criminal code and the code of criminal procedure." (*ibid.*, 4)

as “concrete”? Merleau-Ponty’s question to intellectualism, namely, to the claim that the meanings of percepts are assigned to them by the intellect, also holds for Kelsen: “[if] we see what we judge, how can we distinguish true perception from false perception?”²⁰¹ This ontological bifurcation and the problems it raises are by no means the exclusive bailiwick of the Pure Theory of Law. Indeed, Kelsen’s nutshell account of the legal act exposes fundamental presuppositions that stymie the passage from predicative judgments to a pre-predicative and pre-objective mode of bodily intentionality in much of modern constitutionalism. There where these dichotomies hold sway, there where lawmaking is conceived as giving legal form to matter, there also reigns, in one way or another, the cleavage of agency into culture and nature, mind and body, ideality and reality.

A fundamental correlation comes into view. On the one hand, the interpretation of lawmaking prevalent in modern constitutionalism—namely, as collective self-legislation by a human polity located in a natural environment—splits bodily agency into extended and thinking being. On the other hand, and conversely, the interpretation of bodily agency as split into extended and thinking being reproduces and entrenches lawmaking as collective self-legislation by a human polity located in a natural environment.

It attests to the uncompromising honesty of Kelsen’s work that it cannot carry through to completion the reduction of the body to an extended thing without betraying the impossibility of this endeavor. This becomes apparent in his treatment of perception. For the plausibility of his genealogy of the legal act depends on asking his readers to adopt the first-person perspective of someone who *perceives* an event, first as a jurist, then as a legal ignoramus, then again as a jurist. Consequently, although Kelsen positions perception squarely on the side of natural-physical causality and scientific cognition, it is no less at work in the legal point of view. Even when not issuing a predicative judgment, the jurist *sees and hears* that a statute is issued, a ruling proffered, or a contract signed, *without any need to invoke or apply a legal norm*, and this is possible because the percept appears as *pregnant* with a legal meaning prior to any interpretative act by the jurist.²⁰² Thus, perception takes place on *both* sides of the divide, not only on the side of the legal ignoramus, as Kelsen would have it. The importance of this phenomenological correction of Kelsen’s theory of lawmaking is considerable: it scuppers the “hylomorphism” (Simendon) prevalent in much theorizing about lawmaking as an interpretative activity, hence the assumptions that the subject is the sole source of (legal) meaning and order and, as a consequence, that what is given in perception is transparent to and fully understood and controlled by the form-giving subject.

No less importantly, although Kelsen takes perception to be devoid of normativity, his description of how a legal ignoramus perceives the events resists reduction to the purely “natural” causality he has in mind. So, for example, understanding that individuals “assemble” demands a form of practical orientation in and towards a world irreducible

²⁰¹ Merleau-Ponty, *Phenomenology of Perception*, 36. Hence, “to perceive in the full sense of the word (as the antithesis of imagining) is not to judge, but rather to grasp, prior to all judgment, a sense immanent in the sensible. The phenomenon of true perception thus offers a signification that is inherent in the signs and of which the judgment is but the optional expression.” (*ibid.*, 36-37)

²⁰² “Intellectualism can only conceive the passage from . . . the sign to the signification, as an interpretation, an apperception, or an epistemic intention . . . But this analysis simultaneously distorts the sign and the signification; it separates them by objectifying the sensory content, which is already ‘pregnant’ with a sense, and the ‘invariant core’, which is not a law, but a thing.” (*ibid.*, 154)

to the “physical-causal” relations Kelsen ascribes to natural phenomena devoid of normativity. So, too, that they gather in a *Saal*, translated as a “large room.” Indeed, a *Saal* is large because a gathering room, the kind of room in which people congregate for one or the other purpose. Because the *Saal* and the gathering have a *purpose*, there is already a minimal normativity baked into the description of the ignoramus’ perception. Yet a second example: dressed in a robe (*Talar*), someone speaks to someone else from a dais (*einem erhöhten Platz*). That the ignoramus at all notices the robe; that they see and hear that someone is addressing someone; and that the speaker and their addressee are positioned with respect to each other as higher and lower presupposes at least a minimal understanding of hierarchical, hence normatively governed, relations that play out in a *place* that, like the *Saal*, is irreducible to a “site” in the space of extension. In both cases, the space is where certain kinds of behavior literally ought to take place: an *ought*-place. The “thick” normativity of the legal point of view can be thinned out, but not redacted if the ignoramus is at all to describe what they see and hear in the way suggested by Kelsen.

Here again, Kelsen falls prey to Merleau-Ponty’s critique of intellectualism and his insistence on the pregnancy of perception: “[w]e must acknowledge the symbolic ‘pregnancy’ of form in content as prior to the subsumption of content under form.”²⁰³ Only ex post, in the face of a conflict of interpretations, do “legal meaning” and “material fact,” form and content, fall apart, even if never completely, for at least a minimal meaning of what appears must be shared such that a legal conflict is at all possible.

Heidegger makes a comparable point in his winter semester course of 1919, when inviting his students to consider what it means to “see a lectern”:

Stepping into the auditorium, I see the lectern . . . What do ‘I’ see? Brown surfaces that intersect at right angles? No, I see something else: a box, a large one, with a smaller one built on top. Not at all; I see the lectern from which you are being spoken to, from which I have already spoken. In pure experience there is also no – as they say – foundational connection (*Fundierungszusammenhang*), as though I first saw brown, intersecting surfaces, which then appear to me as a box, then as a desk, and then as an academic lectern . . . All of this is defective, misconstrued interpretation . . . I see the lectern in one fell swoop; . . . I see the lectern in an orientation, an illumination (*Beleuchtung*), a background.”²⁰⁴

In his important study on the early Heidegger, Ferdinando Menga draws the implications of this phenomenological exercise as follows:

From the very outset I do not experience a thing, but rather a lectern; and I experience it “as” a lectern not in autoreferential isolation, but thanks to the simultaneous reference to an order of meanings (*Bedeutungsordnung*), specifically in the environmentality (*Umweltlichkeit*) of the auditorium, which makes it appear “contextually formed” and “contextually confined” (*verhaftet*).²⁰⁵

²⁰³ Merleau-Ponty, *Phenomenology of Perception*, 304. Merleau-Ponty draws here on Cassirer’s analysis of symbolic pregnancy (*symbolische Prägnanz*) elaborated in Volume III of *Philosophy of Symbolic Forms*.

²⁰⁴ Martin Heidegger, “Zur Bestimmung der Philosophie. 1. Die Idee der Philosophie und das Weltanschauungsproblem; 2. Phänomenologie und transzendental Wertphilosophie; mit einer Nachschrift der Vorlesung ‘Über das Wesen der Universität und des akademischen Studiums,’” Bernd Heimbüchel (ed.), Martin Heidegger. *Gesamtausgabe* (Frankfurt: Vittorio Klostermann, 1999), 70.

²⁰⁵ Ferdinando Menga, *Ausdruck, Mitwelt, Ordnung: Zur Ursprünglichkeit einer Dimension des Politischen im Anschluss an die Philosophie des frühen Heidegger* (Munich: Wilhelm Fink, 2018), 117.

Nothing appears in experience that is not given mediated by the web of meanings of an *Umwelt*, a web that includes what appears and to whom it appears, and in which the appearance of something in perception is prior to any explicit interpretative act by the perceiver. See here the basic structure of intentionality: something appears to someone as something within a pre-given and co-given world. It is thus that phenomenology takes up the motif of the historicity and immanence of the human orientation towards the world inaugurated with the passage from transitive to intransitive conservation.

These critiques of Kelsen's theory of judgment are in fact a specification of the more general phenomenological critique of the *Kantian* reading of the cogito principle. What Kant calls the "material condition" of judgment is never simply inert, never only a condition that must be "given" to trigger the form-giving activity of the subject. Symbolic pregnancy demands, as anticipated in §10, a phenomenological radicalization of *affectivity* beyond its Kantian characterization. What affects me manifests itself with a meaning and an agency of its own that are prior to any explicit interpretative act of mine. It retains a degree of opacity that my interpretative act never fully overcomes nor manages to control. These are a meaning and an agency that, as we have seen in Husserl's phenomenology of perception, exceed the subject's expectations about what will appear and how it will appear, thereby calling into question the subject's self-centered activity and its expectation that the world is fully transparent, intelligible, and controllable. The experience of alterity is only possible because what appears is pregnant with a meaning and an agency capable of decentering the (collective) subject and its self-activity: *¡Basta ya!*

To conclude this propaedeutic phase of Part II, Kelsen's account of "normative cognition" inadvertently evokes a practical mode of orientation in and towards the world already operative in the ignoramus' perception, *which is suffused with normativity*, even if not with legal normativity. Here, precisely, lies the opening towards an alternative interpretation of affectivity and perception, one which leads back from legal judgment as a predicative performance to bodily intentionality as practical orientation towards the world. To reclaim the normativity of perceptual processes is to reclaim our essentially bodily mode of encounter and engagement with the world. Despite his best efforts to offer a pure theory of the legal act, Kelsen's genealogy of the legal act betrays the traces of a bodily intentionality that precedes and conditions what he calls "causal" and "normative" modes of cognition.

It is thus that the "I think," in the mode of a "We think," has been a pervasive feature of the constitutional imaginary of modernity, in contrast to an "I/we can," which Husserl intimates and Merleau-Ponty works out much more fully under the title "operative intentionality."

§15. From "I/We Think" to "I/We Can."

In seeking to recuperate this operative dimension of intentionality for a theory of authoritative lawmaking in the Anthropocene, I take my cue from Bert van Roermund, who is, to my knowledge, the first philosopher of law to offer a phenomenology of lawmaking that grants pride of place to operative intentionality.²⁰⁶ Drawing on Merleau-Ponty, Van Roermund engages in a profound and wide-ranging analysis of politics and law that addresses the provocative question, "What is bodily about the body politic?" I will return to

²⁰⁶ Van Roermund, *Law in the First Person Plural*, 150-193.

discuss some of his insights in Part IV. For the moment, I would note that, when addressing this question, he challenges the reductivity of my focus on lawmaking as a representational process, which falls, in the Husserlian idiolect, within the realm of predicative judgments. There is, in Van Roermund's words, "a pre-representational register of sociality that is pre-reflective and pre-predicative, yet not pre-reflexive."²⁰⁷ His critique of my earlier accounts of lawmaking is fully justified on this point. But the follow-up question is how to understand this "pre-reflective" register of bodily intentionality and its implications for what I have called lawmaking in the accusative. Does not Van Roermund pay too high a price in assuming, with Husserl and Merleau-Ponty, that there is a primordial and original access to beings through perception? In a word: is bodily intentionality only *pre-reflective*, *pre-predicative*, and *pre-representational*? Or would one have to insist, as I will, that it is always also *post-reflective*, *post-predicative*, and *post-representational* because there is no original, no primordial domain, perceptual or otherwise, in which things simply give themselves of themselves and as they are of themselves? Likewise, if there is no original or primordial access to beings, can *reflexivity* remain intact, as Van Roermund assumes? By raising these questions, I would like to anticipate that my approach to bodily intentionality is in an important way not only different to but incompatible with Van Roermund's approach to this topic, which, I will argue, retains a residual foundationalism. For the time being, I rest content with following the trajectory of Merleau-Ponty's conceptualization of the passage from "I think" to "I can," focusing on and drawing out the implications of his reading of operative intentionality as pre-reflective, pre-predicative, and pre-representational.

The passage from "I/we think" to "I/we can" entails that prior to and more fundamental than lawmaking as "act intentionality" comes lawmaking as a pre-reflective, pre-thematic bodily achievement, that is, as "operative intentionality." Merleau-Ponty clarifies the distinction as follows:

Husserl distinguishes between act intentionality – which is the intentionality of our judgments and of our voluntary decisions (and is the only intentionality discussed in the *Critique of Pure Reason*) – and operative intentionality (*fungierende Intentionalität*), the intentionality that establishes the natural and pre-predicative unity of the world and of our life, the intentionality that appears in our desires, our evaluations, and our landscape more clearly than it does in objective knowledge. Operative intentionality is the one that provides the text that our various forms of knowledge attempt to translate into precise language.²⁰⁸

As Merleau-Ponty explains it, act intentionality is a reflective mode of experience in which something is *objectivated*, that is, singled out and rendered explicit *as this* or *as that*. So, too, the legal judgment that qualifies something as contract, bankruptcy, legal person, etc. The upshot of a genealogy of judgment that goes from act intentionality to operative intentionality is that objectivating processes are preconditioned by a bodily being-in-and-towards-the-world-with-others which is not simply continuous with the kind of relations

²⁰⁷ *Ibid.*, 173. See also, Bert van Roermund, "Representation and Beyond," in "Author Meets Readers: A Symposium on Hans Lindahl's *Authority and the Globalisation of Inclusion and Exclusion*," a special section in *Indiana Journal of Global Legal Studies* 27 (2020) 2, 33-128; 111-118.

²⁰⁸ Merleau-Ponty, *Phenomenology of Perception*, lxxxii. Textual references to operative intentionality can be found in Husserl, *Experience and Judgment*, 48; Husserl, *Formal and Transcendental Logic*, 235; Edmund Husserl, *Cartesian Meditations: An Introduction to Phenomenology*, translated by Dorion Cairns (The Hague: Martinus Nijhoff, 1960), 77-80.

made available by the subject/object distinction, legal or otherwise. In this vein, reason, which Husserl associates with the structure and dynamic of intentionality, is always and constitutively a *bodily* reason, which Merleau-Ponty takes up in a reference to “operative reason,” a notion which challenges the distinction between reason and practical, everyday life.²⁰⁹ This is the domain of involvement in and with what Husserl calls the *lifeworld*, captured in the lapidary formula, “I can.” Operative intentionality is a practical form of orientation towards the world—a “living intentionality,” as Husserl sometimes calls it, in which meaning emerges through our bodily *in-habiting* the world, prior to any cognitive or evaluative process of subjectivation/objectivation. Instead of restricting reason to a reflective or predicative process, Husserl effectively associates reason with the bodily structure and dynamic of intentionality.

Furthermore, operative intentionality is the domain of what Merleau-Ponty calls a “rich notion of sensing” which “points to an experience in which we are not given ‘dead’ qualities, but rather *active properties*.”²¹⁰ This is crucial to our inquiry because, according to new materialism, the human exceptionalism inaugurated with modern subjectivity turns on disclosing the other-than-human as “inert,” thereby dispossessing it of its agency and rendering it a passive being available for assignment to human purposes. While this objection may hold for Kant’s account of judgment, which Merleau-Ponty characterizes as exemplary for “intellectualism,” it does not hold for a phenomenological account of operative intentionality, in which agency cuts across the distinction between the human and other-than-human. Operative intentionality, in the reading I propose, signals human *decentration*, if by anthropocentrism one means the metaphysical presupposition that activity lies on the side of the human, and passivity on the side of the other-than-human. A genealogy of judgment inaugurates an account of subjectivity that accounts for processes of objectivation/subjectivation, while also rooting these in a mode of experience prior to such distinctions. I can hardly overstate the importance of this finding for the further development of my inquiry: the sensibility at work in bodily engagement with the world speaks to a domain that precedes the human/other-than-human distinction as drawn in modern law and that can be interrupted, destabilized, and reconfigured. No less importantly, it demands a redescription of judgment, leading it away from its characterization as the forming of matter.

Although Heidegger firmly rejects the notion of intentionality in favor of a structural analysis of existence centered on transcendence and care, his description of understanding (*Verstehen*) and its contrasting term, interpretation (*Auslegung*), sheds light on the difference between pre-reflective and reflective modes of orientation towards the world, both of which are modalities of the appearance of “something as something.”²¹¹ A famous section of *Being and Time* describes the situation in which, immersed in their task, someone uses a hammer to, say, bang nails into a plank. Heidegger provocatively calls this “praxis.” Something is used *as* a hammer; but the “as” does not refer to an act that

²⁰⁹ Merleau-Ponty, *Phenomenology of Perception*, 51.

²¹⁰ “A wooden wheel lying on the ground is not, *for vision*, the same as a wheel bearing a weight. A body at rest because no force is being exerted on it is not, *for vision*, the same as a body in which opposing forces are being held in equilibrium. The light of a candle changes appearance for the child when, after having burned him, it ceases to attract the child’s hand and becomes literally repulsive.” Merleau-Ponty, *Phenomenology of Perception*, 53.

²¹¹ Heidegger, *Being and Time*, 189, italics omitted.

assigns a predicate to a subject: “this-as-a-hammer.” To the contrary: “[t]he less the hammer-thing is merely gazed at, [and] the more it is used, the more original the relationship to it becomes, the more it is seen *as* what it is—a tool.” (*ibid.*, 98; translation modified. Italics added) In the mode of understanding, the hammer is fully *operative* or “ready-to-hand” (*zuhanden*).

To be sure, Heidegger’s description of praxis in *Being and Time* elides the *social* character of praxis. It ignores praxis as a mode of bodily orientation towards the world *with others*. More pointedly, and against Heidegger’s depoliticized interpretation of tool-being, Marx’s analyses of labor and his critique of capitalism show that labor is not only a collective endeavor but also one mediated by power relations, and thus political through and through. Menga perceptively traces the passage from the primacy of the political, as evinced by Heidegger’s winter semester course of 1919, to an antipolitical interpretation of *Dasein* in *Being and Time*, in which, amongst others, the interruption of hammering reveals a worker in “autoreferential isolation,” as Menga puts it, rather than in a shared and politically instituted and structured *Umwelt* that, as an *Umwelt*, necessarily “includes certain worldly possibilities while excluding others.”²¹² Indeed, the structure of intentionality entails that there is no direct access to the world (*Welt*) as such, which only manifests itself indirectly, as an excess beyond meaning, in the interruptions of or deviations from orientation towards an *Umwelt*, only to withdraw once again into a transformed *Umwelt*.

However, what is of particular interest for this section, namely operative intentionality, evinces another shortcoming of Heidegger’s phenomenology of praxis, namely, that he does not—and arguably cannot—examine the handiness of the hammer as illustrating *Dasein’s* bodily orientation towards the world, given that his fundamental ontology banishes the body to the subordinate domain of the ontic. But we need not follow Heidegger down this path. To the contrary: the challenge is to carry further the phenomenological description of hammering as bodily orientation towards the world, there where an “Analytic of *Dasein*” prematurely cuts it short.²¹³ For the hammer is literally handy as integral to the carpenter’s habitual engagement with a familiar world. When hammering the nail into the plank, the head of the hammer is the edge of the carpenter’s body; they *feel* the nail entering the wood, “unthinkingly” correcting the angle with which they strike the nail if it threatens to bend or become skewed. A certain convergence with Merleau-Ponty’s phenomenology of the lived body becomes visible, who notes in a no less famous example that the tip of the blind person’s walking cane is the edge of their body. The same holds for the example of the lady with a feather in her hat who, without thinking about it, stoops when crossing a door to avoid damaging the feather. One can speak in

²¹² Menga, *Ausdruck, Mitwelt, Ordnung*, 113; 117; 337 ff.

²¹³ Patočka puts it very well: “Heidegger never takes into account the fact that the original praxis must in principle be the activity of an embodied subject, that embodiment must therefore have an ontological status that cannot be identical with the occurrence of the body as present here and now.” See Jan Patočka, *Le monde naturel et le mouvement de l’existence humaine*, translated by Erika Abrams (Dordrecht: Kluwer Academic Publishers, 1988), 93. Franck, in his critical engagement with the problem of space in *Being and Time*, asks, “[d]oes not the term *Vorhandenheit*, used to interpret the Greek *ousia* and mark the ontological relation between *Dasein* and the being it is not, presuppose that *Dasein* is endowed with hands, incarnate? If the ontological relation between *Dasein* and other-being is said by the hand, must not incarnation be a structure of *Dasein*, an existential and ultimately a mode of temporalization?” See Didier Franck, *Heidegger et le problème de l’espace* (Paris: Les Éditions de Minuit, 1986), 30.

each of these cases of an *extended lived body*, destabilizing the limit between lived body and world, and between the human and the other-than-human: when there is hammering and walking, the hammerhead, the walking cane, and the feather are skin.

Moreover, there is, operatively, only *anonymous hammering* (and, in Merleau-Ponty's example, anonymous walking). "There is" a hammering, rather than "I am" hammering, which precedes decomposition into an "I" and a tool. When hammering, "there is" an I-as-a-hammer and the hammer-as-me. Pushing Heidegger's phenomenological exercise to perhaps say more than what he would want it to, "understanding" is *agency without an agent*. Only when hammering breaks down do carpenter and hammer separate out into distinct modes of being: a subject and an object. Hammering is an anonymous laboring-with where the "with" concerns a mode of collective agency that, when interrupted, falls apart into the separate agencies that the carpenter and the hammer contribute to banging a nail into a plank. The significance of this finding for our inquiry is considerable: an I-centered account of hammering is emergent, the outcome of reflection. *As a mode of pre-reflective and anonymous agency, hammering is decentered agency.*²¹⁴

Two further aspects of Heidegger's description of the workplace are of particular interest. On the one hand, the use of the hammer points to a bodily, pre-reflective "as," a habitual involvement with and in a familiar world prior to any thematization of something as something. It exemplifies what Merleau-Ponty calls a "grasping intention" (*intention de prise*). On the other, thematization—objectivation—involves the interruption of this practical directedness, as when the hammer goes missing or is damaged. Something suddenly becomes obtrusive as a *hammer*; it is singled out and rendered thematic *as such*, becoming the object of reflection—of what Merleau-Ponty calls an "epistemic intention" (*intention de connaissance*), either because it is not at hand or because it lies inert and unusable in the carpenter's hand.²¹⁵ When missing or damaged, the hammer becomes *inoperative*, present-to-hand (*vorhanden*). The hammer *resists* manipulation, losing its docile character, its availability as a tool ready for use and control, coming to stand over and against the carpenter as what obstructs their activity. It suddenly appears as what no longer contributes to the carpenter's task of, say, making a bookshelf. By eluding the carpenter's mastery, the hammer ceases to labor-with the carpenter, now appearing in the modality of *resistance* to laboring. Once again, in a new variation, we encounter the common thread running throughout modernity's conceptualization of agency, namely, the experience of negativity as the resistance of reality to *self*-activity.

I take Heidegger's description of the interruption of hammering and the attendant passage from readiness-to-hand to presence-to-hand to be homologous with Husserl's

²¹⁴ Bruno Latour analyzes a situation in which an overhead projector breaks down, giving way to what he calls "reversible black-boxing," whereby its contribution to the network of relations in which it participates suddenly becomes visible. As Peter-Paul Verbeek points out, this example parallels Heidegger's phenomenology of tool use, a phenomenology Latour was clearly not aware of. There are significant convergences, but also divergences, between the two approaches, to which I return when discussing the technical body in §18. See Latour, *Pandora's Hope*, 183 ff; Peter-Paul Verbeek, *What Things Do: Philosophical Reflections on Technology, Agency, and Design* (University Park: The Pennsylvania State University Press, 2005), 158.

²¹⁵ "I can thus – by means of my body as a power for a certain number of familiar actions – settle into my surroundings as an ensemble of *manipulanda* without intending my body or my surroundings as objects in the Kantian sense, that is, as . . . entities that are transparent, free of all local or temporal adherence, and ready to be named or at least available for a gesture of designation." Merleau-Ponty, *Phenomenology of Perception*, 106, 107-108.

account of the obstruction (*Hemmung*) of perception and the passage it spawns from simple certainty to the certainty of a judgment that predicates something about something. Although Heidegger's description of praxis elides the collective nature of praxis, the passage from ready-to-hand to present-to-hand shows a certain parallel with the interruption of the everyday dealings of individuals triggered by conflict about what counts, in my earlier examples, as the due performance of a rental or mortgage contract. An unreflective mode of collective action, in which the parties to the contract just go about doing what they have agreed to do, gives way, in the face of conflict, to a situation in which the norms governing their contract become the object of explicit attention: the legal norm becomes inert, as it were; its meaning and the purpose of the legal institution of which it is a part turn opaque. The norm ceases to be effective in structuring their agency, such that it calls forth attention in the mode of a means that no longer does its work, namely, orienting participant agency to realize the point of joint action. To echo Merleau-Ponty's distinction, participants no longer *grasp* what their joint action is about. The applicable legal norms appear in the mode of inapplicability, becoming manifest as such, that is, as inoperative or *vorhanden* and unleashing a hermeneutic process that aims to determine their meaning for the case at hand. "Examination (*Vernehmen*) takes the form of *addressing* and *talking about* something as something. On the basis of this interpretation (*Auslegung*) in the broadest sense, examination becomes a *determining*." (*ibid.*, 89; translation modified) To interpret is to determine, and to determine is to objectivate something as something by way of an "epistemic intention," whether a tool or a norm.²¹⁶

Objectivation goes hand in hand with subjectivation. When the hammer goes missing or is damaged, the carpenter becomes aware of themselves, albeit in the deficient mode of not being able to realize themselves *as* who they are: a *carpenter*. The interruption of hammering is the interruption of pre-reflective *and* reflexive agency, such that the anonymous self-relation actualized in a pre-reflective hammering cannot be completed, thereby becoming the object of reflection. In the same way that the interruption of hammering objectivates the hammer, so, too, it subjectivizes agency, which is ascribed to an agent: I-and-a-missing/damaged-hammer. Yet the passage from anonymity to subjectivation as a carpenter is unintelligible when isolated from a reference to others, such as those *with* whom and *for* whom the carpenter makes the bookshelf or, even if the bookshelf is to be the carpenter's own, to books written by authors, etc. Thus, the anonymity of hammering extends to a community that only *ex post*, in a reflective act, is separated out into its distinct participants.

If the interruption of hammering renders thematic the community involved in what the hammering is about, so, too, the interruption of lawmaking thematizes, as we have seen in §12, what becomes a collective, a "we"—a "plural subject," in Margaret Gilbert's terminology. The anonymity of an unreflective mode of collective agency, in which participants simply do their part in realizing what collective action is about—"this is how

²¹⁶ The parallel between tool and norm raises the question about *lawmaking* as a privileged technique, not only and certainly not fundamentally as a means to an end, but rather as a mode of self-disclosure and disclosure of the world, an issue to which I return in §18 when discussing the technical body. For a discussion of norms in the modalities of readiness-to-hand and presence-to-hand see Hans Lindahl, "Intentionality, Representation, Recognition: Phenomenology and the Politics of A-Legality," in Thomas Bedorf and Steffen Herrmann (eds.), *Political Phenomenology: Experience, Ontology, Episteme* (Abingdon: Routledge, 2019), 256-276.

one does things”—, gives way, when interrupted, to a reflective stance. The interruption of collective agency renders “us” thematic as a collective, calling attention to the web of mutual expectations about what participants are to do and about what matters to them, becoming explicit in the form of a reference to the first-person plural perspective of a “we together,” albeit in the mode of a failed reference. With lesser or greater urgency, the interruption of lawmaking in the face of conflict—“Not in our name!”—raises the questions, “who are we?” “What ought we to do?” “What matters to us?” By responding to these questions through a renewed self-interpretation, a predicative judgment yields *an agent of collective agency*. The first-person plural perspective has a genealogy, which means that, analogously to hammering, collective agency without an agent decenters collective self-legislation. A we-centered account of lawmaking is emergent, the outcome of reflection. *When pre-reflective and anonymous, lawmaking is decentered collective agency.*

By these lights, and regardless of their differences, Husserl, Heidegger, and Merleau-Ponty assert the primordially of a pre-reflective realm of practical orientation, in contrast to explicitly cognitive and practical stances towards the world as deployed in science and, we can now add, in accounts of positive law favored by modern constitutionalism. “In order for cognition to be possible as a contemplative determination of what is present, a deficiency of concerned involvement (*Zu-tun-habens*) with the world is required.”²¹⁷ Here, too, a methodological *basso continuo* links together Husserl, Heidegger, and Merleau-Ponty when evincing the distinction between pre-reflective and reflective modes of intentionality. If Husserl and Heidegger privilege interruptions of, respectively, cognitive and practical processes, Merleau-Ponty turns to pathologies of operative intentionality, epitomized by the famous Schneider case, hence to a deviation from normal perception, to elucidate the structure and dynamic of bodily being. Although not mentioning him by name, Merleau-Ponty points to the common thrust of Heidegger’s phenomenological endeavor with that of Husserl when noting that “Husserl’s originality lies beyond the notion of intentionality; rather, it is found in the elaboration of this notion and in the discovery, beneath the intentionality of representations, of a more profound intentionality, which others have called existence.”²¹⁸ It fell to Merleau-Ponty to bring to fruition a phenomenology of operative intentionality as bodily orientation towards the world intimated by Husserl, thwarted by Heidegger’s project of a fundamental ontology, and

²¹⁷ Heidegger, *Being and Time*, 61.

²¹⁸ Merleau-Ponty, *Phenomenology of Perception*, 520, footnote 57. Van Roermund has sought to distance Merleau-Ponty’s account of motor intentionality from Heidegger’s *Analytic of Dasein*, suggesting that in Merleau-Ponty’s description of motor intentionality appearance is immediate and, as such, devoid of the “as” structure deployed in act intentionality. Certainly, motor intentionality is “immediate” in the sense of what appears with a meaning prior to any reflective act that seeks to objectivate or determine its meaning. But what appears in motor intentionality appears with a meaning of its own, that is, *as something*, even if this meaning-structure is not the outcome of a reflective act, a point Husserl also makes in his analyses of passive synthesis. Otherwise than Van Roermund suggests, the “as” structure is constitutive for intentionality *as such*, whether in its pre-reflective or reflective modalities. As concerns Heidegger, while his fundamental ontology excludes a phenomenological elucidation of *Dasein* as bodily being, he aims to clarify the pre-reflective and reflective modes of the “as” structure deployed in, respectively, understanding and interpretation. In *this* sense, the *Analytic of Dasein* runs parallel to Merleau-Ponty’s contrast between grasping and epistemic intentions, between operative and act intentionality. See Van Roermund, *Law in the First Person Plural*, 169-170.

pushed in new directions by what have come to be called “non-representationalist” or “more-than-representationalist” theories.²¹⁹

§16. Interlude

These considerations may suffice, for the time being, to introduce the notion of operative intentionality into our inquiry. They have a primarily exploratory function, as neither the foregoing phenomenology of hammering nor the summary analysis of its parallel in law-making can carry the full weight of the passage to a theory of lawmaking in the accusative. In particular, much more needs to be said about the significance of bodily intentionality for lawmaking when discussing bodily (dis)empowerment, (im)perceptibility, bodily normativity, the technical body, and bodily reflexivity. Before turning to these issues, it may be helpful to pause and briefly highlight the considerable significance of the shift from “I/we think” to “I/we can” for our inquiry and offering the reader an *aperçu* of where I will be taking the argument down the road.

To start with, describing the bodily performance hidden in Heidegger’s discussion of hammering does more than elicit an anonymous unity of carpenter and hammer. Indeed, this abridged phenomenology of hammering shows that the distinction between *person and thing* comes second, only emerging from a condition of relative indistinction when hammering breaks down. When interrupted, the anonymous agency of hammering yields two distinct modes of being: carpenter-being and tool-being. Person and thing: has this not been taken to be a specific manifestation of the distinction between the human and other-than-human in modernity? Is it not also a manifestation of the presupposition that a tool—and technique more generally—is a means at the service of a human end? Hammering as a modality of agency without an agent suggests that the distinction between the human and the other-than-human, and between human ends and technical means, is *emergent*, the outcome of a predicative judgment, hence that there is a pre-reflective modality of experience in which the boundary between person and thing, between the human and the other-than-human, has not yet been drawn, even if the “not yet” betrays that we can only speak about this experience indirectly, refracted through the very concepts to which its sundering gives rise.²²⁰ This insight is a preliminary, still very tentative step towards the second of the decentrations mentioned at the outset of this book, namely, the decentration of the first-person plural perspective of a *human* polity located in a natural environment, a natural environment that, in modern

²¹⁹ “Insisting on the non-representational basis of thought is to insist that the root of action is to be conceived less in terms of willpower or cognitive deliberation and more via embodied and environmental affordances, dispositions and habits . . . This means that humans are envisaged in constant relations of modification and reciprocity with their environs, action being understood . . . as a relational [phenomenon] incessantly looping back and regulating itself through feedback phenomena such as proprioception, resistance, balance and tone; put simply, all action is interaction.” Ben Anderson and Paul Harrison, “The Promise of Non-Representational Theories,” in Ben Anderson and Paul Harrison, *Taking-Place: Non-Representational Theories and Geography* (London: Routledge, 2010), 7. See also Tim Ingold, *The Perception of the Environment: Essays in Livelihood, Dwelling and Skill* (London: Routledge, 2000); Nigel Thrift, *Non-representational theory: Space, Politics, Affect* (London: Routledge, 2007).

²²⁰ Here I join forces with Esposito’s analysis of the person/thing distinction, although the genealogy I have in mind is not historical, as his is, nor do I subscribe to where he would want to take the critique of this distinction, precisely because, as indicated in the subtitle of his book, there is a bodily point of view. See Roberto Esposito, *Persons and Things: From the Body’s Point of View*, translated by Zakiya Hanafi (Cambridge: Polity Press, 2015).

constitutionalism, includes objects such as tools. Indeed, a phenomenology of hammering suggests that the person/thing and human/other-than-human distinctions have a *genealogy*. They are not an a priori structure of reality which reflection renders explicit in the form of a judgment that merely reproduces that structure when positing this *as* a person, that *as* a thing.

Moreover, the shift from “I/we think” to “I/we can” entails that reason (which, as we have seen, Husserl associates with the structure and dynamic of intentionality) is always and constitutively a *bodily* reason, an insight Merleau-Ponty takes up when referring to “operative reason.”²²¹ This shift challenges a strictly reflective account of reason, if by that one means an account of reason the node of which is a predicative judgment, oral, written, or otherwise. Recovering the lived body for lawmaking opens up a pathway to incorporating, literally and figuratively, the entire range of problems we encountered in Part I concerning vulnerability, work, and life into a theory of lawmaking in the accusative. By contrast, intellectualistic theories of positive law and their attendant theories of legal judgment prevalent in modern constitutionalism, such as deontic logic, legal realism, and legal hermeneutics, are strongly reductive, as they have ignored what it could mean that lawmaking is a bodily being-in-and-towards-the-world-with-others. So, too, universalizing accounts of legal rationality, as illustrated most starkly by Habermas’ discourse theory of reason and lawmaking.

Insisting on the bodily nature of intentionality clears the way for *pluralizing* reason, as anticipated in §10. Inasmuch as different forms of embodiment yield different modalities of directedness toward the world, so too there are different modalities of reason, most of which are not tied to the predicative modes of intentionality associated with human language. Such is the insight defended by von Uexküll and much of contemporary biological research, centered on nonhuman forms of experience. Biosemiotics, in particular, naturalizes intentionality, showing that semiosis is constitutive for organismic agency as such, while also differentiating levels of semiotic complexity across different forms of life.²²² In any case, acknowledging the bodily nature of judgment not only involves acknowledging the materiality of reason but also that what Husserl calls *logos* is fragmented into a manifold of *logoi*: the species-specific modes of bodily engagement of organisms with their environments, as discussed by Varela, Maturana, Margulis and others. Crucially, the pluralization of reason militates against a hierarchization of life-forms in which human reason functions as the standard with respect to which animal and plant modes of relating to their environments are posited as deficient modes of reason—and being.

²²¹ Merleau-Ponty, *Phenomenology of Perception*, 51.

²²² So, for example, a semiotics of the skin, as described by Jesper Hoffmeyer, offers a naturalized account of perception as an intentional process: “that a slap is experienced *as* a slap requires that millions of different sensory cells, each in their own specific area of functionality, reacts appropriately regarding the giving and taking of biochemical signs.” Against the objection that this reconstruction of a slap falls prey to a category mistake by mixing intentional and causal analyses, Hoffmeyer argues that the process is semiotic all the way down to its biochemical components, while also drawing on the Peircean triad of icon, index, and symbol to highlight the intentional specificity of experiencing something as a *slap*. See Jesper Hoffmeyer, *Biosemiotics: An Examination into the Signs of Life and the Life of Signs* (Scranton, PN: University of Scranton Press, 2008), 25 (*italics added*). See also Jesper Hoffmeyer, “The Natural History of Intentionality. A Biosemiotic Approach,” in Theresa Schilhab et al. (eds.), *The Symbolic Species Evolved* (Dordrecht: Springer, 2012), 97-116; Morten Tønnessen, Timo Maran & Alexei Sharov, “Phenomenology and Biosemiotics,” in *Biosemiotics* 11 (2018), 323-330.

Husserl comes close to embracing this insight when discussing the relation between “aestheta,” i.e., material things in their sensible or aesthetic structure, and the “aesthetic body,” i.e., the sensing or perceiving body in normal perception. “The qualities of material things as aestheta, such as they present themselves to me intuitively, prove to be dependent on my qualities, the make-up (*Beschaffenheit*) of the experiencing subject, and to be related to my lived body (*Leib*) and my ‘normal sensibility’.”²²³ So, too, when noting that “the external world shows itself as relative not only to the lived body (*Leib*) but also to the psychophysical subject as a whole.” (*ibid.*, 80, translation modified; italics omitted) While Husserl’s focus in *Ideas II* is on human experience, with only a generic reference to other-than-human animals, the essential point for my purposes concerns the relation between a world and the “make-up” of experiencing beings in general, of which the human morphology is but one modality.²²⁴

The passage from “I/we” to “I/we can” suggests yet a further line of inquiry that has been neglected by modern constitutionalism. Indeed, that reason is bodily reason entails that lawmaking is an affective affair. In Jan Slaby’s words, “[i]ntentionality – the mind’s capacity to be directed at something beyond itself – is in the most central cases not a cold, detached, purely cognitive affair, but rather constitutively feeling-involving. It is *affective-intentionality*.”²²⁵ Here, then, is a further feature of the intentional “as”: something appears as something with an affective quality or valence. Indignation, as enacted by the *Movimiento de los indignados* in Spain, is only one of the multifarious emotions that accompany lawmaking. Emphatically: emotivity is not something added on to lawmaking. Whereas the philosophical tradition draws a trenchant distinction between thinking and emotions, the phenomenological insistence on the embodiment of human orientation towards the world entails that lawmaking is *as such* emotive.

Although I have sought to illustrate the affective dimension of intentionality with reference to the indignation sparked by the drastic austerity measures imposed on Spain in response to the financial crisis of 2008, it also has a direct bearing on lawmaking in the Anthropocene. A recent article notes that environmental disruptions call forth, amongst others, “strong emotional responses, such as sadness, distress, despair, anger, fear, hopelessness and stress; elevated rates of mood disorders, such as depression, anxiety, and pre- and posttraumatic stress . . .”²²⁶ Yet the authors argue that “ecological grief” has received comparatively little attention and conceptualization in the literature, namely, “the grief felt in relation to experienced or anticipated ecological losses, including the loss of

²²³ Husserl, *Ideas II*, 61, italics omitted. I translate *Leib* as lived body, in contrast to *Körper* as objective body, a distinction I discuss more fully later in Part II.

²²⁴ But Husserl is careful to point out that the “*relativisms of experience*” do not entail that what appears only is what it is in and for an experiencing subject; a distinction needs to be made “between the identical *thing itself* and its subjectively conditioned *modes of appearance*.” (*ibid.*, 80) Here again, he stands close to von Uexküll.

²²⁵ Jan Slaby, “Affective intentionality and the feeling body,” in *Phenomenology and the Cognitive Sciences* 7 (2008), 429-444, 429. New materialism is certainly right in critiquing the reductivity of modern philosophical analyses of rationality that elide its affective dimension. This critique misses the target regarding phenomenological accounts in which affects are integral to bodily directedness toward the world. Conversely, one may ask whether new materialism’s recuperation of the affects is not itself reductive as concerns the broader and richer concept of rationality that phenomenology has articulated in terms of bodily directedness towards the world.

²²⁶ Ashlee Cunsolo and Neville R. Ellis, “Ecological grief as a mental health response to climate change-related loss,” in *Nature Climate Change*, 8 (2018), 275-281, 275.

species, ecosystems and meaningful landscapes, due to acute or chronic environmental change.” (*ibid.*) Building on their field work with the Inuit of Nunatslavut in Northern Labrador, Canada, and with farmers of the Australian Wheatbelt, they extend the scope of psychological studies in grieving and mourning to learning to live and cope with losses in the Anthropocene, losses which have taken and will take (away) place—“grief over futures losses to culture, livelihoods, and ways of life.” (*ibid.*, 278)

From a phenomenological perspective, one may wonder whether the notion of a “mental health problem” does justice to what the authors refer to as the “experience” of ecological grief. Indeed, the film *Attulauniujut Nunami/Lament for the Land*, in which members of the Inuit community of Nunatslavut narrate their experiences of change, loss, and hope in the face of rapid climate change, shows that ecological grief is a *bodily* experience prior to the distinction between the psychological and the physiological—just like all experience.²²⁷ The film depicts ecological grief as a specific kind of experience, namely, a *deviation from normality* experienced as acute existential disorientation in a world that has lost its familiarity and habitability. Phenomenologically speaking, this experience of alienation from the world amounts to a breakdown of the structure of intentionality, namely, the appearance of something as something within a pre-given and co-given world. It is perhaps not exaggerated to state that ecological grief comes down to a specific breakdown of the intentional “as.”

Admittedly, this characterization of ecological grief remains too capacious. If grief in general speaks to a deviation from normality in the mode of a definitive loss, which the literature has explored with respect to phantom limbs and the loss of loved persons, ecological grief is the experience of the actual or anticipated loss of a way of life, of a certain “style” of bodily orientation towards the world, individual and collective. More radically, it is what Louise du Toit appropriately calls “unprecedented grieving” because, beyond the loss of an individual or even a human group, ecological grieving extends to definitive loss of the more-than-human.²²⁸ As such, ecological grief demands thinking about what it could mean to “grieve, properly, collectively and publicly, for the more-than-human.” (*ibid.*) This thinking is what du Toit calls a phenomenology of grieving the earth. Giving a new point to a famous article by Clark and Chalmers, she argues that “[g]rief is an emotion not only extended throughout the body but also beyond its boundaries and into the world.”²²⁹ This bodily grieving the earth is what the Inuit film calls a lament for the land, to which I now turn.

Its first part is dedicated to first-person narratives of the Inuit way of life. The narrators understand themselves as being part of the land, and the land as being part of them. Significantly, the narrators continuously refer to *land* throughout the film; territory, in its juridical and political sense, only appears marginally, and in a strictly derivative fashion, in scattered references to the Canadian province of Labrador. The difference between land and territory is particularly manifest in one of the opening passages of the film, in which the sensuousness and emotional valence of what Slaby calls affective intentionality inform a narrator’s description of her attachment to the land:

²²⁷ [Attulauniujut Nunami/Lament for the Land](#). A Film by Ashlee Cunsolo Willox and the Communities of Nunatsiavut (last accessed on February 14, 2024).

²²⁸ Louise du Toit, “Inhabiting the End/s of the World: Towards a phenomenology of grieving the earth.” (unpublished manuscript on file with the author)

²²⁹ *Ibid.* See Andy Clark & David Chalmers, “The extended mind,” in *Analysis* 58 (1958) 1, 7-19.

Beautiful, beautiful land. Very healing, very calm, very soothing. I could lie there in a tent and listen to the sounds and hear the waves and the gulls, with the sun on the tent and the shadows of kids running around, and just sort of feel our ancestors out there. And it's like some kind of a connection that makes you feel really, really good about yourself and about the land." (*ibid.*, anonymous)

In various narratives, the Inuit refer to their connectedness to the land as what allows them to be *free*. "You can live in a house anywhere, but when you talk about the land, that's what drives you out, it's the freedom to get out on the ski-doo and go to get in the boat and go . . . just riding on ice. It's definitely the land, it's all about the land (*ibid.*, Kim Dicker) The narratives celebrate a condition of freedom in its basic bodily mode of an unhindered "I/we can." To be free is to know how to orient oneself in the world, an orientation gained through induction into a way of life handed down from one generation to the other:

For people who live in the North, whose livelihoods kind of hinge on the climate that they live in, it's really important to understand that it's not just the meat, the fish, the fur; it's an integral part of who, how you are shaped, how your memories are reinforced, how you survive, and how you learn from your elders and from your family. It's about appreciating the nature around you, and using your own skills, and gifts, and intelligence to navigate that world." (*ibid.*, Michelle Wood)

This style of worldly orientation, of connectedness to the land, bespeaks an initial condition of *normality* in which the Inuit are "used to certain ways of doing things." (*ibid.*, Melvin Hurley). Merleau-Ponty refers, in this context, to habit as "the experience of the accord between what we aim at and what is given, between the intention and the realization."²³⁰ Their habitual practices anchor the Inuit in a world understandable and meaningful for them, temporally as much as spatially. Indeed, being able to find one's way as one moves around on the land is a skillful practice that today's Inuit have learnt from their parents, a practice that, repeated time and again, anticipates a foreseeable future that is, as such, dependable and predictable. Land is a concrete spacetime—a *nomos*. The normality of what appears and how it appears, and the habituality of practical orientation towards what appears, are the two poles of the intentional correlation that the Inuit call their connection to the land.

In brief, the Inuit are *attuned* in a spatially and temporally concrete way to the land. But what does "attunement" mean here? In an extraordinary passage of the film Piercy Boase, a hunter, observes that "For me, my government is my land . . . you can't beat it, you can't beat the land."²³¹ To be attuned to the land is to live in accordance with its rules. To act in accordance with a rule of action is the minimal concept of reason embraced by Western philosophy. Inuit attunement with the land, as lived through in their bodily, habitual practices, illustrates what Merleau-Ponty calls *operative reason*. But Boase's characterization of attunement evinces what has been erased from those modern conceptualizations of reason in which norms are the outcome of an exchange of reasons between human interlocutors. For the Inuit, *the land norms*. The Inuit literally embody the land's normativity; theirs is an embodied reason that plays out in how they perceive their environment, such as the patterns and signs of the weather and the texture of the

²³⁰ Merleau-Ponty, *Phenomenology of Perception*, 146.

²³¹ *Attulauniujut Nunami/Lament for the Land*.

snow, and in the skills and other habitual practices that lend their way of life its distinctive style of bodily orientation towards the world. In their attunement to the land, “is” and “ought” cross over into each other: what they do is what ought to be done; what ought to be done is what they do.

Rapid climate change disrupts Inuit attunement to the land; it breaks what Merleau-Ponty calls the “accord” between what we aim at (e.g., going out on the sea ice to fish) and what is given:

When you live in an isolated community, it makes a big difference when the temperatures change from minus 51 one day to minus six the next day. It makes a difference when the ice is not coming in until December or January and then leaving again in April or May, compared to a few years ago, even six or seven years ago, when we could drive on the ice . . . from November till May . . . And that feeling of being on the land is lost, and we all feel it. (*ibid.*, Kim Dicker)

The “difference” is not an abstract difference like the difference between the numbers two and three. It is a lived, first-person difference, a *deviation from normality* experienced as an emotionally laden condition of disorientation. “. . . [t]hings that we took for granted, that we wonder, ‘Can we still do them?’, which is putting big stress on a lot of people . . .” (*ibid.*, Marilyn Baikie) Normality—what the Inuit could long take for granted about themselves, their community, and the land—gives way to *abnormality*, in the same way that normativity yields to *anomy*. The land no longer governs the Inuit way of life, it no longer provides their communities with more or less stable rules that give Inuit agency a point and meaning.

Following Husserl and Merleau-Ponty, Matthew Ratcliffe points out that “for the most part, human experience involves the dynamic and cohesive actualization of possibilities, in line with anticipation.”²³² Grief, by contrast, “affects systems of anticipation that both shape perceptual experience and provide guidance for action, disrupting what was once presupposed,” such that “what is lacking here is not merely epistemic in nature. It is not just that one cannot *find* a path to follow; the *paths* have gone.” (*ibid.*) To be sure, Ratcliffe offers a phenomenology of the grief attendant on phantom limbs and the loss of loved persons. By contrast, the narratives of *Attulauniujut Nunami/Lament for the Land* describe the radical grief that ensues when rapid climate change renders the land’s norms—the paths it lays out for agency, human and other-than-human—opaque, indeterminate, unintelligible, incapable of providing guidance to the Inuit on how to orient themselves in what has become a strange world.²³³

The disorientation wrought by rapid climate change is temporal. “When I was a young person, more so than listen to the radio weather forecast, I’d always go . . . whether it was [to] my father or my grandfather to get a little bit of advice on what you think today

²³² Matthew Ratcliffe, “Towards a phenomenology of grief: Insights from Merleau-Ponty,” in *European Journal of Philosophy*, 28 (2020), 657-669, 661.

²³³ Referring to the experience of phantom limbs, Ratcliffe notes that “[d]escriptions of meaning-collapse are to be found in almost every published first-person account of grief . . . Along with this, there is a pervasive sense of disconnection from the consensus world. While that world persists, one has lost one’s place within it and no longer finds oneself in the midst of meaningful, shared situations.” Ecological grief is radical precisely because it is the experience of the disconnection to an entire world that revealed itself through a way of life, and not only to one’s place in a persisting world. See Matthew Ratcliffe, “Grief and Phantom Limbs: a Phenomenological Comparison,” in Timothy Burns et al. (eds.), *The New Yearbook of Phenomenology and Phenomenological Philosophy* (London: Routledge, 2019), Vol. 17, 77-96, 85.

is going to end up to be, weatherwise.”²³⁴ He adds: “today, if you talk to the elders, they look at me or whoever, and say, ‘we just can’t predict anymore.’ It’s changing so much.” (*ibid.*) The unpredictability of rapid climate change is tied to the anticipated grief of the Inuits about not knowing whether their way of life will still be possible for their descendants: “[I]t’s hurting me in a way, it’s hurting me in a lot of ways right now because I kind of thinks I am not going to be sure that my grandkids [can live the land] as we used to do it. It’s hurting me, big time.” (*ibid.*, Piercy Boarse) The temporal continuity of a way of life that joined together past, present, and future generations gives way to a disjointed time. “They’ll never know what it was like.” (*ibid.*, Rosie Hurley) Additionally, time becomes “empty” (*ibid.*, Michelle Wood), having lost the rhythmicity of the practices by which the Inuit live through their connectedness to the land.

Disorientation spawned by rapid climate change is also spatial. The Inuit lose their grasp of what one might call the lay of the sea, itself part of the lay of the land. If time becomes empty, space becomes blank: it no longer is possible to distinguish hard ice from ice holes. “I’m afraid to go out on the ice because like my brother said, ‘don’t know where the holes are,’ can’t tell where the holes are unless you know . . . the land.” (*ibid.*, Rosie Hurley). The freedom of unhindered orientation out on the land turns into its opposite, namely, the experience of bodily obstruction and powerlessness: I/we cannot. “You get the feeling of being stuck”; “[t]here is nowhere to go . . . when the ice is gone”; “it’s like being tied down, especially after we have been doing it all these years, going out on the land.” (*ibid.*)

The experience of disorientation that accompanies the loss of sea ice is indissolubly individual and collective. Individual: “People are not how they are, they are not comfortable . . . when a way of life is taken away because of circumstances that you have no control over, then you lose control of a part of your life.” (*ibid.*) Collective: “[t]he Inuit are known as the people of the sea ice, so if there is no sea ice, how can we be the people of the sea ice?” (*ibid.*, Tony Andersen). The narratives contain multiple references to the loss of Inuit identity and to the degradation of community life, including burgeoning drug addiction among the younger Inuit. “The impact is going to be devastating. I think you are going to have a lot more people stressed out, hurt, they’ll probably lose their identity.” (*ibid.*, Wayne Piercy)

In the final fragments of the film, some of the narrators speak about beginning to cope, hesitatingly, painfully, with the definitive loss of their way of life, fumbling their way towards something new, not knowing what it will be like nor whether they will still be able to call themselves the Inuit. “I know that when people have to come together in our community, they’re gonna do it. There’s a lot of love there.” (*ibid.*, Susan Saksagiak) “Communities are pretty resilient. You’re seeing that there are more community activities within communities that the community members themselves are planning.” (*ibid.*, Michelle Wood) Tony Andersen addresses its viewers in the final fragment of the film:

You know, I hope that anyone who’s looking at me today . . . I hope that people understand what we’re going through and that people have to realize that they, hey, we’re all in this together, and the impacts that you know . . . will have on my people, and how, how we’re going to suffer physically and mentally from this is we don’t know, we don’t know yet, but certainly there’s, it’s starting to have impact and just hope we can all work together to try to because we

²³⁴ *Attulauniujut Nunami/Lament for the Land*, Glen Sheppard.

got to try to minimize those impacts and try to find out how we can work with them and around them, and still be a very good, strong people. (*ibid.*)

When asking how the Inuit can come to deal with their loss, yet “still” be a good and strong people, Andersen’s “still” is not the refusal to acknowledge loss. It is not what du Toit, drawing on Freud and Rachel Bath, calls a state of melancholia, in which “one lives in a permanent state of self-enclosure and in a traumatized world poor in possibilities.”²³⁵ To the contrary: Andersen suggests that, through grieving, “one’s perceived future, once narrowed down and radically stripped of possibilities, begins to open up anew.” (*ibid.*) The question, returning to Butler, is how a politics of mourning, if mourning is the public display of grief, might contribute to “reimagining the possibility of community on the basis of vulnerability and loss.”²³⁶ She adds: “[o]ne mourns when one accepts that by the loss one undergoes one will be changed, possibly forever. Perhaps mourning has to do with agreeing to undergo a transformation (perhaps one should say *submitting* to a transformation) the full result of which one cannot know in advance.” (*ibid.*, 21)

Thus, far from being only a “mental health problem,” *Attulauniujut Nunami/La-*ment for the Land shows that grief is a revelatory or disclosive experience in an ontological sense. By disrupting the Inuit connection to the land, rapid climate change reveals to them the threefold relationality that constitutes their being as individuals and as a group: a relation to self, to other, and to the world. Inuit grief discloses their constitutively relational being. But constitutive means two things here. On the one hand, Inuit grief reveals that existence is *as such* relational. On the other hand, their grief reveals a *specific mode* of relational being, namely, the radical disorientation and meaninglessness brought about by the definitive loss of the relations that used to determine who they are and what matters to them.

With some reservations, I would like to interpret this ontological determination of grief in terms of Heidegger’s account of the internal link between finding oneself in the world and mood. *That* one always already finds oneself in the world is what Heidegger calls *Befindlichkeit*; *how* one finds oneself in the world is what he calls a “mood” (*Stimmung*). “A mood makes manifest ‘how one is and how one is faring’.”²³⁷ While specific moods may come and go, worldly orientation is always “moody,” as one might put it, always inflected with mood. In the absence of mood, nothing could matter. Conversely, mood conditions how something matters to us. Along these lines, only because one always already finds oneself in a web of relations can these be lost, giving way to grief and the experience of meaninglessness. Conversely, grief discloses our being as relational: “the world, *Dasein*-with, and existence are *equiprimordially* disclosed.” (*ibid.*, 137) The experience of irrecuperable loss not only discloses this threefold relationality of our being as being-in-and-towards-the world-with-others but also can lead to “finding” oneself *anew*, such that, to repeat du Toit’s formulation, “one’s perceived future, once narrowed down and radically stripped of possibilities, begins to open up anew.”

²³⁵ Du Toit, “Towards a phenomenology of grieving for the earth.”

²³⁶ Butler, *Precarious Life*, 20.

²³⁷ “*Die Stimmung macht offenbar, ‘wie einem ist und wird’.*” Heidegger, *Being and Time*, 134. Macquarrie & Robinson translate *Befindlichkeit* as “state-of-mind,” which is entirely misleading. Stambaugh’s translation, “attunement,” is much closer to the mark, but has its own difficulties. I have preferred to paraphrase the term as “finding oneself in the world.”

Against Heidegger, however, that one always already “finds oneself” in a situation and “fares” therein in one way or another is not merely a felicitous turn of phrase that seeks to grasp an ontological structure more fundamental than *Dasein*’s (ontic) corporeality. *Befindlichkeit* is from the very beginning a *bodily* finding oneself in the world. Unless mood discloses how human beings fare in their bodily directedness towards the world, it would become what Heidegger rejects, namely, an “internal,” mental state available for psychological objectivation and therapy. This is not to deprecate grief as a “mental health problem”; it is to argue that coping with definitive loss demands *bodily* “working with and around” it, as Andersen notes; we must accept to “submit to a transformation” (Butler) of our bodily relations to self, to other, and to the world.

My second reservation turns on Heidegger’s strictly individual and individualizing characterization of mood. Even if mood discloses me in my relation to the other, this relation is not itself constitutive of my mood, which reveals me as “delivered” over to myself. Brinkmann and Kofod point out that although grief is a first-person emotion, it belongs to “the phenomena in the world that only are what they are, because they are shared among several persons.”²³⁸ This insight is essential: it is as a collective practice that grief can become a *political* mode of bodily orientation in and towards the world with others. The characterization of mood in *Being and Time* in terms of what, in an earlier citation, Ferdinando Menga calls the “autoreferential isolation” of *Dasein*, occludes a political reading of grief. Yet it is only thus that Heidegger’s ontology of grief can yield insight into how lawmaking in the Anthropocene might participate in a politics of mourning.

Indeed, Heidegger’s conceptualization of *Befindlichkeit* takes up and reconfigures the notion of intentionality as the appearance of something to someone within a pregiven and co-given world. In particular, it radicalizes the affective dimension of intentionality referred to earlier, insofar as mood not only discloses the threefold relationality of existence but “makes it possible first of all to direct oneself towards something.”²³⁹ In the traditional language of Western philosophy, this directedness towards something can be either theoretical or practical, either “thinking” or “acting.” Heidegger’s radicalization of the phenomenological concept of intentionality posits mood as the common root of this bifurcation and *a fortiori* as the root condition of lawmaking. Like all directedness toward the world, lawmaking expresses a mood, from which it obtains its practical purport and thrust. The intentional “as,” in lawmaking and elsewhere, is always a moody “as.” Grief can be one of those moods. As a public and collective expression of grief, lawmaking that attempts to cope with definitive and irreparable loss of the more than human can partake of a politics of mourning.

Lawmaking *can* be an exercise in mourning, but this need not be the case. That we find ourselves in a situation of definitive loss can be denied in various ways. De-extinction—at bottom the attempt to overcome loss and therefore to deny its definitive character—is a case in point. It is a late manifestation of technique as *Ge-stell*. Against the denial of where we find ourselves and how we are faring when seeking to undo extinction and hold on to whom we have been, Van Dooren and Rose note that

²³⁸ Svend Brinkmann and Ester Holte Kofod, “Grief as an extended emotion” in *Culture and Psychology* 24 (2018) 2, 160-173, 169. This article was brought to my attention and is cited by du Toit in “Towards a phenomenology of grieving the earth.”

²³⁹ Heidegger, *Being and Time*, 137.

[m]ourning is a process of learning and transformation to accommodate a changed reality. Mourning is about dwelling with a loss and so coming to appreciate what it means, how the world has changed, and how we must *ourselves* change and renew our relationships if we are to move forward from here. In this context, genuine mourning should open us into an awareness of our dependence on and relationships with those countless others being driven over the edge of extinction.²⁴⁰

In his late work, Heidegger approaches mood as an historical notion in an ontological sense of the term, that is, a notion that not only speaks to how an individual finds itself and fares in a given situation but rather to a specific relation to self, other, and the world that characterizes an epoch as such: a *Grundstimmung*.²⁴¹ Acknowledging the fruitfulness of this concept need not, however, commit us to Heidegger's interpretation of fundamental moods as marking phases in the history of Being. The question worth asking here about the epochal significance of grief is whether reimagining community—and lawmaking for community—in the face of the Anthropocene is at all possible other than in the mood of grieving for the more than human. This question decides, amongst others, on the fate of restoration ecology, that is, of human interventions for the recovery of ecosystems that have become degraded, damaged, or destroyed. Holding faith with the dead, as Van Dooren and Rose put it, might open the way to a new interpretation of technique as world-disclosive, and so too of law as technique. For grieving demands embracing a human condition of definitive powerlessness, an unsurmountable “I/we cannot,” an irreducible dependency, as the condition for an “I/we can” that reimagines community in the Anthropocene. “You can't beat it. You can't beat the land.”

§17. Bodily (Dis-)Empowerment

Let me continue unpacking the intentional structure of “I/we can,” returning to explore what is perhaps the most important of the implications that follow from Kelsen's account of the legal act. I want to propose that his work highlights, even if this is not what he set out to do, the ambiguity of modern law, which empowers and disempowers the lived body. “I/we can” goes hand in hand with “I/we cannot.” In the long passage cited in §14, he notes that “society, when understood as the factual living together of human beings, can be thought of as part of life as such, and therewith as a part of nature . . .” The reader will have noticed that the passage relegates life to the “factual” or material domain of nature. This observation—an aside to which Kelsen pays no further attention—is important for what it reveals and for what it conceals.

Kelsen's aside reveals. By placing the lived body on the side of materiality, Kelsen can be read as indicating that, in modernity, it becomes the object of regulation *because* it is a living body. The living body manifests itself as a body taken up into and *formed* by lawmaking, since lawmaking, for Kelsen and the interpretation thereof prevalent in modern constitutionalism more generally, is the forming of matter. More precisely: to disclose the lived body as the material condition of a forming activity is to disclose it as *available* for a norming process; the lived body is there to be *normed*, and there to be normed

²⁴⁰ Thom van Dooren & Deborah Bird Rose, “Keeping Faith with the Dead: Mourning and De-extinction,” in *Australian Zoologist*, 38 (2017) 3, 375-378, 376.

²⁴¹ Martin Heidegger, *Beiträge zur Philosophie (Vom Ereignis)* (Frankfurt: Vittorio Klostermann, 2003), especially 14-17, 20-23, 33-3.

because it *lives*. The normed body is the body to be secured and affirmed *as* a living body and as a body that, by dint of living *together* with other living bodies, is vulnerable to other living bodies' agency while also rendering them vulnerable to its agency.

Accordingly, in an admittedly anachronistic reading of his aside, Kelsen anticipates that the principle of self-preservation, in which norming is the forming of matter, enables the exercise of power over the lived body. On the one hand, this involves enabling a certain way of relating to self, Other, and the world. In this basic sense, law is a mode of *bodily empowerment*. Interestingly, Kelsen increasingly came to recognize empowerment (*Ermächtigung*) as the central category of the legal ought.²⁴² As such, empowerment or authorization, in its legal sense, a sense deployed in predicative judgments, *generates* bodily empowerment as an "I/we can."²⁴³ On the other hand, the exercise of (legal) power over the body is never only empowering: it is also always disabling or *disempowering* by dint of closing down alternative ways of relating to self, Other, and world, enacting an "I/we cannot"—a *bodily Entmächtigung*, as I would call it—, an issue Kelsen did not deal with, at least not directly, in the Pure Theory of Law.

This ambiguity is well-captured by two readings of *biopolitics*. For Prozorov, an affirmative biopolitics is a central task of democratic lawmaking: "[t]here is nothing in the *mise-en-forme* of democracy that could possibly endow a particular lifestyle with any ontological or epistemic privilege . . . there is no form of life proper to a democracy, no democratic *bios*, in whose name the unqualified life of *zoe* must be subjected."²⁴⁴ Foucault, Agamben, and Esposito, by contrast, offer a critical reading of biopolitics as the exercise of domination over the lived body. In different ways and with different accents, each of these three thinkers can be read as extending Heidegger's critique of *Ge-stell* to the lived body, rendered available in modernity as the material basis for legal and disciplinary forming. This critical approach to lawmaking, which exposes its role in bringing about bodily disempowerment, is also taken up by feminist critiques of the *gendering* function

²⁴² Kelsen, *Pure Theory of Law*, 15-17.

²⁴³ To be sure, modern lawmaking inscribes itself in lived bodies as a specific form of bodily empowerment, namely, in the abstract mode of a *legal subject*, for whom to act is to exercise rights and to fulfill obligations vis-à-vis other legal subjects with regard to a range of *legal objects*. The counterpart to the emergence of a legal *Sonderwelt* is the juridification of the lived body. A prime task of a phenomenology of legal agency is to elucidate the specific mode of experience called forth by legal empowerment and its attendant transformation of experience in the lifeworld.

²⁴⁴ See Sergei Prozorov, *Democratic Biopolitics: Popular Sovereignty and the Power of Life* (Edinburgh: Edinburgh University Press, 2019), 105. (italics omitted) Whatever the merits of a democratic biopolitics, Prozorov's quintessentially modern account of democracy as a non-exclusive community of individuals who recognize each other as free and equal citizens is fundamentally compromised by dint of omitting an inquiry into the *emergence* of a democratic polity. More specifically, Prozorov nowhere thematizes the authoritative closure whereby a plurality of forms of life are represented as a unity from the first-person plural perspective of a "we." This, the perspective of institutionalized and authoritatively mediated collective agency, cannot include without also excluding forms of life because those representational acts, even if periodically renewed through elections, have to establish *what the collective is about*. This is a *substantive* determination of those forms of life which are and are not authorized to co-exist with each other from the first-person plural perspective. A genetic account of a polity ruins Prozorov's formalist assumption that authority and domination can ever be kept fully separate in lawmaking, democratic or otherwise. More pointedly: it ruins Prozorov's all too simple *reflexive* reading of democratic agency as the "governance of *our own lives*" (*ibid.*, 5; italics added) This, I take it, is the critical thrust of a biopolitics that views the lived body as a *normed* body.

of (legal) power, as in the work of Butler and Iris Marion Young.²⁴⁵ So, too, critiques that unmask the inscription of *antiblackness* into a racialized and colonized body, as in the work of Fanon and others.²⁴⁶ I will return in a minute to noting that a comparable critique can be extended to modern constitutionalism, which inscribes itself bodily as a specific perceptual regime that governs what can be said, seen, and done when lawmaking is about the collective self-legislation of human polities situated in a natural environment.

Calling attention to the bodily empowering/disempowering function of lawmaking suggests that habitual agency without an agent, e.g., anonymous hammering, is never only “primordial” or “original.” The lived body is also always normed through what is itself a bodily norming activity, in which, for instance, someone *teaches* someone to use a hammer, folding the hammer into the apprentice’s hand and helping them to bang a nail into a plank. Or when someone folds a pencil into a child’s hand and teaches them to write by tracing the lines of a letter inscribed in the page of a book. Or a parent that, smiling at its baby, unwittingly teaches it to smile back. While Merleau-Ponty can certainly account for this process in terms of the acquisition of skills that enable habitual engagement with the world, the obverse of a confident “I/we can” is an “I/we cannot” in the strong sense of what cannot be seen or heard within a certain (political) economy of perception that may include biopolitical, patriarchal, racist, or colonialist modes of exercising norming power over the lived body. To norm a lived body through lawmaking is to enable and disable it, to empower and disempower it by determining the who, what, where, and when of agency. This holds a fortiori for legal judgments and posited law more generally, which have what might be called *operative effects* that demand rethinking in what way operative intentionality is “primordial” with respect to act intentionality.

I would like to suggest that, in terms of the bodily structure and dynamic of intentionality, at stake is the relation between the “body image” and the “body scheme.” As elucidated by Shaun Gallagher, whereas the body image refers to “conscious awareness of one’s own body,” the body scheme concerns “a non-conscious performance of the body.”²⁴⁷ Building on and modifying Merleau-Ponty’s notion of the body scheme, Gallagher notes that

[p]re-reflectively, when the body is normally engaged in the world, when consciousness is busy with some task or thought, the body is not explicitly or thematically an object for consciousness. One is not conscious of one’s own body until there is either a voluntary reflection . . . or a forced reflection brought on by pain, discomfort, pleasure, fatigue, etc. (*ibid.*, 544)

²⁴⁵ Butler points to “the recasting of the matter of bodies as the effect of a dynamic of power, such that the matter of bodies will be indissociable from the regulatory norms that govern their materialization and the signification of those material effects.” Judith Butler, *Bodies That matter: On the discursive limits of “sex”* (London: Routledge, 1993), xii.

²⁴⁶ Referring to Fanon’s description of his encounter with a white boy, Sara Ahmed notes that “the ‘knowledges’ that are established in the violence of the white gaze – ‘The Negro is an animal, the Negro is bad, the Negro is mean’ – affect how both white and black bodies are inhabited. The life of such racial categories is in this way a *bodily life*.” Sara Ahmed, “Racialized Bodies,” in Mary Evans and Ellie Lee (eds.), *Real Bodies: A Sociological Introduction* (New York, NY: Palgrave, 2002), 46-63, 56; Frantz Fanon, *Black Skin, White Masks*, translated by Charles Lam Markmann (London: Pluto Press, 1986), 112-113.

²⁴⁷ Shaun Gallagher, “Body Image and Body Scheme: A Conceptual Clarification,” in *The Journal of Mind and Behavior* 7 (1986) 4, 541-554, 543. See also Merleau-Ponty, *Phenomenology of perception*, 100-103.

Gallagher adds that “the body image includes my conceptual construct of the body, informed by my immediate consciousness of my body and by my intellectual understanding (mythical or scientific) of the body.” (*ibid.*, 546)

The conceptual distinction between body scheme and body image is of great importance to understand how embodiment shapes the mind. The phenomenologically informed reader will have noticed that I have borrowed the notion of body scheme, even if I did not mention it as such, when referring to Heidegger’s analysis of hammering and Merleau-Ponty’s analyses of the blind person with a walking cane and the dexterous movements of the lady with the feathered hat. Moreover, Gallagher’s description of the distinction is careful to note that body scheme and body image interact and cooperate closely in intentional action. It may be helpful, however, to introduce some clarifications and a caveat to his luminous study of this conceptual distinction.

A first point is that what he calls the “intellectual” understanding of the body is not limited to myth or science; it includes the law and all other modes of socialization that deploy what I called, somewhat clumsily, operative effects on the lived body. There is a whole study to be conducted on lawmaking as a modality of the interaction between the body scheme and the body image. It would be the lynchpin to an account of how the lived body is both normed and norming with regard to the law. Second, recent studies in developmental psychology on “newborn imitation” lead Gallagher to suggest, contra Merleau-Ponty and others, that there is “a [body] schema sufficiently developed at birth to account for the ability to move one’s body in appropriate ways in response to environmental, and especially interpersonal stimuli . . .”²⁴⁸ Thus, the body scheme has, as one could put it, a *genealogy* in which imitation of the Other is an ingredient element of the body scheme’s development. Precisely this feature of a body scheme is, I want to argue, the focus of critical engagements by biopolitical, gender, post-colonial, and antiblackness theorists with Merleau-Ponty’s phenomenology of the own body (*corps propre*). Third, the point is not to deny that the body scheme operates pre-reflectively; the point, rather, is that a developed body scheme as it plays out in everyday life is *also* post-reflective, post-predicative, and post-representational. Finally, and this is my caveat, one may wonder about the claim that the body scheme regards bodily transparent and immediate self-awareness, as characterized by Gallagher: “[p]roprioceptive-kinesthetic awareness is usually a pre-reflective (non-observational) awareness that allows the body to remain experientially transparent to the agent who is acting.” (*ibid.*, 73) Here again, the point is not to deny a pre-reflective or non-observational self-awareness. Rather, if a body scheme develops intersubjectively, then the body is never only “one’s own body,” as Husserl, Merleau-Ponty, and Gallagher would have it. Responsivity, which is already at work in what Gallagher calls “neonate imitation,” suggests that the lived body is a body in the accusative. Accordingly, an irreducible strangeness is ensconced in the reflexive awareness of one’s own body, regardless of whether such awareness is reflective or pre-reflective. A *corps impropre* resides in the *corps propre*: ~~reflexivity~~.

The entwinement of bodily empowerment and disempowerment, and of body scheme and body image, allows me to highlight where Van Roermund’s and my

²⁴⁸ Shaun Gallagher, *How the Body Shapes the Mind* (Oxford: Clarendon Press, 2005), 72.

approaches to operative intentionality go their separate ways.²⁴⁹ As I noted earlier, he correctly critiques the reductivity of my earlier work on lawmaking, insofar as it focuses solely on representation. But his insistence that motor intentionality is primordial, original, *qua* pre-reflective, pre-predicative, and pre-representational process, falls prey to a form of foundationalism in which the intended gives itself immediately—as “present in person” or as “the thing itself,” to borrow Husserlian turns of phrase. Very much in line with Husserl and Merleau-Ponty’s Van Roermund holds that “[t]here is a “core in political representation that *escapes* representation.”²⁵⁰ Yet motor intentionality is always already normed, always already mediated to a greater or lesser extent through representational processes. Iris Marion Young’s famous essay, “Throwing Like a Girl,” is an excellent example of how a socially defined body image contributes to configure the body scheme at work in motor intentionality. The development of a body scheme involves a socialization process in which the *corps propre* and the *corps impropre* are irreducibly entwined.²⁵¹ The very same conditions that enable a certain style of bodily engagement with the world also disable others: “I can (throw the ball in this way)” goes hand in hand with “I cannot (throw the ball in that way).”

To be sure, Van Roermund acknowledges that “motor intentionality occurs at the interface between a self and its world, where the distance between the two poles becomes unmeasurably small without disappearing.” (*ibid.*, 166). But the problem is not of a “distance,” great or small, between the intention and the intended; it is of a *difference* that emerges between the intention and the intended, where the latter is more and other than how it appears to someone in the course of bodily directedness towards the world. Van Roermund draws on Merleau-Ponty’s distinction between grasping and pointing—the pre-reflective and reflective modalities of intentionality that Merleau-Ponty also refers to as *intention de prise* and *intention de connaissance*—to argue, first, that the former is more fundamental than the latter, and, second, that motor intentionality does not deploy the structure of “something as something.” But the very notion of “grasping” entails a form of *directedness* towards the world; one grasps *something*, such as Heidegger’s hammer or Young’s ball. This is something other than flailing around aimlessly. When grasping something, no less than when pointing to something, what appears, appears *as* this or as that. Grasping deploys the basic structure of intentionality according to which something appears as something (hence as this, not as that) to someone within a pre-given and co-given world, even if grasping does not render what is grasped thematic as such and is *in this sense* immediate. Waldenfels points out that the intentional “as” generates what he calls a “significant difference” between the intention and the intended. The significant difference plays out, in motor intentionality, as an *operative difference* between the

²⁴⁹ Van Roermund focuses specifically on motor intentionality, whereas I refer to operative intentionality more generally. Suffice it to say that, as concerns the structure of intentionality, what holds for operative intentionality in general holds for motor intentionality in particular.

²⁵⁰ Van Roermund, *Law in the First Person*, 35. Referring to a passage in *Phenomenology of Perception*, Van Roermund argues that “intentionality driven by representation, or interpretation, or conceptualization or whatever ‘objectifying function’ presuppose already a bodily entrenched intentionality ‘*sans aucune representation*’.” *Ibid.*, 166. The reference is to Merleau-Ponty, *Phenomenology of Perception*, 140.

²⁵¹ Iris Marion Young, “Throwing like a Girl: A Phenomenology of Feminine Body Comportment Motility and Spatiality,” in *Human Studies* 3 (1980) 2, 137-156.

intention and the intended.²⁵² To cut out the “as” from motor intentionality is to endorse a form of pure presence—a legal variation of the early modern strategy to posit an ultimate foundation capable of overcoming the radical challenge of the *nihil* inherited from the crisis of Scholastic philosophy. This is a surprising implication of Van Roermund’s analysis, because his contribution to the philosophy of law has consistently afforded robust resistance to foundationalism in the law.

Be it as it may, it is in this vein that Cornelius Castoriadis critiques the elucidation of perception in *The Visible and the Invisible*, where Merleau-Ponty states that “. . . I have in perception the thing itself, and not a representation,” a formulation that echoes the passage from *Phenomenology of Perception* cited approvingly by Van Roermund.²⁵³ Against Merleau-Ponty, Castoriadis notes that

[f]rom the idea that perception gives access to “things,” one continually slides towards the idea that perception alone truly gives access to something . . . that, therefore, every other species of representation at the same time finds its origin in perception and is only a carbon copy, an enfeebled variant, a lacunary and deficient residue thereof.²⁵⁴

Notice that Castoriadis refers to perception as a “species of representation.” In so doing, he resists the assumption that there is any form of intentionality that can give access to “the thing itself,” that is, to immediate presence. Here he joins hands with Derrida: *la chose même se dérobe*. Because representation concerns the irreducibly mediated character of presence, of intentional access to the world, whether in the modes of “grasping” or “pointing,” Castoriadis can refer, otherwise than Van Roermund, to perception as “perceptual representation.” (*ibid.*, 4) To the foundationalist thesis, “[t]here is a core in political representation that escapes representation,” a counter-thesis: there is no core.

I would not burden the reader with this very local disagreement (literally: Van Roermund was my predecessor as the chair of philosophy of law at Tilburg) were it not because it contributes to clarifying the two faces of the irreducible *situatedness* of agency. On the one hand, bodily intentionality stands in an immanent relation to a world always already there, given prior to and conditioning the subject’s activities. Foucault’s epigrammatic thesis, “[t]here is order” (*il y a de l’ordre*), means, as concerns lived bodies, that they are normed bodies, the object of disciplinary and legal power.²⁵⁵ This dimension of situatedness is elided, as the critics of Merleau-Ponty (and of Van Roermund, by implication) point out, when bodily orientation towards the world is reduced to a pre-reflective, pre-predicative, and pre-representational mode of intentionality, and when it is taken for granted that a lived body is simply “my own body.”

²⁵²Bernhard Waldenfels, *Spielraum des Verhaltens* (Frankfurt: Suhrkamp, 1980), 129; Waldenfels, *Bruchlinien der Erfahrung* (Frankfurt: Suhrkamp, 2002), 28-30.

²⁵³ Maurice Merleau-Ponty, *The Visible and the Invisible*, translated by Alphonso Lingis (Evanston, IL: Northwestern University Press, 1968), 7.

²⁵⁴ Cornelius Castoriadis, “Merleau-Ponty and the Weight of the Ontological Tradition,” translated from the French by David Ames Curtis, in *Thesis Eleven*, 36 (1993), 1-36, 4-5. I am grateful to Ferdinando Menga for having drawn my attention to this article. Elsewhere, Menga turns the critique of presentism against Castoriadis himself, who rejects political representation in favor of “direct” democracy as properly radical democracy. See Ferdinando Menga, “Castoriadis e il peso dell’eredità democratica: pensiero dell’istituzione e rischio dell’ipostasi dell’autonomia,” in *Ethics & Politics* 24 (2022) 3, 271-297.

²⁵⁵ Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (London: Routledge, 2002).

On the other hand, in defense of Merleau-Ponty, bodies are not only acted upon—normed—by an order; they are also norming, able to act *upon* and transform the order in which they are situated. Like Foucault, Merleau-Ponty notes that “I can never fully justify the permanent thesis of my life that ‘there is a world,’ or rather, ‘there is the world.’”²⁵⁶ But in contrast to Foucault, who relentlessly exposes the exercise of disciplinary and legal power over docile bodies, its counterpart, for Merleau-Ponty, is the norming capacity of the lived body, distilled in an “I can”—an elementary “power of existing” (*puissance d’exister*), where existence is “the taking up (*reprise*) of the [factual] and [of] chance by a reason that neither exists in advance of this taking up, nor without it.” (*ibid.*, 136, 129; translation modified) In this twofold sense of being normed and norming, lived bodies are situated. Maren Wehrle puts it very well in an important contribution to the phenomenology of the lived body:

On the one hand, the way we experience can never be purely individual; it is always already an expression of the culture, history and normative context in which we are situated. On the other hand, experience and embodiment can never fully coincide with existent normative frameworks or dominant discourses; otherwise we could never have new experiences, and changes of discourses and norms would never be possible. It is precisely the occurring discrepancy between individual experience and the dominant normative frameworks that motivates critique and initiates change.²⁵⁷

This ambiguous condition of being inside and outside a given discursive order is, arguably, the modest but not insignificant “truth” regarding the transcendental ego in all philosophies of the cogito. On the one hand, and against the claim that the transcendental ego constitutes the world as the totality of meaning-relations, while not itself a constituted being within that world, the subject’s situatedness entails that it is never outside of the all-encompassing unity of the one world (*die eine Welt*). The subject is always already within this order of orders. There is no genealogy of logic, nor of agency more generally, that could “return” to a pristine, pre-worldly ego that constitutes without already being constituted. In Merleau-Ponty’s words, “[t]he most important lesson of the reduction [of the world to a meaning-constituting achievement of the transcendental ego] is the impossibility of a complete reduction.”²⁵⁸ On the other hand, even if it definitively exceeds the subject’s control because it is neither a subjective achievement nor a world in which it is possible to *live*, the one world is both intimated in and withdraws from bodily experiences of being normed and norming, that is, of being inside and outside a bounded, environing world (*Umwelt*) that acts upon the lived body and upon which it acts. Human or otherwise, the lived body is always already enworlded *and* enworlding. It is enworlded

²⁵⁶ Merleau-Ponty, *Phenomenology of Perception*, lxxxii. And elsewhere: “there is meaning” (*il y a du sens*). Quite simply, rationality is not guaranteed either as total or as immediate. It is in some way open, which means menaced.” Merleau-Ponty, *Le primat de la perception*, 63.

²⁵⁷ Maren Wehrle, “The Normative Body and the Embodiment of Norms: Bridging the Gap Between Phenomenological and Foucauldian Approaches,” in *Yearbook for Eastern and Western Philosophy* (2017) 2, 323-337, 325. This germinal article has led to a string of fine publications, including Maren Wehrle, “Bodily Performativity: Enacting Norms,” in Lucilla Guidi and Thomas Rentsch (eds.), *Phenomenology as Performative Exercise* (Leiden: Brill, 2020), 120-139, and Maren Wehrle, “Situating Normality: The Interrelation of Lived and Represented Normality,” in *Chiasmi International* 21 (2023), 99-119.

²⁵⁸ Merleau-Ponty, *Phenomenology of Perception*, lxxvii.

in a livable—because bounded—world; it enworlds because to live is to engage with the world in an intercorporeal process of setting the boundaries of a world. If one takes the notion of a “lifeworld” literally, then, from the agential perspective of a lived body, a perspective that is by no means the sole bailiwick of human agency, there are lifeworlds in the plural, not the lifeworld in the singular.

§18. (Im)perceptibility

There is a further manifestation of the ambiguous entwining of empowerment and disempowerment that demands our attention: a legal order cannot open up a perceptual field, in which certain things can be *sensed* as legally relevant and important, without also closing down other perceptual fields. Here again, the inaugural dichotomies that structure the Pure Theory of Law, as discussed in §14, can be read as articulating background presuppositions that have governed lawmaking in modernity as a *style of perception*. Modern lawmaking as a reflective performance, i.e., law as posited law, literally embodies itself in a certain (political) economy of perception. Conversely, there is no political economy—certainly not one in which capitalism enjoys pride of place—that is not also a perceptual regime.

Consequently, a theory of material constitutionalism cannot content itself with clarifying and critiquing how the structural conditions governing the political economy of capitalism take shape in legal norms. It must also show how those structural conditions open up a perceptual field in which certain things can be seen, heard, and done, and others marginalized. Here, albeit with some reservations about his interpretation of alienation, a phenomenology of bodily lawmaking stands close to Marx, who notes in an extraordinary passage of the *Paris Manuscripts* that

[j]ust as *private property* is only the perceptible expression of the fact that man becomes *objective* for himself and at the same time becomes to himself a strange and inhuman object; just as it expresses the fact that the manifestation of his life is the alienation of his life, that his realization is his loss of reality, is an *alien* reality: so, the positive transcendence of private property – i.e., the *perceptible* appropriation for and by man of the human essence and of human life, of objective man, of human *achievements* – should not be conceived merely in the sense of *immediate*, one-sided *enjoyment*, merely in the sense of *possessing*, of *having*. Man appropriates his total essence in a total manner, that is to say, as a whole man. Each of his *human* relations to the world – seeing, hearing, smelling, tasting, feeling, thinking, observing, experiencing, wanting, acting, loving – in short, all the organs of his individual being, like those organs which are directly social in their form, are in their *objective* orientation, or in their *orientation to the object*, the appropriation of the object, the appropriation of *human* reality.²⁵⁹

These preliminary considerations lead directly to the general problem of a *selectivity sensibility*, a central operation of legal orders *qua* social orders. Indeed, presumptive collective unity emerges through practices that represent a collective as *this*—rather than as *that*. Who claims to represent a collective not only claims that there is a collective but also what joins “us” together, i.e., what “we” hold in common and distribute justly among “ourselves.” Absent such claims, no first-person group perspective and no distribution of

²⁵⁹ Marx, *Economic & Philosophic Manuscripts of 1844*, 45.

the sensible, to borrow Jacques Rancière's well-known phrase, is possible.²⁶⁰ Crucially, the perceptual field opened up by collective action gives shape to what is important and relevant and what not, hence what kinds of places, times, subjectivities, and kinds of agency are included therein, such that other possible combinations of these four dimensions of agency are *marginalized* as unimportant and irrelevant.²⁶¹ "Marginalization" emphasizes that violence is never fully separable from exclusion. Without selectivity there can be no reference to a "we, who matter," "we, who count," "we, the affected." But selectivity also brings about the exclusion of those who become agents who do not matter, who do not count, who are not affected. What is marginalized from collective unity is rendered legally invisible, even if it can be seen, say as a penguin making its way to a burrow; and it is rendered legally voiceless, even if it can be heard, say as an obstreperous squawk that perturbs the slumbers of seafront property owners. Legal invisibility and voicelessness remind us that perception is an integral dimension of the agential perspective proper to legal ordering, hence that selectivity is a *bodily* process. "I/we can(not)" plays out as "I/we can(not) sense."

The key point here is that matters of concern are never given in abstracto; they appear *as such to someone*, within a pre-given and co-given world. A matter of concern, legal or otherwise, requires a situated, first-person perspective, singular and plural, even if it is not exhausted by that perspective. As to the latter, Menga points out in his critique of Heidegger's *Sorge* that

[w]hile Heidegger's ontological approach [to care] . . . allows us to fully identify the originally defective and precarious character of human beings, it is no less true, on the other hand, that the interpretation of care as a project aimed at filling this gap and, therefore, essentially aimed at realizing a subject in its capacities, ends up triggering a vision of the relationship with alterity that is irremediably functional in nature. That is to say, it is a relationship that, far from making alterity enter the scene in the original form of an Other who invariably challenges me and exposes me to my passivity, makes it emerge, at most, under the appearance of a collaborator with a view to the attainment of my objectives and ends.²⁶²

Menga reminds us that care is *care in the accusative*, a mode of ethical responsibility that can inform politics and law. I return to this important point in Part III.

For the moment, however, I would stress that, insofar as what matters to "us" and what "we" care about involves a first-person plural perspective, mattering and caring are subject to the very same dynamic that governs (im)perceptibility as a first-person perspective: what matters to us, what we care for, is a feature of our bodily *directedness* towards the world, a directedness that involves selectivity. Mattering and caring demand selective sensibility, even if the terms of selectivity can change, on occasion drastically. Because caring has an intentional structure, it goes hand in hand with uncaringness. Phenomenologically speaking, caring for someone/something presupposes and co-presents *a world*—an *Umwelt*—but not *the world*. It is in this spirit that one should read Joan Tronto's claim, "[w]e can recognize care when a practice is aimed at maintaining,

²⁶⁰ See Jacques Rancière, *The Politics of Aesthetics: The Distribution of the Sensible*, edited and translated by Gabriel Rockhill (London: Continuum, 2004).

²⁶¹ See Alfred Schütz, *Reflections on the Problem of Relevance* (New Haven, CN: Yale University Press, 1970); Alfred Schütz & Thomas Luckmann, *Strukturen der Lebenswelt* (Konstanz: UVK Verlagsgesellschaft, 2003), 252-312.

²⁶² Ferdinando G. Menga, *Cura* (Milano: Corriere della Sera, 2023), 79-80.

continuing, or repairing the world.”²⁶³ As Puig de la Bellacasa puts it, “where there is relation, there has to be care, but our cares also perform disconnection. We [notice the first-person perspective, HL] cannot possibly care for everything, not everything can count in a world, not everything is relevant in a world . . .”²⁶⁴ That it is impossible to care for everything is not an empirical statement (i.e., there is too much to care for out there to be able to care for it all). It is a condition of possibility—a “transcendental” feature—of caring. In this, it is no different to what matters as relevant and important: that something emerges as relevant and important for someone requires that something else recede into the background as irrelevant and unimportant. Selective sensibility goes hand in hand with selective caring.

Referring to Foucault’s late work on the care of the self, Cressida Heyes argues that “our ambivalent commitment (I might say ‘attachment’) to self-making remains a valuable part of our aesthetic ethics, but one of the reasons it is ambivalent lies in the anaesthetic desire for respite from the assaults of late modernity and, now, neoliberal postmodernity.”²⁶⁵ Of course, one can turn the argument on its head: the political economy of late modernity and now of neoliberal postmodernity operates as an anesthetic that inures us to so much suffering, human and other than human, and to definitive loss we do not grieve. But I would argue that there is another, more fundamental, ambivalence not limited to our contemporary situation. It concerns the directedness of access to reality. There can be no *aesthesis* without an *an-aesthesis*. There can be no sensitivity and openness to novel experiences that does not always already take place against the background of the relative closure of a perceptual field, and therewith of a fundamental insensitivity and uncaringness, even if the terms of what counts as in/sensitive and un/caring can shift. The passage from uncaringness to caring, from unimportance to importance, from irrelevance to relevance, and vice versa, involves the reorganization of a field of experience wrought by a shift in what we attend to. “Attention is a transformation, a reorganization of [a] field; suddenly something becomes important, something emerges and something else recedes. The criteria of relevance change. So, it is not about a mere appearance of what is already there, but about an original appearance, in the course of which things become what they are.”²⁶⁶ That such passages involve *shifts* in attention means that there is no attentiveness without inattentiveness.

These shifts raise the question about an ethical dimension of attentiveness. Indeed, attentiveness is never simply a “mental,” “cognitive,” orientation towards something/someone; it is always a practical, embodied orientation towards something or something, such as when one “cranes one’s neck,” “turns one’s ear,” or “sharpens the eye” to see or hear what comes to matter in one way or another. Caring, in its strong ethical sense, is one of the ways in which something/someone comes to matter to me/us. Even if not all forms of attentiveness are caring, the latter’s connection to attention becomes

²⁶³ Joan C. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993), 104.

²⁶⁴ María Puig de la Bellacasa, *Matters of Care: Speculative Ethics in More Than Human Worlds* (Minneapolis, MN: Minneapolis University Press, 2017), 78

²⁶⁵ Cressida J. Heyes, *Anaesthetics of Existence: Essays on Experience at the Edge* (Durham, NC: Duke University Press, 2020), 5-6.

²⁶⁶ Bernhard Waldenfels, *Das leibliche Selbst: Vorlesungen zur Phänomenologie des Leibes* (Frankfurt: Suhrkamp, 2000), 63. For “directed attention” see Bernhard Waldenfels, *Phänomenologie der Aufmerksamkeit* (Frankfurt: Suhrkamp, 2004), 228-260.

clearer if we bear in mind that inattentiveness speaks not only to what we do not see or hear because it does not stand out as differentiated with respect to an *undifferentiated* background, but also as that to which we are *indifferent*, uncaring. *Ex positivo*, the ethical dimension of attentiveness as caring for something/someone resonates in the Dutch “*attent*,” the French *attentionné*, and in their English counterpart, *considerate*. More pointedly, of course, sensibility and sensitivity share a common root: a disposition to be affected in a certain way.

Contemporary theories of the affects confidently assert that they have left behind the modern subject. I am more cautious. Without denying the importance of their contributions, I want to argue that the antecedents of these theories are to be found in Kant’s reading of the subject’s activity as dependent on affectivity and, thereafter, in Husserl’s phenomenological radicalization of affectivity.²⁶⁷ Certainly, Kant and Husserl focus on affectivity with regard to the subject’s cognitive activity. And both hold fast to the transcendental ego. But whatever the limitations of their accounts, they aver that affectivity is a constituent and general feature of intentional access to reality. This insight of philosophies of the cogito opens the way for an analysis of the internal connection between affectivity, *aesthesis*, and attention that plays out in ethics, politics, and law. Rancière’s political reading of the distribution of the sensible is a late reappropriation of this internal connection, as anticipated by Kant and Husserl.

In any case, and returning to Kelsen, the ontological bifurcation that governs the foundational oppositions of the Pure Theory of Law is of a higher order than any specific distribution of the sensible in a given legal order of modernity: it speaks to what *counts* as lawmaking, hence to what counts as *possible* distributions of the sensible and of what matters and what to care about available to modern constitutionalism. Indeed, I want to propose that Kelsen’s trenchant disjunctions articulate an historically determinate *perceptual regime* that regiments what can be sensed and cared for when it is taken for granted that lawmaking is about human polities that relate to their natural environment in a process of collective self-legislation. Arguably, Rancière’s account of the distribution of the sensible presupposes this modern perceptual regime, even while critiquing the perceptual regime made available by capitalism. Giving a twist to Foucault’s paradoxical formulation, these disjunctions are the *historical a priori* that has governed legal perception in modern constitutionalism.²⁶⁸

I join forces here with Daniel Matthews, who introduces the notion of an “aesthesis of sovereignty,” meaning by such “the configuration of the political subject and the power that sovereignty has in shaping the subject’s capacities to be rendered *sensitive or insensitive* to a given set of phenomena.”²⁶⁹ Drawing on Rancière’s distribution of the sensible and Castoriadis’ notion of the imaginary, Matthews argues that modern sovereignty structures

the distribution of *seen, heard and felt* in a way that we so often take for granted . . . Indeed, it is this background ordering which gives sense to the various bonds and attachments which

²⁶⁷ Kant: “[o]ur mode of intuition is dependent on the existence of the object, and is therefore possible only if the subject’s faculty of representation is affected by that object.” Kant, *Critique of Pure Reason*, B72. Husserl: “[a]ffection is always prior to grasping (*Erfassen*).” Husserl, *Experience and Judgment*, 24.

²⁶⁸ Michel Foucault, *The Archaeology of Knowledge* (London: Routledge, 2012).

²⁶⁹ Daniel Matthews, *Earthbound: The Aesthetics of Sovereignty in the Anthropocene* (Edinburgh: Edinburgh University Press, 2021), 65.

constitute social life; we routinely fail to be rendered sensitive to those “non-political” modes of attachment which fall outside the modern, sovereign imaginary. Indeed, such a non-political remainder is precisely imperceptible from within the dominant imaginary. (*ibid.* 70)

I would caution, however, against too quickly dropping the notion of sovereignty. While the concept may have been coined in modernity, it functions as a placeholder for a general problem, namely, the authoritative process of (re)drawing, monitoring, and enforcing the boundaries of a collective—and therewith the boundaries of legal (an)aesthesis: of what ought to matter to us and what we ought to care for. Proscribing sovereignty from the political vocabulary of constitutionalism risks depoliticizing this dynamic of inclusion and exclusion, concealing that while different distributions of the sensible are of course possible, no polity can exist without a distribution of the sensible that anticipates what is perceivable nor without a distribution of what we ought to care about. Here again we find one of the intensely depoliticizing implications of the oh so munificent gesture of those who, invoking ontological relationality, claim that everything is connected to everything. The purport of my caveat is critical rather than apologetic. Returning to and supplementing Lisa Guenther’s observation cited at the outset of Part II, to insist that lawmaking is a modality of a selective or directed bodily engagement with and in the world is to understand the account of lawmaking prevalent in modern constitutionalism as, literally, a contingent “[way] of seeing and even [a way] of making the world that [goes] unnoticed without a sustained practice of critical reflection.”

Along these lines, Ricoeur’s cry, “it is unjust!”, entails that (in)justice begins with (im)perceptibility. Indeed, one of the implications of a phenomenology of bodily lawmaking is that distributive (in)justice always involves a distribution of the sensible. Struggles for legal representation and recognition that seek inclusion in a legal order begin as *struggles to be seen and heard in the law*.²⁷⁰ This also holds, and paramountly, for struggles about what cannot be seen and heard when authoritative lawmaking is about collective self-legislation by human polities located in a natural environment, and the distributions of beings into persons and things modern constitutionalism calls forth.

But we would be mistaken to simply align justice with legal perceptibility, and injustice with legal imperceptibility. Injustice may well begin with *how*, not whether something/someone is legally perceived. In liminal situations, namely, where injustice *is* legal perceptibility, becoming or remaining legally imperceptible may be, for those who are included in that perceptual regime, the only way to elude injustice, even if not to gain justice, as the Black narrator of *Invisible Man* knows all too well:

I am an invisible man. No, I am not a spook like those who haunted Edgar Allan Poe; nor am I one of your Hollywood ectoplasms. I am a man of substance, of flesh and bone, fibre and liquids – and I might even be said to possess a mind. I am invisible, understand, simply because people refuse to see me . . . That invisibility to which I refer occurs because of a peculiar disposition of the eyes of those with whom I come in contact. A matter of the construction of their *inner* eyes, those eyes with which they look through their physical eyes upon reality. I am not

²⁷⁰ See Emiliios Christodoulidis, “The Objection that Cannot be Heard: Communication and Legitimacy in the Courtroom,” in Antony Duff, Lindsey Farmer, Sandra Marshall, and Victor Tadros (eds.), *The Trial on Trial: Truth and Due Process* (Oxford: Hart Publishing, 2004), 179-202.

complaining, nor am I protesting either. It is sometimes advantageous not to be seen, although it is most often rather wearing on the nerves.²⁷¹

But he resists, even if he does not protest: a battery of lightbulbs blazes mightily 24/7 in his underground abode, illegally tapping electricity from the grid and generating a huge bill that can be ascribed to no one.

As we shall see, legal perception, in addition to having limits—the sensibly unordered but orderable for a given legal order—also has fault lines: the sensibly unordered and unordered in that order. An “orthoesthesia” and “orthokineshesis,” to borrow Husserlian terms, call forth a “heteroesthesia” and “heterokineshesis,” and, more sharply, a “xenoesthesia” and “xenokineshesis.”²⁷² In effect, the strange, phenomenologically speaking, is what a legal order cannot include without excluding *because* it is included; that which withdraws because it appears in the field of perception and bodily agency of a given legal order as either legal or illegal. This is what I call the phenomenon of *a-legality*.²⁷³ We will examine Anthropocenic a-legalities in Part IV.

§19. Bodily Normativity

I can no longer postpone a discussion of normativity as it plays out in legal perception. The normativity of perception is familiar terrain for phenomenology. In Sophie Loidolt’s words, a “common trait” unites all phenomenological approaches to normativity, namely, that “*normativity is gained from experience.*”²⁷⁴ Phenomenology’s experiential approach to normativity focuses on a question prior to the practical question about what one ought to do in a specific context, and prior to the attempt to identify a metarule that could determine what one ought to do regardless of the context, such as Kant’s categorical imperative. Inasmuch as the core feature of experience is an “acquainting or presenting mode where something is ‘given’ or ‘appears,’” phenomenology seeks to uncover the different modalities of the “*experience of an ought.*”²⁷⁵ It is precisely one of the modalities of this

²⁷¹ Ralph Ellison, *Invisible Man* (Hammondsworth: Penguin Books, 1965), 7.

²⁷² Husserl, ever the philosophical wordsmith, devised the term “kinesthesia” to highlight the bodily connection between sensibility and movement. See Husserl, *Ideas II*, 60-94, 71.

²⁷³ See Hans Lindahl, *Fault Lines of Globalization*, 156-186; Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge: Cambridge University Press, 2018), 195-199; 307-310; Hans Lindahl, “Intentionality, Representation, Recognition. Phenomenology and the Politics of A-Legality,” in Thomas Bedorf and Steffen Herrmann (eds.), *Political Phenomenology. Experience, Ontology, Episteme* (Abingdon: Routledge, 2019), 256-276.

²⁷⁴ Sophie Loidolt, “Experience and Normativity: The Phenomenological Approach,” in Antonio Cimini and Cees Leijenhorst (eds.), *Phenomenology and Experience: New Perspectives* (Leiden: Brill, 2018), 151-165, 152.

²⁷⁵ *Ibid.*, 152, 153. Barad has introduced the notion of “ethico-onto-epistem-ology” to integrate what modern philosophy has sundered into distinct disciplinary fields. While her insistence on the inseparability of ethics, ontology, and epistemology is valid as far as it goes, the question this sesquipedalian expression raises is how and why these are but different facets of the *single* structure and dynamic of human engagement with the world, regardless of the different practices, scientific or otherwise, in which it takes place. Having discussed the internal connection between ontology and epistemology across the epochal transformations of Western philosophy in §§11-12, I would now add that phenomenological inquiries into normativity show that the internal connection between ethics, ontology, and epistemology plays out in responsive intentionality. It is perhaps not exaggerated to state that, for phenomenology, elucidating the “as” in “something as something” yields the key to integrating the emergence of being, truth, and normativity in human directedness towards the world. Importantly, the compass of a phenomenology of responsive

experiential approach to normativity, namely what Loidolt calls “operative normativity,” which §12 sought to uncover when discussing Husserl’s genealogy of judgment. The reader will remember Husserl’s analysis of the passage from simple certainty to a judgment that establishes what counts as certain in response to the obstruction of perception. The logical category of negation was shown to have its source in our bodily orientation towards the world. The “disappointment,” as Husserl puts it, of the perceiver’s expectations of what would appear and how it would appear points to a basic, perceptual experience of normativity: this *ought* (or ought not) to have appeared (a mannequin, not a human being)—or *ought* to have appeared in this way rather than that (green, not red). Norms, in Husserl’s genealogy of judgment, are sedimented or congealed expectations, the outcome of a process of normalization. As such, operative normativity displays an internal connection with *normality* and the *habitual body*, even if the obstruction of perception shows that normativity cannot be collapsed into normality.

So, too, Merleau-Ponty insists on the normativity of perception when noting that, as a matter of course, one adjusts one’s bodily position with respect to a perceived object to achieve a perceptual optimum without having to go through the mental operation of contrasting an initial situation of perceptual disequilibrium and the desired perceptual optimum. Achieving this optimum *motivates* bodily movement, but where motivation is strictly pre-reflective, only becoming a predicative “reason for action”—an explanation about what I *ought* to do to perceive something optimally—were someone to query me about why I draw closer to or step away from the object.

The distance between me and the object is not a size that increases or decreases, but rather a tension that oscillates around a norm. The oblique orientation of the object in relation to me is not measured by the angle that it forms with the plane of my face, but rather experienced as a disequilibrium, as an unequal distribution of its influences upon me . . . There is a point of maturity of my perception . . . towards which the entire perceptual process tends.”²⁷⁶

In brief, Husserl and Merleau-Ponty show that *perception is a pre-reflective striving to realize a norm*, ultimately a norm of existence. Perception is a norm-guided process, albeit not in the narrower moral or even legal sense of “an explicitly formulated rule . . . that serves as the basis for determining whether something (an action, mainly) is permissible or obligatory.”²⁷⁷ Perception is norm-governed in terms of a “standard of success or failure” which distills “what is ‘normally’ done.” (*ibid.*)

The reader will have noticed a certain parallel with the minimalistic account of reflexive agency outlines in §8, described as “a system doing something by itself according to certain goals or norms within a specific environment.”²⁷⁸ Specifically, it was noted that agents “actively regulate their interactions and this regulation can produce failure or success according to some norm.” (*ibid.*, 372) Accordingly, insisting on the bodiliness of operative normativity highlights a certain continuity between human and other than

intentionality is not limited to ethics; it extends in principle to *all* normative experience—including legal normativity, which is conspicuously absent from Barad’s work. See Barad, *Meeting the Universe Halfway*, 185.

²⁷⁶ Merleau-Ponty, *Phenomenology of Perception*, 316.

²⁷⁷ Steven Crowell, *Normativity and Phenomenology in Husserl and Heidegger* (Cambridge: Cambridge University Press, 2013), 2.

²⁷⁸ Barandiaran, Di Paolo, and Rohde, “Defining Agency: Individuality, Normativity, Asymmetry, and Spatio-temporality in Action,” 369.

human modes of agency: the scope of the relation between normativity and normality seems to be co-extensive with agency itself, greatly exceeding the specifically human way in which this relation is deployed.²⁷⁹

Yet, contemporary theories of legal normativity largely fail to account for normality/normativity as constitutive for our bodily directedness towards the world, let alone the aforementioned continuity with other than human modes of agency. Why? And how can phenomenology contribute to elucidating the bodily relation between normality and normativity as it plays out in lawmaking?

I turn once again to Kelsen, my preferred interlocutor, to understand why the conceptual framework of modern constitutionalism blocks access to the embodied relation between normality and normativity. The crux of the matter is the relation between validity and efficacy, a key distinction that runs through all of modern constitutionalism:

Since the validity of a norm is an *ought* and not an *is*, it is necessary to distinguish the validity of a norm from its effectiveness. Effectiveness is an “is-fact” (*Seinstatsache*)—the fact that the norm is actually applied and obeyed, the fact that people actually behave according to the norm. To say that the norm is “valid,” however, means . . . that it *ought* to be obeyed and applied, although it is true that . . . a general norm is regarded as valid only if the human behavior that is regulated by it actually conforms with it, at least to some degree.²⁸⁰

Faithful to the entire set of dichotomies that govern the Pure Theory of Law, most prominently the oppositions between “is” and “ought” and between the real and the ideal, Kelsen contrasts the validity of lawmaking to the factuality of norm-obedience (norm-application is a modality of norm-obedience). That a legal norm ought to be obeyed means that “[t]he question of the validity of any particular norm is answered within the order by recourse to the first constitution, which establishes the validity of all norms.”²⁸¹ As a factual state of affairs, norm-obedience is the object of causal analysis by sociological inquiry, whether qualitative or quantitative. Statistical analyses of norm-obedience are legion. Legal realism and predictive theories of law capitalize on regularities that signal effective norm-obedience.

Certainly, Kelsen is careful to preserve a link between effectiveness and validity: a legal order (and its individual norms) is not valid *because* it is effective but only *if* it is more or less effective.²⁸² Yet, however accurate in its own right, this account of validity and effectiveness takes up a *third-person perspective* on the relation between a legal agent and the norm. As such, it filters out the *first-person*—thus experiential—perspective on this relation. On the one hand, as concerns validity, it elides the experiences in which a norm operates pre-reflectively as a standard for how I/we ought to orient myself/ourselves in the world, and how a deviation from normality calls forth a reflective stance

²⁷⁹ A point also made, with not a little panache, by Margaret Davies. See Davies, *EcoLaw*, 38-56.

²⁸⁰ Kelsen, *Pure Theory of Law*, 10-11. Radbruch: “Law is not valid *because* it can be effectively enforced, but rather it is valid *when* it can be effectively enforced, *because* only then can it guarantee legal certainty.” Gustav Radbruch, *Rechtsphilosophie*, 2nd edition (Heidelberg: C.F. Müller, 1999), 83.

²⁸¹ Kelsen, *Pure Theory of Law*, 62; translation altered. I ignore for the moment the question about the *Grundnorm* and validity of the legal order as a whole.

²⁸² *Ibid.*, 62; translation altered. Similarly, Radbruch avers that “[l]aw is not valid *because* it can be effectively enforced, but rather it is valid *when* it can be effectively enforced, *because* only then can it guarantee legal certainty.” See Gustav Radbruch, *Rechtsphilosophie*, 2nd edition (Heidelberg: C.F. Müller, 1999), 83.

towards the norm *qua* norm. It is this passage from operative normativity to a reflective stance towards the norm of agency that Ricœur's cry, "It is unjust!", captures so well. On the other, as concerns effectiveness, the regularity of norm-obedience presupposes the internal connection between habituality, as an ingredient feature of bodily engagement with the world, and normality, a connection that Merleau-Ponty calls the ongoing, pre-reflective "accord" between what we aim at and the given. Whereas effectiveness is a third-person concept, habituality and normality are first-person concepts, operative at the level of our bodily engagement with the world.

Returning to modern constitutionalism, phenomenology argues that, in a sense, the constitutionalist approach to normativity begins too late. Whereas it generally focuses on normativity as a discursive affair in which individuals exchange reasons in the process of articulating a norm of action, phenomenology begins earlier, pointing to a domain of operative normativity that plays out in our bodily directedness in and towards the world. Yet, in line with my earlier comments on the body as normed and norming, operative normativity is not only pre-reflective but also *post*-reflective, that is, informed by the discursive practices of norm creation which have been the focus of contemporary theories of legal normativity. In Loidolt's vernacular, these discursive practices of norm-formation are part of a "critical normativity," which "implies that not only my actions and convictions can be justified according to [measures I have endorsed] but that the measures themselves can be justified."²⁸³

There is nothing particularly mysterious about operative normativity in law and lawmaking: the very notion of intentionality as bodily *directedness* towards the world implies that a norm directs us towards something, namely, *as* this or that. Normativity is, accordingly, built into the appearance of something *as* something. The perceptual "as" is, as we have seen, a significative "as"—this as a green ball. It is always also a *normative* "as," such as when, having perceived a ball as displaying a uniform green surface when I looked at it from different angles, I expect that its surface will remain green were I to continue turning the ball on its axis. Normativity is also implicit in references to intentionality as bodily *orientation* towards the world: norms provide orientation, guidance, to intentionality, perhaps most powerfully when the norm withdraws as a norm in its sheer operativity rather than when thematized as such in a reflective act. In this vein, conflict about the point of joint action renders legal norms *inoperative*, depleting their binding power and calling forth a hermeneutic process that seeks to clarify their meaning for the situation at hand—critical normativity.

Crucially, I can only expect that something will appear as something because that is how it has appeared in the past, generating a coherent stream of experience I can rely on when anticipating what will appear and how it will appear. Norms depend on normality; they are the outcome of a process of normalization, even though they do not simply collapse into normality.²⁸⁴ A norm ceases to be operative and becomes thematic when our experience becomes incoherent, as a result of which disorientation ensues, whether brief or protracted, and whether specific, as in Husserl's example of the interruption of

²⁸³ Loidolt, "Experience and Normativity," 162.

²⁸⁴ An insight that also lies at the heart of Canguilhem's discussion of normativity and the pathological: "norms are not recognized as such other than when breached." See Georges Canguilhem, *Le normal et le pathologique* (Paris: Presses Universitaires de France, 1966), 139, 91.

perceiving a ball or a figure in a shopwindow, or general, as in the Inuit experience of definitive loss and ecological grief.

Indeed, this experience is the common theme that joins together Husserl's phenomenology of cognitive judgment, the reflexivity of legal judgment, Heidegger's phenomenology of hammering, Merleau-Ponty's phenomenology of operative intentionality, and the Inuit lament for the land. In each of these cases, the experience of an ought is characterized by the interruption of pre-reflective directedness towards the world, sparking worldly disorientation and calling forth a reflective stance towards normativity. In each of these examples, an implicit norm that governs operative intentionality is challenged by a deviation from an initial condition of normality, calling forth the question, "what ought I/we to do?" Inspired by Husserl's wonderful formulation, "there is a crack in everything," Wehrle points to the paradox of normality, namely, that "its dependence on its other (e.g., deviation, break, difference) is the reason for its dynamism as well as its fragility . . . normality can only be established because it is fragile."²⁸⁵

The implications of this insight for lawmaking in the Anthropocene are considerable. There is increasing awareness that environmental normality as we have known it is coming or has come to an end, something the Inuit and other groups at the forefront of climate change experience in the flesh. The interruption of normality sparks the effort to adapt to a "new normal," where adaptation means reconfiguring the norm of action such that what we aim for is once again attuned to what is given to us. Calls to "adapt" to massive environmental degradation, to learn to "work with and around it," if we are to "still" be good and strong people, as Tony Andersen put it, attest to the connection between normality and normativity as a bodily striving to realize a norm of existence: *conatus*.

Let me press this point home as forcefully as I can: there is no difference, as concerns the structure and dynamic of the experience of an ought, between the anodyne interruption of perception when the surface of a ball turns out to be partially green, rather than entirely red, and the catastrophic disruption of Inuit connectedness to the land when massive environmental degradation in the Anthropocene inhibits going out onto the sea ice to hunt, fish, or roam. Both are manifestations of the same fundamental experience of *abnormality as a deviation from normality*. An abnormal event deviates from a norm in a way that challenges the norm's hold on reality. At issue is not only a *factual* hold on reality, i.e., that the norm articulates how reality actually *is* structured, such that we can rely on its unfolding in the way expressed by the norm. To a lesser or greater extent, abnormality also loosens our *normative* hold on reality: reality *ought* to be otherwise than what it is. If normality speaks to a situation in which we take for granted that things are how they ought to be, and that things ought to be how they are, abnormality disrupts this internal connection, such that "is" and "ought" fall apart. Hume's famous guillotine is emergent; it has a genealogy rooted in the bodily experience of abnormality. To borrow Merleau-Ponty's adroit formulation yet again, abnormality raises the question about "what we aim at"—what our agency, individual and/or collective, is about—when it can no

²⁸⁵ Maren Wehrle, "'There is a Crack in Everything'. Fragile Normality: Husserl's Account of Normality Re-visited," in *Phainomenon* 28 (2018) 49-75, 50. See also Maren Wehrle, "Normality and Normativity in Experience," in Maxime Doyon & Thiemo Breyer (eds.), *Normativity in Perception* (Basingstoke: Palgrave MacMillan, 2015), 128-139.

longer be taken for granted that what *mattered* to me/us, and that I/we strove to realize, can be actualized in the face of what is “given.”

The strong claim that emerges from a phenomenology of operative normativity is that, experientially speaking, the Anthropocene marks the disruption of the connection between normality and normativity to which we have been habituated, such that, for example, a United Nations news bulletin of 2023 can state that “[h]eatwaves sweeping large parts of the world offer yet another reminder that extreme weather events boosted by human-induced climate change have become ‘the new normal’, the UN World Meteorological Organization (WMO) warned . . .”²⁸⁶ Referring to massive wildfires in Tenerife, the WMO’s spokesperson added that “‘Unfortunately, that is a picture with which we’ve become all too familiar this summer.’” (*ibid.*) It is not surprising, therefore, that increasing awareness of the effects of the Anthropocene is accompanied by references to a “return to normality,” to the emergence of a “new normal,” or, much more bleakly, to the perspective of approaching catastrophe and the definitive loss of any sense of normality. The Anthropocene is, literally, the “crack in everything.”

I conjecture that the deviation from normality we call Anthropocene appears, in and through all of its concrete and disparate manifestations, as an *exception*, even as *the* exception par excellence. To be sure, an exception only makes sense with respect to a norm that is breached, as attested by the platitude, “the exception confirms the norm.” But the Anthropocene gives the lie to the platitude because it is an exception in a strong sense: that which *disconfirms* norms; that which *resists* application of the norm that would render something intelligible as legal or illegal, constitutional or unconstitutional. Indeed, constitutional law and constitutional theory are well acquainted with this sense of an exception, which goes by the name of a “state of exception.” Carl Schmitt hits the nail on the head when he avers that “[t]he exception is that which cannot be subsumed [under a norm]; it defies the general codification.”²⁸⁷ This translation falls short of adequately conveying the German expression with which Schmitt elucidates the exception (*die Ausnahme*), namely, “*sie entzieht sich*,” which means that the exception defies, eludes, and exceeds a legal order, all at once. The exception is the name of a specific phenomenon or mode of legal appearance, namely, of what withdraws because it appears in the mode of the legal or the illegal. This is what I call *a-legality*, the legal manifestation of strangeness, as described by Husserl: “accessibility in its genuine inaccessibility, in the mode of incomprehensibility.”²⁸⁸

The Anthropocentric exception, in this sense, is not limited to, say, the heat domes that recently baked Pakistan and the American and Canadian North-West; massive floods throughout the world; the Covid pandemic. It also includes resistance by groups of individuals, colonized or otherwise, who denounce the role of modern law in facilitating the human subordination and exploitation of nature. Their resistance shows that the Anthropocene is a complex phenomenon. They not only challenge how modern legal orders organize human relations to nature; they also expose relations of domination between

²⁸⁶ “[Scorching ‘new normal’ as world buckles under extreme heat: WMO](#),” UN News: Global Perspective Human Stories, August 18, 2023 (accessed on March 6, 2024).

²⁸⁷ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab (Cambridge, MA: The MIT Press, 1985), 13 (translation altered).

²⁸⁸ Edmund Husserl, *Zur Phänomenologie der Intersubjektivität*, edited by Iso Kern (The Hague: Martinus Nijhoff, 1973), 631.

human groups by imposing a particular understanding of what counts as a social group, one which draws a category distinction between society and nature, thereby undercutting the very notion of an *Anthropocene*. An exception, in this sense, is ambiguous: it both threatens a polity and opens up novel possibilities. These may be possibilities that a polity can realize by transforming the norms that orient its continued existence: a polity's "own" possibilities. But an exception, in a strong sense, also intimates possibilities that lie *beyond* the polity's own possibilities: a collective "impossibility" that can only appear as a realizable possibility from a perspective different to that of the polity it defies.

§20. The Technological Body

I am making a case for lawmaking as deploying the bodily structure of intentionality: something appears as something to someone within a pre-given and co-given world. The focus of this endeavor is the intentional "as." I began with segueing from "I/we think" to "I/we can" to focus squarely on the bodiliness of the intentional "as." Some of the implications of this shift were outlined in the interlude, with extended attention devoted to the breakdown of the intentional "as" experienced by the Inuit, who experience an existential condition of acute disorientation and ecological grief. In a follow-up step I explored legal (dis)empowerment as a specific bodily modality of the intentional "as," while also arguing against a foundationalist reading of motor intentionality. I then argued that the intentional "as" is the locus of the bodily entwinement of legal (an)aesthesia, of matters of legal concern and unconcern, of matters of legal care and indifference, of legal attentiveness and inattentiveness. Finally, I argued in §17 that operative normativity inheres in the bodily directedness of intentionality—a normative "as" that becomes thematic in the course of (Anthropocenic) deviations from normality. All of this, I want to suggest, is folded into the "as" of "something as something" when, in the passage from "I/we think" to "I/we can," lawmaking is understood as a mode of bodily engagement in and with the world.

But whatever significance one might want to attach to the foregoing considerations, they remain squarely within a phenomenology of consciousness that abstracts from the *materiality* of intentional processes. We encounter here the central concept that neo-materialist thinking has sought to recover from its elision by philosophies of consciousness, including those phenomenologies for which the transcendental ego is the sole source of meaning. Their concerns about a transcendental ego located outside of space and time have their counterpart in concerns about the disjunction between the ideality of meaning and its allegedly contingent real support. A material semiotics, by contrast, refuses to separate matter and semiotics, insisting on the materiality of semiotic relations.

Philosophies of consciousness do not stand alone in separating meaning from its materiality. This is also, as we have seen, the position defended by Kelsen, even if not by modern constitutionalism more generally, in light of hermeneutic philosophy's insistence on the contextuality of meaning. But, arguably, even hermeneutics in modern constitutionalism has turned a blind eye to legal interpretation as a material process. The task of this section is to address this elision, inquiring how materiality is constitutive for the bodily "as" deployed in legal judgment. To be sure, the notion of legal matter is itself ambiguous. Hyo Yoon Kang and Sara Kendall helpfully distinguish to this effect between "legal

matters,” i.e., what matters or is a matter of legal concern, and “legal materials,” namely, the artefacts, technologies, and practices that mediate and transform what matters into what matters legally. “[W]e propose an understanding of law as a distinct mode of producing matters of concern through enlisting materials, whether physical or intangible.”²⁸⁹

What the authors omit mentioning, however, is that lawmaking, as “a distinctive mode of producing matters of concern,” unfolds in the first-person plural. As we saw in §16, there is no matter of concern, no matter of care, that does not involve the first-person perspective. The significance of this point exceeds Kang and Kendall’s specific contribution to a theory of legal materiality. More generally, the first-person perspective is either elided or underplayed by much if not most of the “neo-materialist turn” in social theory. There is a reason for this. Its champions generally assume that holding on to the first-person perspective, singular and plural, amounts to endorsing a substantialist ontology, inimical to the relational ontology they advocate. We have already discussed the problems this creates for Haraway’s account of sympoiesis in Part I.

This is not to say that insisting on the irreplaceability of the first-person perspective for bodily lawmaking precludes exploring the artefacts, technologies, and practices that mediate and transform what matters into what matters legally. To the contrary. It is to aver that these mediations and transformations structure *intentionality* as such, thereby transforming *experience* itself. To acknowledge the materiality of intentional processes is to acknowledge that technological artefacts have a *transcendental* function that ruins the thesis of a transcendental ego outside space and time. Indeed, and paradoxically, technological artifacts, in their very materiality and empirical character, condition the possibility of experiencing something as something. I call this transcendental, disclosive character of technological artefacts “technique.” Thus, the task at hand is not to defenestrate intentionality to save the materiality of a relational ontology but rather to show how the bodily “as” is constitutively a *technological “as”*—in lawmaking, no less than in any other intentional domain.

This is, of course, what Heidegger sought to elucidate in his phenomenology of hammering and, in his later work, with *Ge-stell*, which Bernard Stiegler critically radicalized by showing that technological artefacts ruin the very opposition between the empirical and the transcendental that Heidegger still took for granted.²⁹⁰ As contemporary philosophies of technique insist, technique is not one amongst other modes of access to reality; technicity constitutes human being as such. Human embodiment, hence the very structure and dynamic of intentionality, is a technologically constituted embodiment, as shown by André Leroi-Gourhan’s pioneering studies on the paleontology of language.²⁹¹ To cite Susanna Lindberg, “[t]he subject of philosophy cannot be limited to a pure reason that thinks itself untouched by its technical supports, but on the contrary, it must question technicity as the fundamental relation that ties humans and nature together.”²⁹² In calling this relation fundamental, Lindberg argues, together with philosophers of technique such Heidegger, Plessner, Scheler, Gehlen, and Stiegler, that “the human being’s

²⁸⁹ See Hyo Yoon Kang and Sara Kendall, “Introduction,” in Hyo Yoon Kang and Sara Kendall (eds.), a special issue on “Legal Materiality,” in *Law Text Culture* 23 (2019), 1-15, 7.

²⁹⁰ Bernard Stiegler, *La technique et le temps* (Paris : Fayard, 2018).

²⁹¹ André Leroi-Gourhan, *Le geste et la parole: technique et langage* (Paris: Albin Michel, 1964).

²⁹² Susanna Lindberg, *From Technological Humanity to Bio-Technical Existence* (Albany, NY: State University of New York Press, 2023), 3.

entire world, and therefore its own self, is a technical construction.” (*ibid.*, 80). There is no non-technical directedness towards the world; intentionality *is* technical. This, I suggest, is the basic sense in which one should read Kelsen’s proposal to view lawmaking as “a specific social technique,” although this is surely not a sense he had in mind when proferring his dictum. The question, as anticipated in §1, when elucidating lawmaking as a modality of *Ge-stell*, is whether and how the technicity of lawmaking plays a role in enabling the Anthropocene. I will return to this question—about technology with a capital “T”—in Part IV.²⁹³

For the moment, and much more modestly, the present section brings to bear what Don Ihde calls “phenomenological materiality” on a theory of bodily lawmaking.²⁹⁴ My concern here is, therefore, with what he calls technology with a small “t.” Throughout his career, Ihde has been at pains to describe the different ways in which technology mediates between humans and their worlds, evincing the primordially of what he calls “technical intentionality,” whereby human subjects and their worlds do not preexist but rather emerge through those mediations.²⁹⁵ Drawing on Heidegger’s example of hammering, Ihde shows how technological artefacts *withdraw* in the very process of disclosing reality in a certain way. Yet more pointedly, those artefacts can only do their work if they withdraw from thematic attention. Finally, Ihde insists time and again on the *non-neutrality* of technological artefacts, which magnify human experience while also reducing it—a variation on the entwinement of (legal) empowerment and disempowerment I have been at pains to describe in a foregoing section. “[F]or every revealing transformation there is a simultaneously concealing transformation of the world, which is given through a technological mediation.”²⁹⁶ Let me add, straightaway, that Ihde limits himself to a general characterization of intentionality as mediated access to reality, either sidestepping or avoiding an analysis of its basic structure. That need not trouble us. As transpires from his rich portfolio of case studies, the “as” in something as something is a technologically mediated “as,” thereby ruining the metaphysical opposition between the ideality of meaning and its contingent material support. In this he stands close to neomaterialist critiques of philosophies of consciousness.

I propose to explore how technological artefacts play a mediating role in legal judgments by offering a phenomenological reconstruction of Bruno Latour’s ethnography of the French *Conseil d’État*.²⁹⁷ The reasons for doing so are threefold. First, in contrast to Latour, neither Ihde nor his colleagues in the post-phenomenological tradition engage directly with the technological mediation of legal judgments. In addition to showing how those technologies transform the subject and object of legal judgments, actor-network

²⁹³ For a vigorous defense of technology with a capital T against postphenomenology in the context of a critical diagnosis of the Anthropocene, see Pieter Lemmens, “Thinking Technology Big Again. Reconsidering the Question of the Transcendental and ‘Technology with a Capital T’ in the Light of the Anthropocene,” in *Foundations of Science*, 27 (2022), 171-187.

²⁹⁴ Don Ihde, *Technology and the Lifeworld: From Garden to Earth* (Bloomington, IN: Indiana University Press, 1990), 26. Ihde also refers to himself as a “phenomenological materialist.” See Don Ihde, *Bodies in Technology* (Minneapolis, MN: University of Minnesota Press, 2001), xv.

²⁹⁵ See Don Ihde, *Technique and Praxis: A Philosophy of Technology* (Dordrecht: D. Reidel Publishing Company, 1979).

²⁹⁶ Ihde, *Technology and the Lifeworld*, 49. (italics omitted)

²⁹⁷ Bruno Latour, *The Making of Law: An Ethnography of the Conseil d’État*, translated by Marina Brilman and Alain Pottage (Cambridge: Polity Press, 2010).

theory (ANT) gives these judgments *material and temporal thickness*. By material thickness I mean that ANT identifies and describes the plethora of technological artefacts that mediate and enable the referential and semantic functions of intentionality (respectively: intention *of* something and intention *as* this or that). By temporal thickness I mean that ANT dilates, multiplies, elongates the intentional dynamic at work in lawmaking, identifying and describing the interconnected sequence of materially mediated acts leading up to a legal judgment which are elided by the canonical formulation of a legal judgment, as in Kelsen's formula I have cited on various occasions: "a judge . . . brings together the material fact he has established and the statute he is to apply; that is, his cognition becomes legal when he interprets the material fact *as* 'theft' or 'fraud'." Latour relentlessly reminds phenomenologists that the intentional "as" is a materially mediated, technological "as."

But second, and inversely, in contrast to post-phenomenology's focus on intentionality, Latour's material semiotics privileges the third-person perspective on legal judgment, thereby eliding the first-person perspective from which legal judgments are issued, and absent which these judgments are unintelligible. As we shall see, only once in *The Making of Law* does Latour switch from a third-person description of the movement of a dossier into the first-person perspective of the Council of State. We shall identify the difficulties Latour encounters when a material semiotics is the sole avenue of access to "making the law." In this vein, the maturation of a file, which Bruno Latour calls the *mise en dossier* leading up to a legal judgment, is, phenomenologically speaking, a *mise en intention*, an intention that involves a threefold reference: a self-reference to the French collective, on whose behalf the Council issues its judgments; a reference to the case about which it judges; and the reference to a world pre-given and co-given with what appears—a legal *Sonderwelt*. The great strength of Latour's illuminating and painstaking analysis of the maturation of a dossier leading up to the French Council's judgments is also its great weakness. Its strength: Latour is keen to resist the trap of a philosophy of consciousness that elides the materiality of how law is "made." Its weakness: in the absence of an account of bodily intentionality, what a *mise en dossier* is about gets lost: a judgment, issued in the first-person plural, that discloses something as having this or that legal meaning.

Third, a reconstruction of Latour's deployment of actor-network theory in a phenomenological key will allow me to assess the agency and role of technological artefacts in bodily lawmaking. Does the dossier—the lynchpin of Latour's ethnography of the Council of State—justify referring to a legal judgment as an instance of "cyborg intentionality"?²⁹⁸ *Sub judice* is whether and how technology demands reconsidering what counts as a (collective) body in a theory of bodily lawmaking.

(To be continued!)

²⁹⁸ See Peter-Paul Verbeek, "Cyborg Intentionality: Rethinking the Phenomenology of Human-Technology Relations," in *Phenomenology and the Cognitive Sciences* 7 (2008) 3, 387-395. See also Verbeek, *What Things Do*, 122-135.