

Semantic Ecology and Lexical Violence: Nature at the Limits of Law

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This essay addresses two related questions. Each asks, in different ways, to what extent might we know law by the company that it doesn't keep? The first, given the theme of this special issue, concerns the comparative underdevelopment of interdisciplinary work involving legal scholarship and (critical) human geography. The second, raised, in part, in response to the first, concerns a more fundamental tendency in legal thought and practice to constitute the domain of the legal in opposition to physicality. Clearly, theoretical stipulations of the domain of the specifically legal have frequently been founded on its asserted contrasts with, say, politics, morality or society. Often, to theorize the legal is to draw boundaries around it, to mark its limits, to distinguish the interior of law from the extra-legal. (Davies 1996) To undertake this sort of operation is to create a conceptual or analytical distance between 'law, properly speaking,' and its mere contexts, or the ground against which law emerges as a figure. As critical scholars long ago demonstrated and now simply assume, the hows and whys of these moves may tell us a great deal about law as putative object of inquiry and about jurisprudence as internal border patrol and supervisor of legal identity. (Hutchinson 1988; Kerruish 1991) In many ways, then, we may know law most intimately by what it renounces, repudiates, ignores or denies.

The paper is in three sections. In the first I briefly discuss the phenomena of law and (not) geography. I offer some speculations as to why the two disciplines have so infrequently been brought into fruitful contact and suggest that the comparative disinterest in geography among legal thinkers might, in part, be explicable as a local manifestation of a broader aversion to--renunciation of--physicality. In the second section I offer a field guide to the concept "nature" as artifact and tool. Here I describe some of the rhetorical-ideological tasks it is commonly called upon to perform. I also discuss law as a significant cultural site where the 'construction' of nature takes place and how the very idea of "law" is sometimes constituted in opposition to "nature." In the third section I analyze one set of rhetorical maneuvers from a case concerning endangered species. My interest is in how renderings of "nature" may be deployed in practical efforts to stabilize legal meaning. For some, appellate court justices, for example, the stabilization of legal meaning may be the most compelling concern. For others, though--plaintiffs, defendants, prosecutors or political activists--what may *matter* more is how the meanings so stabilized condition the circulation of force in the material world. What might matter *most* is how legal meanings are realized on bodies.

Law and (not) Geography

The last generation of legal scholars has witnessed and participated in an unprecedented proliferation of "law-and-s." (This journal itself is evidence enough of the battering of the boundaries and limits of law from within and without.) Some law-and-s have genealogies long antedating the critical revolutions of the 1970s. Legal history, legal anthropology and the sociology of law, for example, have long been well established on both sides of their respective disciplinary copulas. These approaches have taught us much about law and about the particular "ands." Of the potential couplers among the social disciplines one, at least, is conspicuous by its virtual and long-standing absence or underdevelopment. This is the field of human or cultural geography. (The reader at this point might reasonably ask: "what would a legal geography--or *critical* legal geography be?; what might it be good for?" I will return to this in my conclusion.) As one can verify by simple reflection, the presence of a critical geographic perspective on (or in) law is at best negligible, and what does exist is of very recent provenance. Nonetheless, if one is in a position to look at both fields, it is striking that one rarely encounters them together. My objective, though, is not to make the case that they should be connected, it is only to speculate as to why they are so infrequently linked and what this might tell us about how we look at law.

There are many features of academic geography that may partially account for this situation. (Blomley and Clark 1990) In the first place, until recently very few geographers took law seriously as a source for answers to geographical sorts of questions. Then there is a sense that geography as a discipline has had a tendency to be more inward looking and insular than other fields of social studies. Conversely, comparatively few non-geographers "see" it and when they do, judging by citations, they tend to see only the work of a handful of prominent geographers (such as David Harvey or Edward Soja). I think

that it is also fair to say that until the last generation the theoretical sophistication of geography was weak at best, and until quite recently what theory that did exist was Marxist. (Peet 1998) In short, it is reasonable that geography might not have seemed a particularly promising pasture for legal grazing. Added to this, perhaps, is the more pervasive bias toward themes of time, history, process and change that characterizes modernist modes of social thought and what some have seen as a concomitant devaluation of questions of space. (Agnew and Duncan 1989, Soja 1989) All of this may help us make sense of the phenomenon of Law and (not) Geography. Still, when one considers the innumerable ways in which "the legal" and "the geographical" are literally constitutive of one another and, together, of so much of human social life and experience, reflecting on the underdevelopment of the connections induces something like intellectual phantom limb syndrome.

This situation has changed somewhat in the past decade. There is, for example, a convergence between a greater attentiveness to spatialities in social theorization generally and a more diverse range of theoretical incursions within the field of human or cultural geography more specifically. Prominent and widely read writers from Foucault to Bourdieu to Lyotard and Said have put "the space question" to the fore in social inquiry. Indeed, one mark of the postmodern turn has been the shift from metaphors of time and process to those of mappings, margins, and mobilities, now so ubiquitous in book titles. Likewise, geographers are much less insular than they once were and no longer simply examine the whereness of phenomena within some singularly conceived, objective "geography." Many are more likely now to explore the social "production" or discursive "construction" of diverse spatialities. (Benko and Strohmayr 1997; Gregory 1994; Peet 1998; Rose 1993) More importantly, this reorientation is often explicitly in the service of broader scholarly projects elucidating the connections between space, power, meaning and experience. As Doreen Massey writes, "space is by its very nature full of power and symbolism, a complex web of relations of domination and subordination, of solidarity and cooperation." (1992: 81)

In consequence, a handful of geographers have demonstrated the fruitfulness of a serious engagement with legal studies for a deeper explication of "how these connections are made and unmade in practice." A recent special issue of the journal *Historical Geography* (Forest 2000) highlights some of these contributions. At the same time, North American legal scholars such as Richard Ford, (1994, 1999) Keith Aoki, (1993, 1996) Robert Chang, (1996; Aoki and Chang, 1998) and Rosemary Coombe (1995) have found in contemporary geographical thought potent resources for making sense of socio-legal life. In 1996 *The Stanford Law Review* put out a special issue on the theme of "Surveying Law and Borders" with an Afterword by Edward Soja, while most of the contributors to a recent *Law and Geography Reader* (Blomley, Delaney and Ford, 2001) are institutionally located in law schools. In a sense, then, some North American legal thinkers have been doing "legal geography" all along. This is all to the good. However, the question remains, might there be something more to account for the paucity of "legal geography" than the traditional relative backwardness and insularity of geography? Might there be something about *law*--perhaps the very idea of law--that explains at least part of the disinterest, or renders geography particularly unattractive?

Among the social disciplines, geography has traditionally been concerned with a rather odd assortment of themes. Place, space, landscape and nature are the touchstones of traditional geographical inquiry. In comparison with, say, sociology, political science, anthropology, history or psychology, there is a certain worldliness, even a non-humanness, to much geographical thought. Or, to put it another way, one might say that a distinguishing feature of a geographical imagination is the somewhat greater attention traditionally paid to the materialities of earthly existence. Might the comparative underdevelopment of the links between geography and legal scholarship be accounted for, at least in part, by a sort of constitutive aversion to physicality on the part of law?

One legal writer who has considered the question goes so far as to describe law as constitutionally "anti-geographical." (Pue, 1990) On this account, where law is identified with abstraction and generalization, geography is perceived as a discourse of the contextual, the particular and the concrete. Stated this baldly, of course, the distinctions that are being drawn can be criticized from both ends. Much work in geography aspires to the nomothetic, and much of law is finely, even obsessively, particularistic. More to the point, in ways too numerous to mention, "the legal" and "the geographical" are inextricably fused. But perhaps these criticisms miss the mark. It is the invisibility or denial of these 'fusions' that is at issue.

One might draw an analogy. In a sense, space, place, landscape and nature might usefully be regarded

as law's extended body. On this view, the *stuff* that is the focus of geographical inquiry is nothing other than the material realization of the ideas, ideologies and normative commitments of legal analysis. One need look no further than the overlapping mosaic of "legal spaces" within which you, the reader, are situated at this very moment. You are embodied and emplaced within the material world. You are (at least) a physical presence interacting with the world around you. But you also inhabit a sea of property and jurisdiction that makes the materialities of this moment meaningful in a peculiarly legal sort of way--even to your self. The micro-, meso- and macro-territorialities of law will condition your every move today. Through these spatialities legal meanings and the matter of the world are fused; the discursive, the imaginative and the material are experientially one. And, of course, the connections between the legal meanings (doctrines, categories, rules and so on) and marked spaces (walls, doors, fences, lots, municipalities, districts, states and state borders) are saturated by power. (Delaney 1998) But where conventional geographical analysis has tended to look *through* the ideological commitments projected onto landscapes by way of law (preferring, for example, to study patterns of spatial interaction or "land-use"), conventional legal analysis tends to look past the materialities through which these commitments are realized in the material world. Or, perhaps more accurately, legal analysis tends to stop before these materialities are brought into view. Its focal point is contained within, restricted to, the domain of the immaterial. Property, as every first-year law student rather counter-intuitively learns, is not about "things" at all, it is about describing relationships in terms of the rules that fix constellations of rights, duties and the limits of authority.

Now, on the one hand, flesh-and-blood practitioners *know* that what is at stake in contests over legal meanings is very much about "stuff": money, bodies, property, world. On the other hand, legal discourse is very much about turning away from materiality, turning away from the world of things, turning away most particularly from bodies. The disembodiment of law has long been a particular target of much feminist legal scholarship, critical race theory and queer theory. Legal discourse is principally oriented toward the realm of meaning. Its special domain is that of the word. It is fixated on the immaterialities of mind, of intentionality, foresight, reason, rules, doctrines, texts and interpretation. And this, it seems, is the point of it all.

I want to suggest, then, that there may be something more to the "law as anti-geography" argument by building on the analogy of geography, that is materialities of existence, as law's extended body. Does it make sense to ask if law is to geography (in conventional legal thought) as mind is to body (in the wider cultural matrix of which law is a core constituent)? It has been suggested that much of the conceptual structure of the modern law idea is predicated on the presumption of common dualistic (aka "Cartesian") conceptions of mind and body, human and nature, immateriality and materiality, and that the domain of the legal is strongly associated with the former terms. Chea and Grosz assert that "law as *nomos*, has always been predicated as a function of the mind and therefore in a hierarchical opposition to materiality which law serves to order and govern." (1996: 3) That is, law may be conceptualized as not only other than materiality but as fundamentally oriented toward the subordination, distanciation and repudiation of the material, and, especially, the corporeal and animal. The separation of law and geography, then, might simply be a manifestation of this deeper, constitutive repudiation of physicality at the level of disciplinary organization. Perhaps. But I am less interested in making a case for the utility of a geographical imagination for legal studies than I am in suggesting an approach to understanding the physicality of law.

Most of what is called "critical legal geography" has concerned itself with elucidating the spatialities of law and the legalities of space. (Blomley 1994, 1998, 2000; Clark 1985, 1993; Delaney 1993, 1996, 1998, 2000, 2001a, 2001b; Forest 2000; Kobayashi 1993) In this paper I want to take a different tack. As mentioned, another core theme of the discipline is "nature," and more specifically, "human nature interactions." Conventionally, geography's nature is "the environment." But, of course, nature can mean much, much more than that, and in fact, some geographers have begun to look at other prominent figures of nature, such as animals (Anderson 2000; Wolch and Emel 1998) and bodies. (Duncan 1996; Nast and Pile 1998) Along with scholars in other disciplines, they have directed their attention to the conditions and consequences of the social construction of nature. From the other side, critical legal scholarship has relentlessly attacked the constitutive limits of "law properly speaking" for more than a generation now. As a result, the traditional constitutive boundaries, such as those separating law from politics, morality, economics or society, as well as the underlying public/private distinction are, from a critical perspective, in a shambles. What I want to do is contribute to a breaching of the immaterial/material distinction--the idea that nature marks the limits of the legal--in a way that neither

simply assumes the naturalness of the underlying metaphysical contrasts nor falls victim to any of the materialistic reductionisms that have commonly offered a path through them.

In the following pages I will briefly discuss "nature" as both cultural artifact and political-interpretive tool. I will look at law as a cultural location within which the construction and contestation of "nature" takes place. I will suggest that as law inscribes limits by marking distinctions between the realm of nature-physicality and human-immateriality, it can sometimes be seen to be inscribing its own limits. To put this another way, as institutionally located social actors, using available conceptual, ideological, legal materials produce competing renderings of nature *in law*, they can be seen as simultaneously engaged in enactments *of law* as epitomizing the primacy of immateriality over materiality, mind over matter, order over chaos, freedom over determinedness, form over substance. I will follow this discussion with a brief illustration of some of the practical operations involved in the task taken from one authoritative reading of nature in law.

The Work that "Nature" Can Do

Nature is not what it used to be--if it ever was. There has arisen in the last generation a diverse interdisciplinary literature examining what it means to regard nature itself as a social construction. (Soper 1995; Haraway 1991) Although this project is by no means the sole terrain of geographers many geographers have participated in it. (Braun and Castree 1998; Castree 1995; Delaney 2001b; Demeritt 1994, 1998; FitzSimmons 1989; Proctor 1998; Smith 1996, 1998) Heterogenous as this literature is, its primary focus is on the cultural *category* "nature": the ways in which it is shaped and transformed, and the ways in which nature and its multitude of variants and surrogates are used or practically deployed in efforts to make a particular kind of sense. Typically, a basic normative point of this work is the deleterious consequences of the use of rhetorical figures of nature to make sense of the environment, women, people of color, animals and others categorized as other or less-than-fully-human. (Yanagisako and Delaney 1995; Marchant 1989) Paradoxically, looking at the discursivity of "nature" is important because of the physical and experiential effects of its various modes of inscription. The point, again, is that meaning *matters*. To be the topic of naturalizing and de-naturalizing operations is, often, to be located within--or outside--operative circuits of violence or coercion. But, of course, "nature" is not simply a category in a universe of other categories. It is a category whose specific function is to render physicality knowable and, often, in need of being controlled. It is a category which informs the social-material practices by which people intervene in physical processes and participate in transformations in the material world. That is, while it is important to examine the practices associated with the social construction of "nature", *why* it is important is because of *how* reliance on the category--or on this or that conceptualization--is an ingredient in actual physical transformations. And it is here that we may glimpse the traces or scars of the physicality of law.

One way of rephrasing the question, then, would be to ask not what nature *is* but what "nature" *does*. In this brief space I can only be suggestive. Regarded as artifact or tool, "nature" discursively or conceptually situates topical entities (such as things, processes, relationships, events, behaviors, or beings) within a conventional, albeit complex, framework of understanding. One of its primary uses is making physicality intelligible in particular ways. But, in an important sense, nature talk is centered on its own margins. What is most important about nature is its difference from what is rendered as other than nature; most often, what is located across the line in the domain of the distinctively human. Nature is, above all, a trope for differentiation. What nature *does* is make the difference.

Nature as negativity

Here I will simply lay out some core features of the meanings that are commonly projected onto entities by way of nature talk. First, as I have already mentioned, because its principle task is contrastive, "nature" is used to situate entities in opposition to "the (distinctively) human." In practice this often means rendering the topical entity in terms of ontological negativity. "Nature" gathers together everything from quarks to quasars, from hurricanes to dung-beetles, from mudslides to embryos, from ecosystems to neurotransmitters, from heterosexuality to wombats and renders them in an over-riding sense, as instances of the same thing. One element that appears to hold many of these together has to do with that which they are not. Distinguished from nature in many conceptions are those critical aspects of humanness--consciousness, intentionality, culture, knowledge and so forth--which, if not regarded as unnatural, are generally considered to be of such a radically different ontological status as

to justify a basic distinction in kind between the human and the natural, between humans and other animals or life forms, between bodies and minds and, more specifically, between brains as matter and mind as, well, something else. In *The Idea of Nature* Collingwood put it like this: "According to Galileo, whose views on this subject were adopted by Descartes and Locke and became what may be called the orthodoxy of the 17th century, minds form a class of beings outside of nature." (1945: 103) More recently Daniel Dennett described Cartesian dualism as "the idea that minds, unlike brains, are composed of stuff that is exempt from the laws of physical nature." (1984: 28)

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

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

Similarly, the human body--the aspect of being that humans share with other animals--is commonly cast as the negative partner of the mind. "The body and its passions," writes medical anthropologist Laurence Kirmayer, "are viewed [in dominant representational theories] as disruptions to the flow of logical thought, as momentary aberrations or troublesome forms of deviance to be rationalized, contained and controlled." (Kirmayer 1992: 325) More explicit is Elizabeth Grosz's argument concerning the effects of the "common view of the human subject as a being made up of two dichotomously opposed characteristics: mind and body, thought and extension, reason and passion, psychology and biology." (Grosz 1994:9) Such "dichotomous thinking," she says,

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

In this way animality and corporeality are figures of nature precisely by virtue of their positions as negativities in contrast to the positivities of minded human subjects.

Nature as necessity

Somewhat more specific than negativity, and flowing from it, is another cluster of nature-meanings that circulate around the notion of necessity. Nature is often used to signify the universal, the permanent, the inexorable or essential. Alan Lightman, contrasting the workings of nature with the movements of a ballerina, writes that nature possesses "...the ultimate in classical technique, unaltered since the universe began." (1996:5) Necessity here is contrasted with the open-ended features attributable to human forms of being that issue from our mental life such as free-will, creativity, culture, choice, intentional change and variation and the infinite wealth of contingencies that mind brings into the world. Continuing the contrast, Lightman says, "Newton's laws and Coulomb's force, and the charge of electrons must be identical night after night - otherwise, the ballerina will misjudge the resilience of the floor or the needed moment of inertia. Her art is the more beautiful in its uncertainty. Nature's art comes from its certainty." (5)

More colloquially, nature may be appealed to in order to indicate the realm of what simply *is* or, perhaps, cannot be helped. One image of necessity is constraint. From the standpoint of human action, nature--external or internal--may constrain our action, limit the realization of our will and confine the reach of our freedom. Nature--gravity, bodily characteristics, cerebral circuitry--makes us say "I can't." But another key image is necessity as compulsion. In human terms: "I must." As one legal scholar puts it, "the victim of compulsion does not 'act' at all; rather, she is acted upon by some external force or agency." (Hill 1997: 378) "Nature," then, positions entities within a field of determinism. This sort of necessity is frequently located in the materialities of existence. It is the nature of physical laws. It is the nature of environmental limits. It is located in bodily needs, urges, drives, instincts and reflexes. To foreshadow my discussion of endangered species: an owl whose "critical habitat" is being destroyed

cannot "vote with its wings" and choose a more suitable niche. It is locked into a very specific web of material necessity. What makes an animal an "animal" is its total emersion in necessity. What makes humans "human" is the possibility of escaping or transcending these webs of necessity--if only provisionally, partially and occasionally. Sometimes naturalized necessity is simply to be recognized and respected as cold, hard fact. But often it is to be situated in a position rendering imperative its control or transformation.

Nature as metaphor

"Nature" also imparts a specific metaphoricity to understandings. The metaphoric constitution of nature may provide the conceptual ground for the conditions of knowledge, what counts as knowledge and what it means to know. Nature as dark, deep, mechanistic, hidden, passive, secret, blind and closed is mutually constitutive of the construal of knowledge as enlightening, penetrating, analytical, sighted, active and open. As the mind or the force of rationality more deeply penetrates nature, more and more knowledge is exhumed, uncovered, extracted and accumulated. All of this, again, tends to place what is naturalized in a position of subordination. As environmental philosopher Murray Bookchin writes,

In our discussion of modern ecological and social crises, we tend to ignore the underlying mentality of domination of each other and by extension of nature. I refer to an image of the natural world that sees nature as 'blind,' 'mute,' 'cruel,' 'competitive,' and 'stingy,' a seemingly demonic 'realm of necessity' that opposes 'man's' striving for freedom and self-realization... This all-encompassing image of an intractable nature that must be tamed by a rational humanity has given us a domineering form of reason, science and technology. (1980: 50)

As with the culture in question more generally, these images of nature have been incorporated into specifically legal ways of seeing the world.

At this point it might be helpful to raise the questions at the heart of constructivism: to what extent or in what situations is it the case that humans confront a pre-existing, pre-discursive nature--comprehended as negativity and necessity--and seek to control, manage or protect it, and to what extent or in what situations is it the case that (some) humans seek to work their will on parts of the social-material world, to control, manage or maintain it and identify that aspect as "nature?" Thus, women, disabled people, people of color, criminals, animals and ecological systems may first be cast as objects of fear or desire and as such conceptually separated (from the fully human) and rendered suitable for subordination. This more nominalist argument locates a critical moment of the politics of nature in the process of control over the meaning of "nature." This gives rise to anxieties associated with the rhetorical maneuvers of naturalization and denaturalization as preparation for justificatory maneuvers of physical control.

The Nature of subjects

Perhaps the most significant cultural work that "nature" is called upon to perform is to provide the contrasting background against which "the subject" becomes legible. Or, to switch the axis, the idea of nature provides the foundation upon which subjectivism as a philosophical anthropology is built. For example, according to Lawrence Cahoon, "Subjectivism is the conviction that the *distinction between subjectivity and non-subjectivity is the most fundamental distinction in an inquiry.*" (1988:19, emphasis in original) Subjectivism, or humanism, is, of course, the simple obverse of naturalism. It is naturalism looked at from the other side. Restating the basic terms of the human-nature distinction in terms of the doctrine of subjectivism Cahoon writes,

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

What "nature" as cultural artifact does is facilitate the constitution of objects (of a particular sort),

subjects (of a particular sort) and of the descriptive, explanatory and justificatory relationships between the objects and subjects thus constituted.

Doing Things with "Nature"

My discussion of "nature" as artifact thus far may foster the view that the "device" in question may be disassociated from any sort of agency. As an artifact it has been under construction and revision for hundreds, if not thousands, of years. (Collingwood 1945, Dupres 1993, Thomas 1983) In a real sense we are born and socialized into nature talk. Part of what it means to be a competent speaker of languages that carve the world up this way is to learn to see "nature" and the differences it makes as simple immediacies. Nature simply *is*. Nature talk is utterly and profoundly conventional. As with most conceptual domains, to use it competently is to use it unthinkingly. (On the other hand, to re-think it takes a sort of counter-cultural effort.) In a sense, then, it may be less true that we think with nature than that it thinks itself through us. Nevertheless, regarding nature as artifact and tool also allows us to better grasp the social conditions of its construction and revision. It also allows us to examine the mechanics of its practical deployment as well as instances of resistance to its deployment. More practically, one of the things that competent participants in nature talk can learn is how plastic "nature" actually is. We learn to do very practical things with it. "Nature" is not all syntax (subject-verb-object) and semantics (negativity, necessity, darkness, limits); it is also pragmatics. Agents *do* things with it. (Indeed, part of the beauty and attractiveness of 'nature' is specifically its self-denying or self-negating character.)

The question can now become one of asking not merely what nature *does*, but what situated actors do *with* it. It is used to frame relations between the entities that are objectified or naturalized and those that are subjectified and humanized. It thus makes sense to speak of pragmatic, rhetorical operations such as naturalization, de-naturalization, humanization and de-humanization. In the next section I will look at contending naturalizations and denaturalizations in the idioms of legal discourse.

Nature, then, is a basic cultural device for marking limits. It may be used to mark first order ontological or causal limits. It marks the limits of the possible, the desirable, the mutable. It may also be used to mark derivative or second order limits to subjectivity, consciousness, intentionality, responsibility and culpability. Moreover, precisely because the limits that it inscribes are themselves implicitly naturalized, it sets limits to what is debatable or open to political revision. Nature is a tool for de-politicization. These are some of the limiting tasks that nature performs as it circulates through descriptions, explanations and normative assessments of reality. And, as it, by definition, inscribes limits to the distinctively human, it can also be used to set limits to aspects of the specifically legal.

"Nature" at the limits of law

The very idea of law, it was claimed, is frequently aligned with the immaterialities of reason, word or logic. There is a well-developed and long-standing set of renderings of the legal in which it is cast as a sort of anti-nature. The enduring contrast between *nomos* and *physis* expresses one manifestation of the line. (Kelley 1990) Another is the construal in classical liberal thought of the emergence of civil society as an emergence from--and triumph over--the state of nature. Here, "nature" is a fundamental trope for the absence of the legal. It refers to a time before the law when power was directly related to physical capacity. (Hobbes 1668/1994, Locke, Simmons 1993, Johnston 1986) Likewise, prominent cultural accounts of the civilization process (Freud 1930/61) and, at the level of the individual subject, descriptions of socialization processes (Turiel 1985), commonly posit the inception of law as that which rives nature and creates the space of possibility of the distinctively human.

More generally, the very idea of law and the distinction between the nomic order of humanly created law and the universality of physical laws is commonly predicated on the assumption of the distinction and hierarchical relation of mind over body, human over animal (both the beast within and the beasts without) and the human over external nature more broadly. The primacy of mind over body is expressed rather directly in basic doctrines of criminal law (Dresser 1991, 1993; Perlin 1994), contract law and tort. The primacy of human over (other) animals is clearly expressed in property law doctrines that reduce non-human beings to the functional equivalent of machines or stones. (Francione 1995)

"Nature," then, sets up, in various ways, a realm of imagination beyond law, before law or beneath law. Law may, in contrast, be understood as supplemental or super-ordinate. Law is an imagined realm of presence, light, order and positivity. Nature, from a legal perspective, occupies a space beyond law as deterministic, dark, blind, dumb, unfree and negative.

My discussion of nature at the limits of the law has been pitched at the most general level where conventional cultural framings of "the very idea" register. But the domain of law is much more than "the very idea." Law names a set of state institutions. Law also names a range of specialized cultural practices or practical activities. In the context of the present discussion, law--along with science, religion, literature, art, primary education, sport and many other cultural locations--is a site of cultural construction. It is a social location where renderings of "nature"--the category, its content and contrasts--are produced or constructed. (Delaney 2001b) It is also, significantly, a site of political contestation where rival framings and figurations confront each other under adversarial conditions in contests for official validation. In many contexts, "nature," its surrogates and antitheses, are pragmatically, rhetorically deployed in efforts to craft plausible renderings of reality--in order to stabilize elements of legal meaning. And, of course, one distinguishing feature of law as a site of construction is its rather direct relationship to the physical means of state coercion where the "It Is So Ordereds" of texts and utterances animate channels of physical force in the material world.

But now, if, as I said earlier, "the very idea" of law is commonly predicated as an anti-nature ("nature" being a marker of the limits of law), then it makes sense to examine episodes in the construction and contestation of "nature" *in* law as occasions for the construction and contestation *of* law. And here, the pragmatic, institutional aspect and the broader ideological aspect may coincide in the structure of justification for violence. This may be seen in the extent to which the positioning of some topical entity "within" nature--and so beyond, before or beneath the law--serves as the explicit or tacit justification for the deployment of physical force with respect to that entity, say, a landscape, an animal or human body. Again, what is at issue here is not simply the metaphysical or definitional "limits" of a *category*, but the practical limitations on the exercise of physical force put into circulation and justified in the name of law.

To summarize my discussion so far: modern law, it has been claimed, is deeply, if ambivalently, structured by a modernist metaphysics that assumes and reinforces an ontological distinction between immateriality (mindedness) and materiality (nature). It is identified with and asserts the primacy of the former while it denigrates and subordinates the latter. These two moves of identification and denigration may be mutually reinforcing such that the metaphysical purity of law may be achieved by way of the distanciation, repudiation or denial of physicality. In the cultural order of which law is a core component, physicality is made intelligible by way of the categories and images of nature talk. Law, then, is, in part, founded on its contrast with and asserted control over what is rendered as "nature": negative, deterministic, dark or blind.

There are many figures of nature in both common and more specialized discourses. Three broad categories are particularly important. These are: the environment or "external nature," animality or non-human beings, and corporeality, which includes the material component of human forms of being. In contexts involving the politics of nature we may see contests over where and how the lines that make nature and the other-than-nature meaningful are drawn. We may see rival renderings of nature, of humanness, of what makes the difference, and of what the relationship between that which pertains to the domain of the natural and that which pertains to the realm of the distinctively human is or ought to be. In the wider social world we are familiar with the politics of nature as it registers in environmentalism and anti-environmentalism, scientism and anti-scientism, animal politics and the many forms of body politics. Often, these broader socio-political contests appear in specifically legal fora for authoritative resolution. Rival renderings of nature may confront each other, now more particularly packaged in the idioms of legal discourse.

Endangered Species

In this section I will illustrate some of these rather general points through a brief analysis of a set of interpretative moves in an opinion by U.S. Supreme Court Justice Antonin Scalia. The case, *Sweet Home*¹, concerned the meaning of "harm" in a Department of Interior regulation designed to clarify the meaning of "take" in the 1973 *Endangered Species Act*. (ESA)² Justice Scalia's opinion was a dissent

joined by Justices Rehnquist and Thomas. As such, we cannot make too much of it. Nonetheless, it is serviceable as an example of how--by what tactical maneuvers--"nature" or materiality is constructed and repudiated by legal actors and of how the realm of the legal is constituted by privileging immateriality over materiality.

One of the basic cultural figures of "nature" is as "the environment" or external nature. As "environment" it is a ground against which figures of the human are legible. *The* environment is *our* environment. As "external" nature it is rhetorically distanced, located outside the domain of the human. This nature is the geographer's conventional nature. It is the nature that nature lovers love and that nature writers write about. It is commonly conceived of as a system of flows of energy through matter. It is described and explained in terms of the complex interconnections among solar inputs, climate and weather, geology and soils, biomes and habitats, prey and predator interactions, behaviors and metabolisms. Among the more politically salient troubles with this sort of nature is the accelerated artificial extinctions of plant and animal species. (Mann and Plummer 1995, Stearn and Stearn 1999, Tobin 1990) "Extinction" points to the physicality of truncated processes of reproduction. "Artificial" points to causation rooted in the realm of human actions.

In the United States before 1973 the erasure of animal species was largely a fact beyond law. The death of the last passenger pigeon or great auk was not legally meaningful. In 1973, though, some non-human beings in the United States became legally meaningful--or, rather, meaningful in a new way--by way of the categories of the ESA. This was, of course, a time when the prevailing cultural meanings of "nature" were undergoing an historically significant and highly contested shift. The statute mandated the investigation and identification of those plant and animal species whose continued existence was "threatened" or "endangered" by human actions. To become formally "listed" is to become protected. That is, a being--a wolf, a butterfly, a liverwort--is brought inside the nomic web of law. It becomes the object of legal concern, an object with respect to which social rules of prohibition and penalty come into play.

The ESA situates some non-human beings--members of those species identified by natural scientists as facing a significant possibility of immanent elimination--within dense layers of legal meaning. For example, section 9(a)(1) of the Act prohibits the "taking" of listed species; section 3(19) defines "take" to include "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect or to attempt to engage in any such conduct." Subsequently, the Department of the Interior, through the Fish and Wildlife Service, promulgated a regulation that further defined "harm" to include, "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing behavioral patterns including breeding, feeding, and sheltering."³ Additional regulations require the identification of "critical habitats" for listed species. These are legal spaces constructed to correspond to the natural spatial thresholds of survival as determined by field scientists. There are also penalty provisions of the Act itself. Beings such as owls, bears and salamanders do not only inhabit their physical habitats, they now also inhabit the conceptual universes brought into being by the operative directives that make their physical worlds legally meaningful. Such beings are now legal figures in their own right.

The ESA incorporates specialized readings of nature--those produced by natural scientists--into law and inscribes legal meanings onto segments of the material world: onto landscapes deemed "critical habitats"--or not, and onto the bodies of animals that are "listed"--or not. Like any legal directive, the ESA along with its ancillary regulations describes a diagram of power implicating state agents and "persons subject to the jurisdiction of the United States." But unlike most, it also implicates cross-species power relations or the circulation of power across the nature-human divide.

The problem, for some, is that the structure of legal meanings limits the power of some humans to engage in what Justice Scalia termed "routine private activities" that entail the physical transformation of nature. The topic of endangered species is, of course, a deeply political one. Extinction is a high intensity issue for many environmentalists and the prohibitions contained within the ESA constitute a high intensity issue for partisans of the anti-regulatory "property rights movement." (Shogren 1998; Sugg 1993) One strategy of opponents of the Act is to challenge its meanings in court. The ultimate objective of challenges is to push back the limitations on "routine private activities," and thereby expand the operative zone of freedom of landowners. In terms of the present essay, this entails reconfiguring the diagrammatic map of power so as to re-situate the bodies of non-humans beyond the line of legal protection. One way to accomplish this, short of a direct constitutional challenge of the Act, is to challenge the relationship between the Department of Interior's definition of "harm" in the regulation and

Congress's statutory definition of "take." This has the effect of recasting the prohibition on "taking" animals as itself a prohibited "taking" of private property by the federal government. This strategy met with mixed success.

Sweet Home

In *Sweet Home*, the plaintiffs--an organization representing logging interests in the Northwest and Southeast--sought a declaratory judgment against the Secretary of the Interior. They challenged the applicability of the regulation defining "harm" as it pertained to the legal spaces (designated critical habitats) inhabited by the northern spotted owl and the red-cockaded woodpecker. The District Court⁴ rejected their arguments as did, initially, a panel of the Ninth Circuit Court of Appeals.⁵ Subsequently, however, the Court of Appeals granted a petition for rehearing and reversed its earlier ruling.⁶ This created a conflict within the Ninth Circuit and the Supreme Court granted certiorari to resolve it. The formal issue was one of administrative law. At issue was how power, encoded in a statute, is transmitted through a regulation in ways that modify the rights of property owners. Materially, the power described in legal texts comes to rest or is realized on segments of the material world made meaningful by the legally determined spaces of "critical habitats," and, ultimately, the bodies of animals. Again, my analysis is focused on Justice Scalia's dissent. As it turns out, the Supreme Court also rejected the plaintiff's reading of law and nature.

For Scalia, there were many things wrong with the regulation, with the way in which it channeled the flow of power and with the images of human-nature interactions that it incorporated. Scalia's principal task was to disconnect the regulation from the statute. Where the regulation exceeded the authority of the agency and too severely limited the discretion of property owners, disconnecting it from the power of the statute would result in a restitution of property power. Among the features that made the regulation unreasonably excessive--and the majority's reading inaccurate--was an inversion of the material and the immaterial, of animality and humanity, of the natural and the distinctively human. Tactically, the desired disconnection between the regulation and the statute was to be accomplished by the re-drawing of the lines and the re-righting of the positions. Had this been successful animals would have been re-positioned beyond the bounds of legal protection and property owners removed from exposure to legal coercion. In what follows I will briefly discuss two smaller and one more significant and diagnostic of Scalia's rhetorical operations.

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

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

Justice O'Connor supposes that 'impairment of breeding' intrinsically injures an animal because "to make it impossible for an animal to reproduce is to impair its most essential physical function and to render that animal, and its genetic material, biologically obsolete...". This imaginative construction does achieve the desired result of extending 'impairment of breeding' to individual animals: but only at the expense of also expanding 'injury' to include elements beyond *physical*

harm to individual animals. For surely the only harm to the individual from impairment of that 'essential function' is not the failure of issue (which only harms the issue), but the *psychic harm* of perceiving that it will leave this world with no issue (assuming, of course, that the animal in question, perhaps an endangered species of slug, is capable of such painful sentiments). If it includes that psychic harm, then why not the psychic harm of not being able to frolic about... (2430, emphasis in the original.)

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

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

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

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

Justice Scalia, however, seemed to reverse the directionality of word and world. It is in the enactment of this reversal that his prioritization of the immaterial over the material, mind over matter, and form over substance is most telling. The bulk of Scalia's argument is oriented toward confining the words "harm" and "take" to what he calls their "ordinary and traditional," "ordinary," "standard," "common and preferred" usages. Their meanings as interpreted by the agency and the majority are deviant and out of order. Among the tools that he relied upon to restrain these meanings are: Blackstone's *Commentaries on the Laws of England*, published in 1766; a usage manual from 1949 and four dictionaries published in 1828, 1933, 1970 and 1981. From these authorities he constructed a diagram of a semantic ecology of violence or "harm." This is a map of lexical order and stability founded on the interconnections among

concepts and categories. And it is this semantic ecology which takes precedence over the material ecological systems inhabited by the owls and woodpeckers.

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

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

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

Beyond that, the desired result of these operations was to relocate wild animals and their worlds beyond the bounds of legal protection. But, of course, they were not and never had been beyond the law. They were already and irrevocably within the law as the incidental denizens of a naturalized property regime. Reaching back through the 1896 case of *Geer v. Connecticut*⁷ to the *Digest of Justinian*, Justice Scalia reminded us that, "All animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them." That is to say, non-human animals, as figures and physical tokens of the idea of nature, were already and eternally located within operative circuits of physical force that are made legally meaningful through conceptions of property.

Conclusion

Justice Scalia's rendering of law and nature in *Sweet Home* is only a single, if rather neat, illustration of how empowered social actors, working with available legal-conceptual materials, participate in the social-political construction of nature. It illustrates the themes of nature as artifact and law as a site of construction. Faced with a dangerous inversion, Scalia sought, unsuccessfully, to set matters right. He

insisted on the subjectification of humans by re-inserting elements of immateriality into any legally accurate portrayal of events and he objectified non-humans as mindless slabs of matter.

But how he did it *with* and *in* the law can tell us something about the auto-constitution or self-portrayal of the legal as anti-material. If it makes sense to see law as a site of construction, and if legal materials are tools with which "nature" is crafted, it also makes sense to see "nature" as a conceptual tool with which to construct the idea, the limits, and the primacy of the legal. In this case, the tool was used for constructing or reinforcing a prevalent image of law by symbolically demonstrating the primacy of semantic ecology over the material interconnections of ecosystems. This is seen most succinctly in Scalia's privileging of "harm" over harm. This way of symbolically setting things straight represents at the level of performance the identification of law with word. It also, incidentally, represents an assertion of the institutional autonomy and authority of law vis-a-vis science. In his *Sweet Home* dissent Scalia limits the scope of appropriate legal analysis to texts, to definitions, to forms. He turns away from material "facts" and, implicitly, places them beyond the bounds of law, properly speaking. These facts may be appropriately within the purview of wildlife ecology--or bio-geography--but they are not to be admitted to the domain of legal thought. As mind is commonly conceptually severed from and placed in a position of sovereign authority over body, and as humans (as beings of reason) are placed in dominion over animals, so, for a formalist like Scalia, law-as-word is disconnected from and placed in control of world. By way of the symbolic expulsion of physicality and the negativity, determinism and metaphorical darkness associated with "nature," law is purified. Law becomes, in the words of Lord Coke, "perfection of pure Reason."

Of course, the majority opinion is also strongly logocentric, only slightly less so insofar as it counsels deference to scientific representations of materiality. In this case, though, this small difference was decisive. What is most important, again, is that various renderings of nature--even, and especially those that performatively render it as absent--are justificatory elements that serve to direct or deflect physical force. With respect to non-human beings we may call it "violence," or "harm," or not. But as with force more generally, when it touches bodies--when it is realized in the world--we have reached the limits of nominalism.

In the first part of this paper I suggested that the comparative underdevelopment of a dialogue between legal scholarship and geography might be explained as an instance at the level of social inquiry of this more pervasive phenomenon of law's repudiation of physicality. Honestly, who's to say? This is a sociological question. As a geographer who seeks to understand how profoundly the cultural domain of legal practice shapes what the world is like and conditions what it is like to be in the world, I have offered a small example of what a critical geographic perspective on the legal might be for. Perhaps, paradoxically, I tried to reveal the physicality of law by way of a study of the discursivity of nature. The sense of paradox, though, is itself reliant on an assumed separation of the immaterial and the material. One possible contribution of a geographical perspective on law would be to resist both naive materialist reductionism and rote dichotomization and to insist that, in the words of Hilary Putnam, that "the mind and the world jointly make up the mind and the world." (1983: 5) The central question then becomes how -under what conditions, with what consequences--they are made up.

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Footnotes

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2 16 USC § 1531 et seq.

3 50 CFR § 17.3, 1994.

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7 *Geer v. Connecticut*, 161 U.S. 519 (1896).