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Legal Materiality

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Contents

1. Introduction
Hyo Yoon Kang & Sara Kendall

Part One: Differential legal materialities: What counts as ‘legal’ material?

16. Documents against ‘Knowledge’; Immanence and Transcendence and Approaching Legal Materials
James Leach
40. ‘You People Talk from Paper’: Indigenous Law, Western Legalism, and the Cultural Variability of Law’s Materials
Jill Stauffer
58. Prefaces and Authorship in International Law. The Example of Vitoria’s De Indis
Wouter Werner

Intermezzo:

79. Cultural Techniques of Law. Remarks on a Format of Legal Studies (Excerpt)
Fabian Steinhauer (translated by Hyo Yoon Kang)

Part Two: What counts as legal ‘material’?

91. ‘The beauty...is that it speaks for itself’: Geospatial Materials as Evidentiary Matters
Kamari Clarke and Sara Kendall
119. Against the Power of Algorithms. Closing, Literate Programming, and Source Code Critique
Markus Krajewski

Intermezzo: Poem

134. Punishment: An Index (Excerpt)
Tung-Hui Hu

Part Three: Materialising equivocal legal matters

138. What If All We Can See Are the Parts, And There Is Not a Whole: Elements and Manifestations of the Making of Law of 'Climate Justice'

Hyo Yoon Kang

171. The Duelling Ethic and the Spirit of Libel Law: Matters and Materials of Honour in France

Matei Candea

198. A Rhetorical Matter of Life and Law: The Speculative Futures of (Bio)political Reproduction

Stuart J. Murray

Part Four: How legal 'objects' do or don't matter

223. Targeted by Persuasion: Military Uniforms and the Legal Matter of Killing in War

Mahmoud Keshavarz and Amin Parsa

240. The Law is not a Thing: Kafkan (Im)materialism and Imitation Jam

James Martel

Part Five: Legal materiality as and in objects

262. A Change of Heart: Retraction and Body

Marie-Andree Jacob and Anna Macdonald

276. The Paper Shredder: Trails of Law

Marianne Constable

Contributors

Introduction

Hyo Yoon Kang and Sara Kendall

Over the last decade there has been an increased interest in materiality within legal scholarship, as well as in related disciplines that study law and its practices. Much of it has accounted for the concrete and complex manifestations of law through various materials: from formats of inscription to other mediated devices, such as files and images, to bodies and spaces upon and through which law acts. Yet the terms ‘matter’, ‘materials’ and ‘materiality’ are employed in divergent ways across different works, and often without clear distinctions or theoretical delineations.¹ This special issue begins from proposing a differentiated understanding of these terms in relation to law and legal scholarship, and embeds them in a broader conception of legality, unpacking their premises and implications.

After developing the working definitions of matters, materials and legal materiality outlined below, we invited contributors from a range of disciplines – including law, anthropology, philosophy, political theory and literature – to critically engage through matters or materials that they have chosen. The following collection of articles, essays and a poem is an experimental and open-ended form of production, illustrating the benefits and challenges of legal materiality as a mode of inquiry. As these contributions show, the working definitions of these terms are not always easy to separate and sometimes recalcitrantly collapse into each other. Yet distinguishing between matters (problematisations) and materials (their constitutive parts) helps to illuminate law's actual

workings by identifying and analyzing the composition and forms that enact legality, instead of confining critique to a general level which leaves 'law' intact as an abstract black box.

1 Why materiality?

Other disciplines have undergone 'material turns' to the point that works employing a materialist approach are included in the canons of their disciplines. The 'materials' in such turns in other disciplines, as in anthropology, history of science or political theory, are particular practices and claims, artefacts, organisms and physical settings, distinct from broad categories such as 'culture', 'society', 'science' or 'politics'.² Inspirations for such a turn in law are diverse, but much is owed to Cornelia Vismann's pioneering work at the intersection of legal history and media studies (2001, 2008, 2011, 2012), which considered the legality of concrete media, such as files or films, rather than categorical accounts of legal doctrinal forms. In Anglophone legal scholarship, theoretical discussions of what materiality may mean in relation to law have been offered by scholars building upon the work of Foucault, Latour, Vismann (Pottage 2012) and Benjamin (Tomlins 2010).³ We have traced the different strands of materiality and notions of legal materiality elsewhere (Kang 2018; Kang and Kendall 2019); here we illustrate what a focus on materiality could offer.

We understand the turn to materials as a reaction and a possible way out of the postmodern conundrum of the self-referentiality of social and historicist critique. God is dead, but it would seem so is society. If there is nothing outside the social, which means that law forms part of the very thing by which it is often explained, any explanations of the 'legal' by reference to the 'social' or 'political' result in dedifferentiation (Schlag 2009). The risk of abstract explanations in legal scholarship – for example, explaining the 'legal' by reference to the 'social' or 'economic' — is that they flatten the explanatory field, as with the economic determinism of orthodox Marxist historical materialism or the political determinism of Critical Legal Studies. Biopolitics, markets, and racism cannot be explained by reference to

other abstract categories, such as power, because they already form part of these categories. Explaining neoliberalism through capital, or politics through power, or indeed law through politics does not contribute much to an understanding of what these labels themselves consist of, how they come about, and the concrete practices that they entail. Legal concepts such as property or jurisdiction cannot be explained by references to sovereignty or territory. These abstract categories can be rendered more concrete and their compositions can be unpacked to open them to greater critical potential. A legal materialist approach reintroduces differentiation into legal analysis by focusing on the artefacts, practices, formats and settings in and through which law acts and is enacted. A legal materialist approach turns from knowledge of legal concepts (as with the doctrinal study of law) to legal ways of knowing and to the materials that law draws upon.

Approaching law in a materialist way calls for reflecting upon the ways in which we can identify the constitutive parts of a legal concept by situating our own viewpoint. It then involves analysis and interpretive reconstruction, followed by a critical assessment of the resulting picture of, for example, jurisdiction as a 'whole' whilst taking into account the unstable composition of the parts.⁴ Assuming a deconstructivist ontology and an inductive epistemology, the legal materialist approach proposes to look at the concrete composition of abstract legal categories, such as evidence, honor or human rights. Rather than assuming an overarching or unifying theory of 'Law' or legality, this approach offers a reconstruction of how specific legal issues are stabilised in the absence of such an outside referent. Through attending to the composition of specific assemblages, and the techniques and relations they entail, a legal materialist approach has the potential to generate more clarity for understanding what counts as legal knowledge and how legality materializes.

The meanings and uses of materiality in legal scholarship have been varied and based on divergent understandings of matter and materials. For example, some strands of legal scholarship understand materiality to denote physical objects or artefacts to be taken as symbols

or allegories of law, an approach that reads law into objects (Hohmann and Joyce 2018). Other scholars of law work with new materialist theories, such as insights from the cognitive sciences concerning embodied and distributed minds, as well as socialized bodies (Miller 2013). The material turn in legal scholarship has been more pronounced in some legal subfields than in others. This has particularly been the case in subfields that take up challenges to or the breakdown of existing legal concepts. For example, biotechnological entities pose challenges to legal conceptions of personhood and invention, and the proliferation of digital data contests conceptions of privacy and jurisdiction. In these cases the scholar faces two distinct materialities: not only the materiality of the novel thing, but also the materiality of legal categories that depend upon techniques of legal representation. Other legal scholars have traced how law shapes physical matters and their meanings, such as plants, rather than arguing that physical materials determine law (Sherman 2008). Scholars in other disciplines, particularly anthropology, sociology, science and technology studies (STS), and media studies, have also studied law as (partially) materially mediated constructions (Scheffer 2004, Biagioli 2006, Krajewski & Vismann 2007, Leach 2008, Strathern 2010, Lezaun 2012).

2 Conceptualising legal materiality

Building upon previous work on materiality in law and legal scholarship, we introduce a specific understanding of legal materiality that denotes the process or composition by which matters turn into legal concerns or problematisations through materials, such as texts, forms, formats, techniques, and physical as well as immaterial entities. This approach seeks to understand how different materials articulate and shape legal difference. Yet the terms ‘material’ and ‘matter’ are often misunderstood as physical ‘things’. By contrast, we propose an understanding of these terms that moves beyond instrumentalising objects as symbols or tools of and for law, and also beyond ascribing causal agency to objects and things without attending to their specific enlisting within law as well as their histories outside the legal realm (Kang 2018). We contend

that some of these approaches take a reductive view of law, treating it as a black box or reading it into objects without accounting for the ways in which law is a specific mode of knowledge that transforms certain objects into *legal* materials in order to deliberate over ‘matters of concern’ to law.⁵ Moreover, some of the legal transpositions of actor network theory and new materialism also adopt a reductive view of matters and materials as self-evident and self-explanatory without accounting for the complex processes, particular knowledge practices and techniques which make them appear (for example, with image and sound). Our proposed approach takes care not to collapse into either a materialist determinism or a hermeneutic self-referentiality, and a legal materialist mode of inquiry would mediate between these two poles.

In thinking through what is specific about *legal* materiality – as opposed to physical materiality or other kinds of materialities – we have needed to address the question of legal ontology. Some of our interlocutors have explicitly grappled with the question ‘what is law?’, such as Marianne Constable in relation to legal speech (2014) and Alain Pottage asking about law as the unknown of ‘the materiality of what?’ (2012). Our approach takes their work as departure points and extends them into an understanding of legal materiality, an approach which makes a theoretical argument defining a specific notion of *legal* materiality as well as offering an analytical perspective that shows the constitution of matters of concern and the role of materials in law. Legal materiality as a mode of analysis does not offer a unifying theory of legal causality or meaning, but instead serves as a mode of tracing and differentiating between the fluctuating elements, internal structures and compositional arrangement of a particular matter of law. Legal materiality is therefore concerned with the concrete steps of *how* something comes to matter (in the sense of a verb) rather than in the sense of a physical object.

We propose some working definitions of matter, materials and materiality specifically in relation to law. As with Scheffer and Pottage, who draw on Foucault, we understand ‘law’ not as a material phenomenon, but rather as the difference attributed to a legal matter or

problem as distinctly *legal*. This difference is generated in the moment of attributing a legal quality to a matter. Legal difference, or the attribution of ‘legal’, is the mode of veridiction specific to law. This builds upon Foucault’s general conception of *énoncé*, a discursive form that is often translated as ‘statement’ or ‘utterance’ (1972).⁶ Latour also builds upon this particular understanding of law as an autonomous mode of distinct enunciations, a singular ‘mode of existence’. He contends that law is ‘recognized as a domain that can be isolated from the rest... it has its own mode of veridiction... universally acknowledged as capable of distinguishing truth from falsity *in its own way*’ (2013: 358-9). Legal meaning is a distinct socially constructed attribution of meaning that draws and enacts a difference between the legal and the non-legal. ‘Law’ does not exist prior to or outside such an act of differentiation.

Law’s distinctness then arises by differentiating matters into ‘legal matters’. The attribution of a distinct ‘legal’ difference is a linguistic or – if outside human language, other communicative⁷ – act of interpretation, which turns matters into arguments or claims. Despite their physical presence, things may not matter as ‘legal matters’ or may not be perceived as relevant for law, and they may only become legal matters under distinct conditions and material mediations. If a matter is transformed into a legal matter (through the attribution of legal difference), then it becomes a matter of concern to law. In order for a matter to be legally relevant, there has to be a legally recognizable problem; in other words, it has to have a legal context so that it can be perceived and expressed in legal language. Legal matters are therefore problematisations in Foucault’s sense: ‘the set of discursive or nondiscursive practices that makes something enter into the play of the true and false, and constitutes it as an object for thought (whether under the form of moral reflection, scientific knowledge, political analysis, etc.)’ (1988: 157). Latour’s ‘regime of enunciation’, Vismann’s ‘cultural techniques of distinction’ or Luhmann’s idea of coded communication are similar to Foucault’s notion of problematisation, although these theorists differ in their understanding of the referent(s) of the legal mode of veridiction. A legal materialist study would need to consider the distinct conditions under which law recognizes and represents matters

of concern – legal matters – and the distinct mode in which it mobilizes materials. How do certain (social, economic, cultural, environmental) matters become legal matters? Legal materials mediate and transform matters into distinctly legal matters. For example, manuals and restatements of law are legal materials, whereas jurisdictional claims are a legal matter of concern. Without legal materials, matters are not intelligible to law.

Legal materials materialize legal difference, but they are distinct from legal matters. Whereas legal matters are not physical but are rather conceptual, legal materials may be physical or intangible. Legal materials' defining features are that they are *constitutive* and *functional*; they are materials for the making of legal meaning. Legal materials include techniques (different forms and genres), modes of representation (different media, textual and non-textual), bureaucratic arrangements, and physical spaces in which legal matters are discussed. Materials are only legal materials insofar as they contribute to the making of legal meaning, such as a the qualified space of a courtroom; but they also may have purposes outside of the distinct regime of enunciation that is law; for example, when the courtroom is used in other functions or transformed into a residential building. Legal materials can be dormant (closed criminal case files in archives, abandoned and discarded patent applications), but they can also be active (texts of rulings, rules for statutory interpretation, drafting techniques, mapped borders, animals, humans, mediums of evidence). Legal materials do not always matter (in the sense of a verb). For example, a notebook might be kept by a researcher for her own records, but it becomes a legal material if she has to claim priority for the novelty of an invention in patent law. A legal materialist approach makes visible the materials through which law operates and shows how they are enlisted in the production of legality.

For Foucault and Luhmann, however, materials do not determine or 'make' law; causation works the other way around, as the legal énoncé turns certain things into legal materials. The legal énoncé is performed and enacted in a Foucaultian *dispositif* consisting of materials.⁸ Perhaps more materialist than Latour, Foucault and Luhmann, Cornelia

Vismann conceived and studied materials as law's constitutive media that inform the ways in which a legal matter is revealed. We believe that the turn to materials is particularly useful if the legal matter itself is hard to figure, especially when it seems even more immaterial than other matters, as with intellectual property or jurisdiction. If there is no established legal matter or it is in the process of emerging, a legal materialist mode of inquiry looks for the materials that make up the 'law'; that is, the means by which legal difference is produced.

Lastly, we distinguish legal matters from law's objects or legal objects, where the nature of legality is taken as given. In some scholarly approaches it would appear that potentially *anything* can be read as a legal object, but its manner of legal materialization and qualification – *how* legal difference manifests – is rarely considered. We contend that objects are only legal matters of concern as far as they are taken as or mediated by legal materials. We do not assume that tactile things and artefacts are self-evident to law simply because they physically exist. Their physicality would need to be translated into a legal context in order to be perceived as a legal material, and they only become material to law under distinct conditions. Matters of law are not tactile or physical, but rather issues, problematisations or concerns. For example, a matter of law is not land, but rather territory, jurisdiction, property or sovereignty. A piece of music itself is not a matter of concern to law, but it becomes one if it gets implicated in questions of authorship, copyright or access. A legal material may be a physical object, such as a book, but also may be an oral testimony or a technique, such as rules of procedure. Building upon these distinctions between legal matters and legal materials, we propose an understanding of law as a distinct mode of producing matters of concern through enlisting materials, whether physical or intangible.

3 Thinking through law's matters and materials

This special issue began from an experimental approach, and contributors' engagements ranged from building upon the project's points of departure to offering different ways of thinking through

legal materiality. Their articles and essays take up a diverse set of matters, from overtly legal examples – as with evidence, title, justice, and distinction – to considerations of knowledge, hope, and honor as they relate to legal forms. The materials under consideration are equally diverse, drawing on texts such as novels, source code, statutory language, a case concerning jars of jam, early international law treatises, prefaces, and postcards (literal and metaphorical), as well as practices such as expert testimony, oral history, duels, military targeting, and even changes of heart. Not all contributors shared our terminology and premises, and some contributions reveal what eludes or unsettles law and its juridical forms.

For example, in James Leach’s opening account, ‘Documents against “Knowledge”’, he warns against treating law as a transcendent form, ‘a “reality” that is inscribed in, makes use of, and appears through materials’. Law exists within practices, Leach contends, and some of these practices may in fact subvert a transcendent vision of law’s authority and authoritativeness, as when people of the Rai Coast of Papua New Guinea ‘do’ knowledge through the production of documents that are not bound to a transcendent conception of what lies outside the activity of their making. What Pierre Legendre has described elsewhere as ‘legal delineation’ and ‘the juridical space of structure’ that transmits content and power over time actually presumes an occidental approach to knowledge, a knowledge that is inhabited through texts and tied to authoritative forms (Legendre 1997: 71). Leach unsettles such framings by showing how they presuppose a transcendent form of knowledge inscribed in law through various (textual) materials, but that there are other cosmologies that bear ‘attributes’ of legality. Jill Stauffer’s contribution also reveals the cultural particularity of western legal forms by examining the encounter between a Canadian jurisdiction and indigenous claims to title based on songs, stories, and objects, arguing that what constitutes ‘legal’ materials should be expanded to avoid reinscribing colonial relations within and through law. These two opening pieces illustrate the importance of materials in thinking through what constitutes legality, and they raise the ethical question of how to avoid the imposition of dominant legal cosmologies through

accepted 'legal' materials.

Wouter Werner's contribution takes up a legal material by turning to what Gerard Genette calls 'paratextual elements', focusing on the role of the preface in international law. If the first two contributions attempt to unsettle the givenness of what is considered 'legal' in the first place, revealing its colonial presumptions, Werner approaches the question of how legal authority is produced from within textual practices. As mediations between text and context, prefaces situate what follows within a tradition and may in fact produce and shore up the structure of authorship, as with the example of Vitoria's *De Indis*, a central text in the historical emergence of the discipline. An excerpt from Fabian Steinhauer's work follows as a bridge between these first three accounts of the legality at stake within legal materiality, and advances 'cultural techniques of law' as an approach between law, media studies, and cultural studies. Steinhauer contends that such an approach should be 'parajudicial', moving beyond law's medium of language and attending to the ways in which law attempts (and fails) to differentiate itself from what it posits as its outside.

Following Steinhauer's call to explore these cultural techniques, Kamari Clarke and Sara Kendall's contribution considers the incorporation of geospatial technologies as legal materials in international criminal tribunals, focusing on the matter of evidence as a highly regulated field of practice. Through focusing on expert witness testimony before the International Criminal Court, they offer an account of 'juridical mediation' that illustrates how satellite images and practices of expert reading are conscripted into legal processes that 'see' things otherwise. Markus Krajewski explores the juridical character of algorithms as a precedential mode of reasoning, contending that they foster a kind of closure or codification as legal materials. Against this view of algorithmic opaqueness, he advances the idea of 'source code critique' that would examine the 'interplay of code and commentary', rendering algorithms more transparent through practices of reading and commentary that are familiar within the legal field, where codes (of law) have been compiled through accumulated commentaries over time.

An excerpt from Tung-Hui Hu's poem *Punishment: An Index* recounts the various ways that humans have sought to attribute responsibility to inanimate objects, flogging and banishing bells, placing 'homicidal objects' on trial, and impounding cars for their complicity in moral failures. Hyo Yoon Kang takes up the broader problem of materializing abstract matters in her contribution on 'climate justice', where attempts to litigate climate change as human rights violations run up against the limits posed by differing scales of knowledge and legal formats. Kang employs a legal materialist approach of seeing the legal enactment of 'climate justice' through the elements that comprise it. Matei Candea's contribution considers the matter of honour, 'a recalcitrant matter of law', which he claims *comes to matter* for French law through the transformation of the duel – and its material traces of violence and bodily harm – into libel. The emergence of late nineteenth century libel law – still in use today – serves as the textual location of honour, more accurately viewed as the extension of the duel's concern with its violation rather than a formalisation of a social code concerned with truth. Stuart Murray's intervention explores how life appears as a matter for law, arguing that both life and law are 'technological artefacts of biopolitical power' that exceed what a legal materialist approach can address. Through a reading of Milan Kundera's novel *The Joke* and the production of hope within the fertility industry, Murray argues that the 'immaterial' rhetorical force of language and speculative futures determine law, which he conceives as a sovereign-judicial tool of 'biopower'.

Mahmoud Keshavarz and Amin Parsa show how materials imbued with legal meanings are consequential by considering the role of military uniforms in establishing the principle of distinction as a matter of concern to (international) law. Their contribution illustrates how the law of armed conflict establishes a domain of persuasion in which signs and markers used on the battlefield enables the distinction between civilian and military targets. The matter of legitimate targeting is rendered intelligible through the material of the uniform, which is troubled by the absence of such insignia in contemporary asymmetric warfare. James Martel's contribution focuses on law's

fraught entanglements with objects by reading Franz Kafka's *The Trial* together with a US supreme court case. Following Walter Benjamin (and Kafka), Martel shows how law lacks a clear ontological basis for its authority and must rely upon objects to assert itself; when these objects prove recalcitrant, as with the case of 'imitation jam', law's vulnerability and dependence are revealed as a foil to its 'powerful desire to be read otherwise'.

The last two contributions consider mediations through which law is altered, both textually and materially. The collaborative work between Marie-Andree Jacob and Anna Macdonald brings together perspectives from legal scholarship and artistic practice to consider the typographical line of the ~~strikethrough~~ as an embodied force, a performance of the 'change of heart' that the inscription enacts. Marianne Constable's account of the bureaucratic and cultural lives of the paper shredder illustrates its entanglements with law's matters of evidence and privacy. Both show how materials such as bodies, texts, inscription devices and machines move in and out of relations with law in dynamics that manifest through material traces: the ~~strikethrough~~ marking a change that lingers, the shredded document as a remainder.

Endnotes

1. Notable exceptions include, in particular, Pierre Legendre, Cornelia Vismann, Alain Pottage, and Christopher Tomlins, who have different understandings of materiality, particularly in relation to the level of analysis at which the notion of materiality would be employed in legal scholarship (for example, for an analysis of a contemporary development as it stabilizes into something 'legal', or as a legal historical method of montage).
2. There are too many examples to list, but here we list some which contain thoughtful discussions and conceptualization of an interpretive-materialist approach and the rich analysis which such an approach can yield: in anthropology: Gell 1998, Latour 1979; in political theory: Mitchell 2013; in history of sciences: Rheinberger 1997, Daston ed 2000.

3. These have been informed by Cornelia Vismann's work on law and media studies and Bruno Latour's ethnography of *Conseil d'Etat* (2010).
4. With the concept of jurisdiction, for example, the observer's epistemological task of self-reflection is to trace how the abstract idea of jurisdiction is brought into being by delineating and qualifying the relations amongst constitutive parts that comprise it.
5. The phrase is often associated with Latour (2004).
6. Pottage (2012) draws on Thomas Scheffer's (2004) observation that the énoncé 'is material because it affords certain possibilities of "reinscription and transcription"' (169).
7. For example, the study of algorithmic governmentality and regulatory frameworks as a legal matter does not engage with language expressing law, but rather with other legal materials, such as numbers and probability calculations. With regard to these modes of communication, Luhmann's (1998) understanding of an ecology of communication in which the 'code' of law is one out of many contingent modes of communications may work as a better analytical framework.
8. Pottage (2012) follows Foucault's notion of the *dispositif* and proposes a definition of legal materiality as a heterogeneous *dispositif* composed of discourses ('regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic arguments') and other human constructions ('institutions, architectural formations').

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Hyo Yoon Kang and Sara Kendall

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Marianne Constable is Professor of Rhetoric at UC Berkeley, where she specializes in the study of law, language, and knowledge. Her books include *Our Word is Our Bond: How Legal Speech Acts* (Stanford University Press 2014) and *Just Silences: The Limits and Possibilities of Modern Law* (Princeton University Press 2004). She is currently researching the 'new unwritten law' that supposedly exonerated women who killed their husbands in Chicago at the beginning of the twentieth century.

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