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1

Introduction: Deleuze and Law – Forensic Futures

Rosi Braidotti, Claire Colebrook and Patrick Hanafin

This volume engages with the impact of a thinking of law with Gilles Deleuze. It is an attempt to engage in another mode of doing jurisprudence, which places the emphasis on the material bodies of citizens and their interests rather than the abstract formless subject of law. It is, as Claire Colebrook observes in her essay in this volume, a reconsideration of law and legal theory as a differential jurisprudence. In such a jurisprudence the emphasis would be placed on how the claims of some bodies might transform the relation between what counts as a speaking subject for law and what is silenced. This shift in the way we view the manner in which individual bodies are formed and subjugated by law provides an opening to another thinking of law, which emerges in the essays in this collection. In this regard the collection attempts to perform what one might term a vitalist jurisprudence or one in which the body obtains primacy over what Deleuze and Guattari termed the terror of the signifier.

In doing so the essays in this volume explore the relation between law and life following the demise of the “linguistic paradigm” in critical theory and the advent of a politics of “life.” How have recent events focused social, political and cultural attention on the living body and its maintenance and management? The central concept, through which the embodiment of the subject is examined, is that of “biopower.” Articulated by Michel Foucault, but brought to attention more recently in the work of Giorgio Agamben, this concept recognizes that the relation between life and law is both historical and necessary in that the law must operate on bodies but can only do so by establishing a border between the body of the polity, and the mere life excepted from political concern. For both Foucault and Agamben the contemporary advent of biopolitics occurs when the polity increasingly and invasively

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operates on this “mere” life, and the body or organism – rather than the self – becomes the object of political management. The manner in which the body, in its “mere life” (or what Agamben refers to as ‘zoe’) becomes the focus of contemporary power has led legal theory to explore new questions of the threshold between life and death and has led social theory to question the new extensions of the law and the polity into embodied life.

In Alexandre Lefebvre’s contribution to this volume the possibilities of a differential jurisprudence are considered. Lefebvre reads the work of Oliver Wendell Holmes, the American legal realist jurist, through Bergson’s conception of the creativity of life in order to propose a reading of Holmes’ work on the notion of legal judgment as one which sees judgment as inescapably inventive. In doing so he attempts to develop a new image of jurisprudence that can appreciate the inventiveness of adjudication insofar as it is *in time*. In looking at Holmes’ work *The Common Law*, Lefebvre argues that the key theme animating this work is the notion that adjudication is based on the desire of a society *insofar as desire changes in time*. As such, the work of the judge cannot be assimilated to the straightforward recognition and application of rules to cases; instead, it has an inherently creative power. In their essays in this volume both Patrick Hanafin and John Protevi expand on what a jurisprudence of differentials might look like in analyzing a number of US court decisions on the right to die. These essays look at how in practice rights jurisprudence could be reconceived if analyzed in a manner, which moved beyond the liberal model of a deathbound jurisprudence. One of the cases discussed by Hanafin in his essay concerns the right of a body to decide its own death. As Hanafin points out, the state has taken over the calculation of such decisions and has done so according to an axiomatic: is the individual’s ongoing life capable of being managed and ordered by the social machine (in which case there can be no cessation of life) *or* is the body criminalized and thereby rendered capable of being put to death? A differential jurisprudence is already, Hanafin suggests, visible at the margins of this case, where various legal voices enter into debate to decide the points at which a life ceases to be liveable. John Protevi in his essay also demonstrates that we need to look beyond abstract and discursive conceptions of “the subject” to an ontology of singularities. At what point does a body’s corporeal relations – that is, the various relations among its organic and nervous potentialities – undergo a sufficiently major configuration to produce an incorporeal event? That is, we cannot reduce a person to mere physical and organic functions, for in addition to the breathing,

speaking, moving and interacting body, selves are also capacities for perception, affection, memory and imagination. However, certain corporeal events – such as the state’s capacity to refuse a woman’s desire to terminate a pregnancy – will produce incorporeal events; that woman will now become a “mother.” That latter incorporeal event is not simply caused by a change in body, for it requires other – political – relations, such as the social institutions of parenting, the norms of gender binaries and the notion of the private nuclear family. For Hanafin cases that concern the border between life and death demand an inclusion of various voices that would go beyond the simple opposition between a state power that must preserve and maintain viable life. Protevi argues that Deleuze’s ontology gives us tools to examine thresholds of viability.

In her diagnosis of contemporary necrophilosophy, Patricia MacCormack not only argues that the move beyond a life/death dichotomy has implications for the “subject” who can no longer be defined against death as some constitutive limit; she also argues that a Deleuzian attention to thresholds has implications for sexual difference. Deleuze’s concept of “becoming woman” indicates a new vitalist possibility for thinking, where we attend less to “man” who defines himself against a field of death, and more to those whose bodies have always been precarious and subject to minor deaths – not only women and animals, but those populations who have less access to the means of life. In Rosi Braidotti’s essay in this volume the theme that only a liberal and humanistic view of the subject can guarantee basic elements of political agency and ethical probity is further interrogated. Braidotti argues for a politics of “life itself” as a form of active bioethical citizenship. In order to counter the strong “biopower” of political and technological discourses Braidotti calls for a thinking which focuses on processes and interconnections, a post-anthropocentric approach to the analysis of “life itself,” as a way of broadening the sense of community. Her essay elaborates sets of criteria for a new social and political theory. She argues that political practices that take life itself as the point of reference need not aim at the restoration of unitary norms, or the celebration of the master-narrative of global profit, but rather respect for diversity and sustainable growth at the heart of which lies an ethics that respects vulnerability while actively constructing social horizons of hope.

Joanna Zylińska’s contribution to this volume develops this theme by looking at how the transformation of the very notion of life and of the accompanying idea of the human, as well as the promises and threats to human and animal health posed by science and technology, have evoked particular hopes and anxieties among the public in Western

liberal democracies. For her bioethics has been given the task of having to arbitrate over life, death and the nature of the human in the age of biotechnology. She suggests that its response to this task has so far been conservative, in the sense that the foundational humanism of the theories and practices upon which traditional bioethical discourses have been based – be it in their religious or secular guises – has remained intact even though recent advances in scientific technology have called into question not only humans’ ontological status as skin-bound, sovereign beings but also their kinship with, and dependency on, other species and material forms. She engages with the inherent humanism of bioethics and considers the possibility of thinking bioethics otherwise – beyond the belief in the intrinsic dignity and superior value of the human, and beyond the rules and procedures rooted in this belief. Melinda Cooper in her essay also engages in a critical rereading of life in its current biocapitalist mode. She questions why it is that we have inherited a philosophy of life that seems to affirm – indeed ontologize – the contemporary forms of biocapitalist production without offering a corresponding critique of its political economy and modes of capture? Her concern is to find a way in which we can intervene in and contest such regimes of biological production without resorting to something like a nostalgic politics of life, a politics in which the potential human all too often comes to figure the messianic horizon of a foundation to come?

In the domain of domestic and international politics contemporary modes of law as biopower are clearly exhibited in what has been termed the “war on terror” where individual bodies and entire populations become the targets of a heightened desire to impose order and control on the part of governments. As can be seen in Lisa Parks’ essay in this volume, certain procedures have been effected in the war on terror that produce a direct image of the lawless. It is through processes of airport monitoring, immigration control and restrictions placed on individual rights that the terrorist is produced as the bomb wielding, border transgressing, hate-inducing and fundamentalist other of law. It is also the case that those bodies who are engaged in process of monitoring also make up the power of the law. Indeed as Ian Buchanan and Laura Guillaume argue in their essay in this volume the spectacle of the “war on terror” is what enables what Deleuze and Guattari term unavowable politics to function. It gives desire something to invest in even as it derides our need to believe in something. For Buchanan and Guillaume war has not only lost legitimacy, but lost the need for legitimation. The discourse is such that the public will to war can be assumed without being tested. The political will to use military force,

undoubtedly strong in the immediate aftermath of 9/11, has become a foundational reality which is unthreatened by actual manifestations of discontent about the course of the war in Iraq, making war seem ever more eternal as it becomes ever more useless.

This collection calls for another thinking of the relation of law and politics to the bodies of individual citizens and to the environment in which they are located. In our role as either citizens or rights-claiming subjects in contemporary liberal democracies the efficacy of our speech is limited because, to paraphrase Foucault, we as speaking subjects are also the subject matter of legal and political discourse. The interlocutor (in this case the political elite or the judiciary) is always in the position of authority.

What the essays in this collection perform is a rethinking of the manner in which the subject of law and politics is defined. In this other jurisprudence, a renewed emphasis on the shifting boundaries between living and dying, surviving and becoming extinct, can be distinguished. As is demonstrated in several of the essays, the resurgence of vitalism can be seen as profoundly regressive, with the invocation of "life" in pro-life politics operating as a way of silencing political debate. On the other hand, an attention to the vital forces that are the very basis of politics; the living bodies that are the basis of terror, rights and exclusions requires a thinking that goes beyond the notion of the subject as a speaking/known being. In this thinking one can detect the instantiation of a thinking of legal subjectivity as embodied existence, which subsists beyond the biopolitical traps of territory, nation state and identity. This relational encounter of the individual with the law, as Deleuze reminds us "threatens to bring what's been established back into question" (Deleuze, 1995, p. 153). What is at stake here is a politics beyond the bureaucratic rights-giving or rights-depriving state, which remains after the word has been said. This is the self declaring itself not in response to the call of the state or as the subject matter of rights, but as an active participant in political affairs. It is a self which exceeds fixing.

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