



UNIVERSITY
OF WOLLONGONG
AUSTRALIA

2017

Making Sense of Minor Jurisprudence

Mark Antaki
McGill University, Canada

Follow this and additional works at: <http://ro.uow.edu.au/ltc>

Recommended Citation

Antaki, Mark, Making Sense of Minor Jurisprudence, *Law Text Culture*, 21, 2017, 74-75.
Available at: <http://ro.uow.edu.au/ltc/vol21/iss1/4>

Making Sense of Minor Jurisprudence

Abstract

This essay attempts to understand 'Minor Jurisprudence', to articulate some of its senses and resonances. It does so, first, by looking into the emergence of 'Minor Jurisprudence' out of the 'Law As ...' symposia, particularly Christopher Tomlins' reflections thereon. It does so, second, by looking into 'Minor Jurisprudence' as a modification of the 'minor literature' Deleuze and Guattari coin or borrow from Kafka in their reading of him. There are underexplored resonances between some of the language and thinking tied to the emergence of 'Minor Jurisprudence' out of the 'Law As ...' symposia and the language and thinking of Deleuze and Guattari. Indeed, when one looks into Deleuze and Guattari's 'minor literature', one even finds a 'minor jurisprudence', one that merits attention as 'Law As ...' grows up into 'Minor Jurisprudence'.

Making Sense of Minor Jurisprudence

Mark Antaki*

1. Introduction

This essay attempts to understand ‘Minor Jurisprudence,’ to articulate some of its senses and resonances. I write it as a latecomer to the ‘Law As...’ series of symposia who is curious both about the ‘Law As...’ enterprise generally and, more specifically, about ‘Minor Jurisprudence’ as the name for its destination or maturation. My tendency as such a latecomer – as a guest – is to reflect and write about that to which I have been invited (as I have done for workshop themes (Antaki 2016), journal names (2014), and even calls for papers (2015a and 2015b)). On the one hand, this kind of reflection and writing appears derivative, beholden to the agenda-setting of others. Perhaps even, one might say, it appears as heteronomous, as minor... On the other hand, it risks looking like – even usurping – the kind of work we see symposium organizers and their collaborators doing in forewords, afterwords, or introductions. This kind of reflection and writing then also risks looking major – if not a major misstep.

‘Minor Jurisprudence’ is a striking phrase and I am motivated to reflect upon it for several reasons. The first is the appeal of the phrase and the kind of psychic, affective investment one may have in it, tied perhaps to the celebration of difference, of resistance, of refusal to conform, to grow up and become staid (to take oneself too seriously?). The appeal of the phrase points me in the direction of ‘Law As...’

Making Sense of Minor Jurisprudence

and ‘Minor Jurisprudence’ as a scholarly or intellectual ‘movement’ that may seek recognition, if not status – or even majority! – and to the vexed question of the relation of such a movement to existing and past movements of ‘critique’. The second is whether and how the minor can be disentangled from the major – including whether and how the minor-major distinction itself is helpful. It may be that what is sought after in such a label as ‘Minor Jurisprudence’ is not a minor to a major but something beyond (existing?) minor-major dualities. The third is an interest in the conditions of possibility – and survival – of the kind of life in or of law that would constitute or go along with ‘Minor Jurisprudence’, or with *a* minor jurisprudence. I am particularly interested in the ways in which or degrees to which a minor jurisprudence requires re-thinking or re-living law as we have come to think and live it. Indeed, what if ‘Minor Jurisprudence’ does away with law as we know it and invites us to a life ‘beside’ – but not ‘in’ or ‘of’ or ‘with’ law?

In order to make sense of ‘Minor Jurisprudence’, to get a feel for its appeal and vocation, I begin by looking into the emergence of ‘Minor Jurisprudence’ out of the ‘Law As...’ symposia, particularly Christopher Tomlins’ reflections thereon (I). Because the phrase ‘minor jurisprudence’ is a modification of the ‘minor literature’ Deleuze and Guattari coin or borrow from Kafka in their reading of him, I then consider these origins of minor jurisprudence (II). Interestingly, there are underexplored resonances between some of the language and thinking tied to the emergence of ‘Minor Jurisprudence’ out of the ‘Law As...’ symposia and the language and thinking of Deleuze and Guattari. Furthermore, when one looks into Deleuze and Guattari’s ‘minor literature’, one even finds a ‘minor jurisprudence’, one that merits attention as ‘Law As...’ grows up into ‘Minor Jurisprudence’.

2. Minor Jurisprudence as the Destination of ‘Law As...’

A. Growing Up Into Minor Jurisprudence?

‘Minor Jurisprudence’ appears as the name for the ‘direction’ (or destination?) of [t]he three sets of essays emerging from the “Law

As...” enterprise’ (Tomlins 2016). As Tomlins writes in the synopsis of the fourth and fifth symposia, this ‘direction’ was ‘made explicit in the introduction to the third set’ (2016: 2). While the second symposium resulted in the ‘outcome’ that “‘Law As...’ could become a kind of jurisprudence’ (2015: 241) the third symposium specified ‘Minor Jurisprudence’ as the kind of jurisprudence. Might one say that ‘Minor Jurisprudence’ is the name to be given to the ‘movement’ (Tomlins 2014: 3) of ‘Law As...’ once it has become developed sufficiently for its potential to become manifest, i.e. once it has become self-aware and mature, once it has arrived and grown up?

Maybe, but the appeal of minor jurisprudence(s) is also the appeal of *Glossolalia* – part of the title to the ‘Law As... III’ Foreword – a word which ‘suggests the attractiveness (and mystery) of speaking of law and justice in different tongues’ (2015: 246). To the extent that *glossolalia* points us in the direction of ecstatic experience and in the direction of where, when, and how language both ceases to be language but is, thereby, all the more language, perhaps we may see in the invocation of *glossolalia* the connection between limit experiences of law and limit experiences of language. Does minor jurisprudence then invite us to consider where, when, and how law and justice cease to be (recognizable as) law and justice but are thereby all the more law and justice?

If we take jurisprudence to be the posing and answering of the question ‘what is law?’ (see the first few lines of Hart 1961, perhaps the most ‘major’ of jurisprudes). ‘Law As...’ could appear as an inflection, perversion, even hostile take-over of the jurisprudential enterprise. ‘Law As...’ could nudge or push jurisprudence from the logical to the analogical, from the definitional to the metaphorical, from ‘is’ – and not just ‘and’ (see Tomlins and Comaroff 2011) – to ‘like’ (if not ‘as’), a move we see and experience in, among other places, W.H. Auden’s *Law Like Love*. This move is also one from the propositional to the poetic, from intellectual mastery to experience (from *logos* to *mythos*?). The minor jurisprudence of ‘Law As...’ would undermine, if not dethrone, the (major?) jurisprudence of ‘Law Is...’ (perhaps implicit in ‘Law And...’). Indeed, the turn of ‘Law As...’ to ‘Minor Jurisprudence’

and *glossolalia* evokes not simply jurisdiction but also that of the relation of any jurisdiction to a veridiction (e.g. Foucault 2014).

Of course, ‘jurisprudence’ could also send us (back?) to *ius* and to *prudentia*. If law is a ‘form that has invaded modernity’ (Schiavone 2012: 3) this invasion may be largely attributable to the birth of *ius* and its experts, *prudentes*, in Rome. Would a minor jurisprudence conserve *ius* and its *prudence*, or would it re-visit, re-tell, re-place the Roman ‘birth of a technique’ (Schiavone 2012: 43)? What might take the place of *ius*? Of *prudentia*? Or how might they be inflected, transformed? Does a minor jurisprudence point to non-experts and non-officials? Does it encourage us to think of (legal) virtue, fitness, or excellence differently? For instance, do minor jurisprudence and *glossolalia* point to the unhomely, the uncanny (*to deinon*) in, or at work in, prudence or *phronesis*? (Fisher 2011). Here too, we move towards an experience, if not a philosophy, of the limit.

Might ‘Law As...’ do away with ‘jurisprudence’ (and hence law?) altogether? Is a minor jurisprudence an anti-, or better yet, a non-, jurisprudence?

B Foundation as the Vocation of Minor Jurisprudence?

While his foreword to the third set of essays points to ‘a’ minor jurisprudence (Tomlins 2015: 239), Tomlins identifies multiple registers of ‘Minor Jurisprudence’ (hence *glossolalia*?), two of them in the body of his text and another, below, in a footnote. Unlike major jurisprudence, both principal registers of minor jurisprudence call into question law’s systematicity (241). Both are influenced by Nietzsche, as well as Deleuze and Guattari (247), whose ‘minor literature’, itself drawn from Kafka, inspired ‘minor jurisprudence’. The first, associated with Peter Goodrich’s *Law in the Courts of Love* (1996) is, as Tomlins puts it, ‘simultaneously plural, subaltern, and subversive’ (242). Within this register, history is marshalled to ‘recall minor jurisprudences [note the plural] from oblivion’ so that these can ‘destabilize’ the – monopolizing and totalizing – project of modern law (242). According to Tomlins, Goodrich’s minor jurisprudence ‘begins and ends with critique’ (242).

Tomlins notes how the second register, which he associates with Panu Minkinnen's 'The Radiance of Justice: On the Minor Jurisprudence of Franz Kafka', reveals that 'the rule of law of modern jurisprudence does not exist' (Tomlins 2015: 245). While 'a particular Nietzschean understanding of law in modernity' is revealed by Minkinnen (1994: 351), Tomlins emphasizes – even seizes on – the way in which Minkinnen's minor jurisprudence is 'initiator and so, to that extent, foundational' (Tomlins 2015: 246). (It is also worth noting here that Minkinnen's account of Kafka's minor jurisprudence may challenge the move from 'is' to 'as', insisting on the literal and not metaphorical character of 'Kafka's writing on suffering': 'for Kafka, the world *is* a penal colony' writes Minkinnen (1994: 352)).

In a footnote, Tomlins gestures towards a 'third and distinct "minor" register' he associates with Olivia Barr, Shaunnagh Dorsett, Shaun McVeigh (perhaps a kind of Melbourne register of minor jurisprudence) (Tomlins 2015: 246). McVeigh approaches jurisprudence by way of the 'office and the conduct of the minor jurisperit' and as a 'guide to a conduct of lawful life (or a life lived with law)' (2015: 501). He notes the historical ties of 'office' to state and church authority and that '[m]inor jurisperits take up office, *if at all*, in other places or other ways' (my emphasis) (501). Indeed, 'the minor jurisperit may also be engaged in crafting new juridical personae capable of acting within and *without office*' (501, my emphasis). As McVeigh opens the door to other offices or even non-offices, and thus to non-officialdom, one wonders whether the minor jurisperit need be involved in the crafting of 'personae' at all rather than, for instance, de-pose the grammar of the 'person' and its centrality to state and church, Rome and Christianity.

The hope of 'Law As...' as 'Minor Jurisprudence', it turns out, is to 'benefit tangibly' from critique, 'and to move through it, toward new foundational positions' (Tomlins 2015: 247). The idea, as I understand it, is to found a law and modes of life in, of, or with law that are not 'systematic' and tied to domination, but nonetheless durable and existentially, if not logically, of some coherence. If 'minor jurisprudence' stems from, leads to, and requires a different engagement with otherness

and concrete others, then, presumably, the ‘new foundational positions’ sought will reveal a different engagement with the question of founding, beginning, and hence futurity. We have here, it seems to me, the massive and fraught question of whether foundation without violence, without violation is possible (see, e.g., Arendt 1963). Can the minor aspire to found without aspiring to be major? Does the founding gesture of the minor require a kind of disavowal of its own majority? Indeed, is the security of foundation not precisely what major jurisprudences seek? Do we have here the possibility of the meek inheriting the earth, or even of (Nietzschean) *ressentiment*? (1967) Why and how ‘foundational position’ rather than, e.g., ‘initiatory condition’? (see, e.g., Antaki 2003). And what is sought to be founded, exactly? Not a system... Not a state? But an order?

C. Minority without Majority?

In probably all of its registers, ‘Minor Jurisprudence’ has a dual vocation and valence. One is juridical or political and involves what I have elsewhere called ‘un-stating law’ (Antaki 2015), i.e. separating law and justice from state and officialdom. The other, to which the first is intimately related, is metaphysical or ontological and involves, for instance, a rejection of the so-called metaphysics of presence, and an appeal to *becoming* rather than *being* (see McVeigh 2015: 503-505 for an outline of the inspirations and emphases of the versions of minor jurisprudence).

Scholarly work on minor jurisprudence, it seems to me, involves a kind of un-minoring of minor jurisprudences, i.e. recalling them from ‘oblivion’ in the Goodrich register (Tomlins 2015: 242). Whether or not such work aims to retrieve and celebrate ‘minor jurisprudences’ that have been forgotten or (violently) repressed, its goal is to explore alternative modes or forms of life in, of, or with law. The paradoxical task of work on minor jurisprudences is to un-minor these without reproducing the major. This work, as conceived by Tomlins, confronts difficult questions about whether minority without majority is possible. These questions arise in both the juridical or political and the metaphysical or ontological valences.

i. Un-Statting Law

In reflecting on minor jurisprudence and on the minor-major distinction, including the potential impossibility of conceiving or living the minor without the major, I cannot help but think of Robert Cover's 'Nomos and Narrative' and his turn to the word 'paedeic', which evokes a range of things etymologically connected in Greek but not in English. Paedeic is drawn from *paideia*, which is often translated as education. But *paideia* is related to *paizein*, the verb 'to play', as well as to *pais*, a child, but also a slave (Liddell and Scott 1889: 585). How does Cover turn to the 'paedeic' and what can it teach us about minor jurisprudence?

Cover distinguishes two 'ideal-typical patterns' (1983: 13) that must be found together in any actual *nomos*: the 'paedeic' and the 'imperial'. The 'paedeic' is about 'commonalities of meaning' (14). It is so powerfully 'world-creating' (12) and law-creating that it is threatened by its own 'jurispotence', (15) i.e. its multiplication into a plurality of interpretations (of a sacred text, for instance). In part because paedeic communities might war with one another over their differing interpretations and existential commitments, the 'law as meaning' (18) of the paedeic must be supplemented by the 'law as power' (18) of the 'imperial'. If the 'paedeic' is 'world-creating', the 'imperial' is 'world-maintaining' (13). It is also 'jurispathic' (60) as it must kill law to make peace and order; it must cull the overgrowth of normativity that comes from the 'paedeic' and its jurispotency. The 'systematicity' minor jurisprudence calls into question is firmly linked by Cover to the 'imperial'. On the other hand, the narratives which imbue the precepts which comprise the imperial with meaning, Cover says, are 'radically uncontrolled' (17). Part of the task Cover sets for himself in 'Nomos and Narrative' is to 'un-minor' – to make visible, effective, important) – narrative in relation to rule or precept.

Could minor jurisprudence be, ought it to be understood as, an attempt to separate and rescue the paedeic from the imperial? The necessity of the imperial is the impossibility of 'Babel heureuse' – 'happy Babel' – a happiness which, for Roland Barthes, reflects the priority of 'difference' to 'conflict' (see Girard 2015). 'Babel heureuse'

disappears as *nomoi*, jurisprudences, ways of living a life in, of, or with law, are killed, disappeared, relegated to lower status, in a word 'minored' by the state or state courts or whatever seeks to monopolize 'law' ... Is such 'minoring' inevitable? Is a world without 'minoring' possible? Is that what 'Minor Jurisprudence' is after? If the 'paedeic' cannot be rescued from the 'imperial', from the need to grow up into sobriety (the sobriety of moderation, *sophrosune*, of that which preserves prudence, *phronesis*?) then can the opposition between the 'paedeic' and the 'imperial' be elided, avoided altogether? Are there, need there be, 'minor' versions of the imperial?

ii. *Metaphysical Inflections...*

When it comes to the senses, one might say, sight has traditionally been the 'major' sense whereas the others have been minored. However, within sight too, there are 'major' and 'minor' modes which raise the question of the possibility of the minor without a major and draw attention to some of the metaphysical valence of minor jurisprudence. For instance, Edward Casey's *The World at a Glance*, itself influenced by Deleuze, is a book-length account and celebration of the 'glance' in relation to the 'gaze' ('le regard fixe'). We might say that the glance has been 'minored' in relation to the 'majored' gaze. The glance is 'fickle' (Casey 2007: xi) or frivolous, not weighty (4) or deep (16); playful, not serious. Perhaps it is stuck in 'what seems' as opposed to 'what is' (xiii) ... As Casey writes: '...the glance is incompatible with most Western paradigms of knowledge. It lacks the motive of mastery; it has no pretense to be encyclopedic or systematic (even if it can be sweeping); it does not wish to be part of a grand narrative of knowledge about the external world (it has its own *petit récit*)' (xiii) Glancing is synoptic in the 'wrong' way, one might say: it is synoptic in an a-systematic way. Moreover, it is too open to sharing its being-in-the-world with senses other than sight. Think of the *flâneur* in the hustle and bustle of the boulevard or the arcade (217-225). In being minored, glancing has become a kind of minor sight whereas gazing has become the major one. Nevertheless, both are modalities of the same sense and one is not intelligible or possible without the other. When it grows up, so to

speak, perhaps glancing becomes gazing just as play becomes work (or labour?). Would a kind of un-minoring (in the status sense) of glancing, of play, then belong to the 'foundational work' of minor jurisprudence? Perhaps 'glancing' would lead us to emphasize the initiatory rather than the foundational.

Cover and Casey, it seems to me, give us some sense of the valence and vocation of minor jurisprudence, all the while raising the question of whether and how the minor can be separated from the major, not just analytically but existentially. Is the minor always and necessarily an inflection of the major? Can it ever supplant the major?

3. Minor Jurisprudence, Major – or Minor – Paternity?

As mentioned above, Deleuze and Guattari's 'minor literature' lies in the background of 'Minor Jurisprudence'. Minkinnen notes that Deleuze and Guattari 'motivate their understanding of Kafka by way of what they call "minor literature"' (1994: 357) and seems to conceive of his work articulating Kafka's minor jurisprudence as complementing or supplementing theirs: 'Kafka also writes what one could call "minor legal literature" or "minor jurisprudence"' (357). Goodrich's *Law in the Courts of Love* is sub-titled *Literature and Other Minor Jurisprudences* (1996). Significantly, Goodrich cites not only Deleuze and Guattari's *Kafka: Toward a Minor Literature* but also some of Deleuze's suggestive remarks on *nomos* (90, 179).

Exploring Deleuze and Guattari on the 'minor' turns out to be fruitful for several reasons. First, scholarly work on 'Minor Jurisprudence' is, to some extent, about the proper recognition of the different and suppressed and involves attending to what is easily overlooked or misunderstood. If minor jurisprudence involves escaping the 'phantasm of a superior law or sovereign jurisprudence' (Goodrich 1996: 4), one danger of scholarly work on minor jurisprudence is the phantasmic creation of the 'minor' – a danger of which Goodrich is aware and which he playfully and ironically channels. Does it change anything if the 'minor literature' which inspires or gives rise to 'minor jurisprudence' is a phantasmic projection of 'major' scholars? Second,

whatever the virtues of their reading or misreading of Kafka on minor literature, Deleuze and Guattari's work on the entanglement of the minor and the major as well as the allure of majority may contribute to better understanding the past and future of the 'Law As...' project. Finally, while Goodrich cites some suggestive references of Deleuze and Guattari on *nomos*, it turns out their work may contain a whole minor jurisprudence worth looking into.

A. Kleine Literaturen

The phrase 'minor literature' – or rather *Kleine Literaturen* – finds its source in Kafka's notebooks, in three fragments with three different dates, the 25th, 26th and 27th of December 1911. In his notebooks, Kafka wrote of 'small peoples' and their 'literatures'. It appears as though these fragments were ignored in the first edition of his notebooks and then combined into one entry by Max Brod for a later edition. As Dirk Weissman puts it, perhaps too strongly, we have here: 'an abusive *montage* that tries to give a coherent form to what turns out to be dispersed [*éparses*] notes' (Weissman 2013: 34, my translation). Weissman raises questions about the 'coherence' and 'settled character' of 'minor literature' as a category of thought for Kafka. For the most part, Minkinnen and Goodrich (and Tomlins by extension) use the work of Deleuze and Guattari as inspiration or as a springboard but do not dive into it.

Like others, Weissman draws attention to a question of translation. In the 1945 translation of Kafka's notebooks into French, the translator uses 'mineure' – 'minor' in English – rather than the literal translation of 'klein' which would be 'petite' – 'small' in English. The English Schocken edition uses 'small' – as in 'literature of small peoples' (Kafka 1948: 191). Weissman writes that *klein* 'can be' purely 'descriptive' whereas 'mineure' is 'pejorative and axiological' (Weissmann 2013: 76, my translation). In so doing, he wants to impute to the translator, Marthe Robert, responsibility for introducing questions of status, stature and standing into Kafka's notes. However, it has also been pointed out that '[t]here is no other word for "minor" in German that Kafka could easily have used. To translate his *klein* by "small" is only

Mark Antaki

to translate literally and unidiomatically; it is not to bring out some important semantic difference between *klein* and “minor”’. (Edmunds 2010: 356). Perhaps, but it seems that other translators into other languages generally opted for the literal translation (Weissmann, 2013: 77). A literal translation might have changed whether and how *kleine Literaturen* was received by Deleuze and Guattari, and then translated into law as ‘minor jurisprudence’. Even though Jean Carbonnier famously wrote of ‘grand droit et petit droit’ (1988: 105) – big law and small law – ‘small jurisprudence’ does not have quite the same ring to it as ‘minor jurisprudence’.¹

Kafka’s December 25 entry begins with a reference to ‘contemporary Jewish literature in Warsaw’ and to ‘contemporary Czech literature’ (Kafka 1948: 191). His interest seems to be in how ‘many of the benefits of literature’ (such as movement of spirit, national solidarity, national pride) can be produced ‘by a literature whose development is not in actual fact unusually broad in scope, but seems to be, because it lacks outstanding talents’ (192). Kafka’s attention is directed to how the absence of ‘greats’ in the literature of small peoples is not so problematic after all, even tying this absence to a greater ‘liveliness’ (*Lebhafigkeit*) of that literature (192), a word Kafka later repeats as the first trait of the literature of small peoples in a ‘character sketch’ of them. The other two traits Kafka identifies are ‘less constraint’ and ‘popularity’, with sub-traits under each (195). In his entries, Kafka refers to German literature – not a literature of a small people – as rich in talent (193). He notes that: ‘[t]hat which plays out in a great literature underneath and forms an inessential cellar of the building, here takes place in broad daylight; that which there allows a momentary convergence to develop here produces nothing less than a life or death decision’ (194).

As far as I can tell, Kafka’s own remarks on the ‘literature of small peoples’ do not articulate the ‘minor literature’ that engenders ‘Minor Jurisprudence’... at least not directly.

B. Deleuze and Guattari's 'Minor Literature'

i. Misreading Kafka?

If some commentators charge both Max Brod and Kafka's French translator, Marthe Robert, with playing fast and loose with Kafka, some do so even more with Deleuze and Guattari who, they say, 'invent the concept of "minor literature" which does not exist in Kafka' (Gauvin 2008: 126, my translation). How did Deleuze and Guattari do so? They undertook 'the theoretically expedient but historically and linguistically outlandish move of substituting Kafka's view on Czech and Yiddish literature for his views on his own relationship to German literature' (Jamison 2003: 31). They undertook this move, it seems, by fusing the aforementioned diary entries on the literature of small peoples with a letter Kafka wrote to Max Brod in June 1921 about the suffering of Jews (like Kafka himself?) who wrote in German:

... the product of their despair could not be German literature, though outwardly it seemed to be so. They lived between three impossibilities, which I just happen to call linguistic impossibilities. It is simplest to call them that. But they might also be called something entirely different. These are: The impossibility of not writing, the impossibility of writing German, the impossibility of writing differently. One might also add a fourth impossibility, the impossibility of writing (since the despair could not be assuaged by writing, was hostile to both life and writing; writing is only an expedient as for someone who is writing his will shortly before he hangs himself – an expedient that may well last a whole life). Thus what resulted was a literature impossible in all respects, a gypsy literature which had stolen the German child out of its cradle and in great haste put it through some kind of training, for someone has to dance on the tightrope... (Kafka 1977: 289)

In their account of 'minor literature' in *Kafka: Toward a Minor Literature*, Deleuze and Guattari write:

The problem of expression is staked out by Kafka not in an abstract and universal fashion but in relation to those literatures that are considered minor, for example, the Jewish literature of Warsaw and Prague. A minor literature doesn't come from a minor language; it is rather that

which a minority constructs within a major language. (1980: 16).

Deleuze and Guattari ascribe three characteristics to minor literature: the first is the deterritorialization of language, the second is 'that everything in them is political' and the third is that 'everything takes on a collective value' (1980: 17). Commentators suggest that the first is 'an extrapolation of Kafka's own situation, a situation that obliges him to work the German language in a certain way' and that this notion does not apply to 'those Kafka designates as belonging to small literatures' (Gauvin 2003: 28-29, my translation). There appear to be grave misgivings about Deleuze and Guattari's 'extrapolation' as well as doubts about the existence of Prague German as Deleuze and Guattari would have it, i.e. as 'a deterritorialized language, appropriate for strange and minor uses' (Deleuze and Guattari 1980: 17).²

It seems to me that at least two things are of interest here. The first is the idea that the paternity and pedigree of 'minor literature' and 'minor jurisprudence' may grant a kind of legitimacy, purchase, and resonance to both phrases and that, therefore, it matters whether and how Deleuze and Guattari 'got it right'. This question is close to the general methodological question that may haunt work on minor jurisprudence. If Deleuze and Guattari 'create' a 'minor literature' in Kafka where it is not to be found, do scholars invent or imagine minor jurisprudences where they are not to be found? Weissmann, for instance, will speak of the benefits or virtues of misreading and encourage his readers not to be too hard on Deleuze and Guattari (283). The question, however, of the minor as an invention or projection of some major seems an important one to me and is tied to the psychic investment one may have in the 'minor'.

ii. Stranger in One's Own Language: The Limits of Language – and Law?

Second and of greater interest, it seems to me, is Deleuze and Guattari's focus on the experience of being a stranger to 'one's own' language. As they write:

Making Sense of Minor Jurisprudence

How many people today live in a language that is not their own? Or no longer, or not yet, even know their own and know poorly the major language that they are forced to serve? This is the problem of immigrants, and especially of their children, the problem of minorities, the problem of a minor literature, but also a problem for all of us: how to tear a minor literature away from its own language, allowing it to challenge the language and making it follow a sober revolutionary path? How to become a nomad and an immigrant and a gypsy in relation to one's own language? Kafka answers: steal the baby from its crib, walk the tightrope (1980: 19).

Kafka's relation to German is meant to capture or reflect this being a stranger to one's own language. For instance, Semprún writes that German was not Kafka's "mother" tongue in its most profound sense' (2009: 86). Semprún draws attention to Kafka's 24 October 1911 diary entry in which Kafka relates that if he did not love his mother as much as she deserved, it was in part because of the German language: "The Jewish mother is no *"Mutter"*" (Kafka 1948: 111). Indeed, the question arises as to whether Kafka felt 'at home' in any language, including Czech, and whether Yiddish was the mother language from which he was estranged and in which he dreamt (Edmunds 2010: 364). In *A Thousand Plateaus*, Deleuze and Guattari go so far as to write: 'there is no mother tongue...' (1987: 7).

Deleuze and Guattari's appropriation of Kafka seems to turn a condition tied to specific people into 'a problem for all of us'. In so doing, they also appear to turn what may be Kafka seeing the literature of small peoples as 'defensive' into him seeing it as 'revolutionary' (Edmunds 2010: 355). Instead of the literature of small peoples as having its own place and integrity, do we have minor literature becoming the *telos*, the destiny and destination, of all literature? As Deleuze and Guattari write: 'We might as well say that minor no longer designates specific literatures but the revolutionary conditions for every literature within the heart of what is called great (or established) literature' (1980: 18). In so doing, they wish to replace one dream (of majority) with another: 'There is nothing that is major or revolutionary except the minor' (1980: 26). They write:

Mark Antaki

How many styles or genres or literary movements, even very small ones, have only one single dream: to assume a major function in language, to offer themselves as a sort of state language, an official language (for example, psychoanalysis today, which would like to be a master of the signifier, of metaphor, of wordplay). Create the opposite dream: know how to create a becoming-minor. (1980: 27)

We have here the paradoxical dream not of arrival or settlement (founding?) but of dis-possession, perhaps even dis-enclosure (c.f. Nancy 2008). Of great interest here for 'Minor Jurisprudence' is that the minor is a 'practice' of the major (1986: 18). Minor *literature* is a practice of major *language*. The minor practice of the major language pushes languages to its limits: '...it would seem that the language of a minor literature particularly develops these tensors or these intensives. Language stops being representative in order to now move toward its extremities or its limits'. (1980: 23) And what is more:

What interests Kafka is a pure and intense sonorous material that is always connected to its own abolition—a deterritorialized musical sound, a cry that escapes signification, composition, song, words—a sonority that ruptures in order to break away from a chain that is still all too signifying (1980: 6).

We are sent back here to Tomlins' evocative turn to *glossolalia*. Does the idea of language escaping signification and representation suggest a limit experience of language whereby language ceases to be language (as signifying) – but is thereby all the more language? One can wonder in the same about what we take to be law and its limit experiences. If language is 'meant' to communicate, law perhaps is meant to guide, direct? What are the 'extremities' of law when it 'stops' guiding and directing?

iii. Deleuze and Guattari's 'Minor Jurisprudence': Reworking Nomos?

In *A Thousand Plateaus*, Deleuze and Guattari take up again many of the lines of thought (or flight) they had pursued in their work on Kafka. We see again 'major' and 'minor' as different modalities of the same. As they write, "Major" and "minor" do not qualify two different languages but rather two usages or functions of language...' (1987: 104)

And returning to Kafka:

Kafka, a Czechoslovakian Jew writing in German, submits German to creative treatment as a minor language, constructing a continuum of variation, negotiating all the variables both to constrict the constants and to expand the variables: make language stammer, or make it “wail,” stretch tensors through all of language, even written language, and draw from it cries, shouts, pitches, durations, timbres, accents, intensities... (104)

We see again the intertwining of major and minor: ‘Minor languages do not exist in themselves; they exist only in relation to a major language and are also investments of that language for the purpose of making it minor...’ (1987: 105) And Deleuze and Guattari clarify that ‘the problem is not the distinction between major and minor language; it is one of becoming...’ (1987: 104) ‘All becoming is minoritarian’ (1987: 105).

If *A Thousand Plateaus* echoes their *Kafka*, it may also be described as pursuing and transforming their thinking on ‘minor literature’ into one on, for present purposes, ‘Minor Jurisprudence’. Indeed, a hint or suggestion of a minor jurisprudence is to be found in the chapter of *Thousand Plateaus* titled ‘1227: Treatise of Nomadology – The War Machine’ in which they mention, writing of Kleist, ‘[t]he necessity of not having control over language, of being a foreigner in one’s own tongue...’ (1987: 378). In this treatise, Deleuze and Guattari refer to ‘a *nomos* very different from the “law”’ (1987: 360) and oppose this *nomos* to the *polis*. As they write:

...even though the nomadic trajectory may follow trails or customary routes, it does not fulfill the function of the sedentary road, which is to *parcel out a closed space to* people, assigning each person a share and regulating the communication between shares... The *nomos* came to designate the law, but that was originally because it was distribution, a mode of distribution. It is a very special kind of distribution, one without division into shares, in a space without borders or enclosure. The *nomos* is the consistency of the fuzzy aggregate: it is in this sense that it stands in opposition to the law or the *polis*, as the backcountry, a mountainside, or the vague expanse around a city (‘either *nomos* or

polis'). (1987: 380)

The 'de-territorializing' move they make here is a momentous one, and certainly an invitation to *glossolalia*, to speak of law and justice in different tongues. They write of '[a]nother justice, another movement, another space-time' (1987: 353). We have here nothing less than a radical calling into question of the understanding of justice in our tradition – to each his (or its) own³ – which is not merely juridical or political but also metaphysical or ontological. The so-called principle of one being:one work (or one man:one work) is the foundation of teleology but also that which, in Plato's *Republic*, allows the *polis* to cohere. Undoing this principle looks like dissolving the *polis* into 'the backcountry'.

Does the becoming-minor of language, the experience of one's own language as a stranger, translate into, juridically speaking, 'nothing is your own'? What is left of law and justice then? Is Deleuze and Guattari's so-called minor jurisprudence a non-jurisprudence? When *nomos* is (re-?)worked as Deleuze and Guattari would have it, what happens to *nemesis* and to being put back in one's place? And what happens to the excellence of *sophrosune* which, presumably, prevents the *hubris* or reaching for what is not one's own? (How) does 'sobriety' itself get inflected in a 'minor' way?

iv. Un-stating Law?

In Deleuze and Guattari's Nomadology, *polis* corresponds to the 'state'. The *nomos* they write of corresponds to the 'war machine' which they seek to distinguish from the State-form. In their treatise, they pose the question of whether it is possible to ward off 'the formation of a State apparatus' (1987: 356; to avoid 'major law' or 'major jurisprudence?'). In posing this question, they pay 'a tribute to the memory of Pierre Clastres', (1987: 357) the French political anthropologist. In *Society Against the State* (1989), Clastres attempted to 'un-minor' so-called primitive peoples. Rather than define them as societies of 'lack' (189) – lack of state, lack of market and so on – pre-destined to arrive at the state and market, Clastres painted a picture of them as 'societies against the state', as refusing to grow up into domination, so to speak,

Making Sense of Minor Jurisprudence

as refusing to be divided into ruler and ruled.

In her reading of H.L.A. Hart's *The Concept of Law*, Marianne Constable (1994) does something similar to what Clastres, to whom she refers, does. According to Constable, Hart assumes that societies living only by primary rules are defective and must necessarily grow up into a legal system, as secondary rules (of recognition, of change, of adjudication) arise, by evolutionary necessity, to fix those defects. Hart, Constable suggests, projects the defects he identifies onto so-called simple societies because of his presumption that rules are necessarily writable in propositional form (see generally Chapter 4). Constable suggests, like Clastres, that the 'legal system' (or 'state') is an evolutionary necessity only in the positivist imagination. Hart's views, suggests Constable, turn what happens in conquest (when the conquered must make their 'rules' legible to the conqueror, must objectify their law in propositional, written form) into an evolutionary necessity.

If Clastres celebrates the 'minority' ('becoming' for Deleuze and Guattari) of primitive societies as opposed to the 'majority' of the State ('the one' for Clastres), he seems perplexed by the mysterious break that would lead to the state. If primitive societies are not minor versions of states destined to become states then how would the state arise? (He concludes his book by raising the possibility that 'prophetic speech' might lead to the State; 214-218). As Deleuze and Guattari write, 'on the one hand, the State rises up in a single stroke, fully formed; on the other, the counter-State societies use very specific mechanisms to ward it off, to prevent it from arising'. (1987: 359) Deleuze and Guattari see themselves as departing from Clastres in asserting that there has always been the State, that there has never been a minor apart from the major (1987: 360). They suggest that primitive societies would always have been in contact with Imperial states and that, and 'of greater importance': 'the State itself has always been in a relation with an outside and is inconceivable independent of that relationship. The law of the State is not the law of All or Nothing (State societies *or* counter-State societies) but that of interior and exterior' (1987: 360).

Mark Antaki

The work of Deleuze and Guattari is quite suggestive with regard to the inter-belonging of minor and major. Among other things, I wonder whether it calls into question ‘Minor Jurisprudence’'s search for, or promise of, ‘foundational positions’ (as opposed to, e.g. initiatory conditions). Seen in the light of Deleuze and Guattari’s minor jurisprudence, there is something perhaps too static, too *civilizational* – not ‘backcountry’ enough – about ‘foundation’. The un-stating of law, it would seem, must always take place in the shadow of the state and in contrast to the security of *its* foundation. Perhaps the maturation of ‘Law As...’ into ‘Minor Jurisprudence’ signals nothing other than the steadfast refusal of foundation in its embrace of the initiatory. Indeed, Deleuze and Guattari, by way of Clastres, may lead us to consider the work of scholars such as James C. Scott (2009) as well as Andrej Grubacic and Denis O’Hearn (2016). Following the work of such scholars, ‘Minor Jurisprudence’ would be inseparable from the attempt to think through the ‘art of not being governed’ in ‘exilic spaces’.

Endnotes

- * Associate Professor, Faculty of Law, McGill University, Montreal. I wish to thank Shaké Sarkhanian, Spencer Young, and Raoul Wieland for their thoughtful help. I am grateful for the support of the Social Sciences and Humanities Research Council of Canada.
1. Carbonnier's preface invites one to think of a 'minor' performance of the sociology of law... His 'vers le degré zéro du droit' also evokes a limit experience or knowledge of law as well as invites us to imagine a 'minor jurisprudence' and 'minor literature' drawn from Roland Barthes.
 2. Edmunds writes: 'The main point made by Deleuze and Guattari apropos of the letter under discussion is then correct ("Prague German is a deterritorialized language"), as long as one understands language to refer not to a dialect but to a received literary language, in effect a style' (2010: 366).
 3. Dig.1.1.10pr : 'Ulpianus I reg. Iustitia est constans et perpetua voluntas ius suum cuique tribuendi'.

References

- Antaki M 2016 'Declining Accusation' in Pavlich and Unger 2016: 44-69
-- 2015a 'Un-stating Law' in Van Praagh et al 2015:105-113
-- 2015b 'Les méthodes indisciplinées qui ne mènent nul part' in Sefton-Green 2015: 217-232
-- 2014 'No Foundations'? ' *No Foundations: Interdisciplinary Journal of Law and Justice* 11: 61-77
-- 2003 'Leading Modernity (to) A-Ground' *Australian Feminist Law Journal* 19: 115-131
- Arendt H 1963 *On Revolution* Viking Press New York
- Auden WH 1979 'Law Like Love' *Selected Poems* Vintage Books New York 89
- Bertrand J-P and Gauvin L eds 2003 *Littératures mineures en langue majeure* Presses de l'Université de Montréal Montréal
- Carbonnier J 1988 *Flexible droit: pour une sociologie du droit sans rigueur* Librairie générale de droit et de jurisprudence Paris
- Casey E 2007 *The World at a Glance* Indiana University Press Indiana

Mark Antaki

- Clastres P 1989 *Society Against the State: Essays in Political Anthropology* Zone
New York
- Constable M 1994 *The Law of the Other: The Mixed Jury and Changing
Conceptions of Citizenship, Law, and Knowledge* University of Chicago
Press Chicago
- Cover R 1983 'Nomos and Narrative' *Yale Law Journal* 97: 4-68
- Deleuze G and Guattari F 1987 *A Thousand Plateaus: Capitalism and
Schizophrenia* University of Minnesota Press Minneapolis
- 1980 *Kafka: Toward a Minor Literature* University of Minnesota Press
Minneapolis
- Edmunds L 2010 'Kafka on Minor Literature' *German Studies Review* 33/2:
351-374
- Fisher D 2011 'Is *Phronēsis Deionon*: Ricoeur on Tragedy and *Phronēsis*' in Mootz
and Taylor 2013: 156-177
- Foucault M 2014 *Wrong-Doing, Truth-Telling: The Function of Avowal in Justice*
University of Chicago Press Chicago
- Gauvin L 2008 'Écrire en français en Amérique : quelques enjeux' *Francophonies
d'Amérique* 26: 121-134
- 2003 'Autour du concept de littérature mineure: Variations sur un thème
majeur' in Bertrand and Gauvin 2003: 19-40
- Girard X 2015 'Babel Heureuse' *La pensée du midi* 14/1: 30-31
- Goodrich P 1996 *Law in the Courts of Love: Literature and Other Minor
Jurisprudences* Routledge London
- Grubacic A and O'Hearn D 2016 *Living at the Edges of Capitalism: Adventures
in Exile and Mutual Aid* University of California Press Oakland CA
- Hart H L A 1961 *The Concept of Law* Clarendon Oxford
- Jamison A 2003 'Kafka and Czech: Away from "Minor Literature"' *Journal of
the Kafka Society of America* 27: 31-39
- Kafka F 1948 *The Diaries of Franz Kafka 1910-1913* Max Brod ed. Schocken
Books New York
- Kafka F 1977 *Letters to Friends, Family, and Editors* Schocken Books New York
- Liddell H G and Scott R 1889 *An Intermediate Greek-English Lexicon Founded
Upon the Seventh Edition of Lideell and Scott's Greek English Lexicon*
Clarendon Oxford

Making Sense of Minor Jurisprudence

- McVeigh S 2015 'Afterward: Office and the Conduct of the Minor Jurisprudent' *UC Irvine Law Review* 5: 499-511
- Minkinnen P 'The Radiance of Justice: On the Minor Jurisprudence of Franz Kafka' (1994) 3 *Social and Legal Studies* 349
- Mootz F J and Taylor G H eds 2011 *Gadamer and Ricoeur: Critical Horizons For Contemporary Hermeneutics* Continuum London
- Nancy, J-L 2008 *Dis-Enclosure: the deconstruction of Christianity* Fordham University Press New York
- Nietzsche F 1967 'On the Genealogy of Morals' in *On the Genealogy of Morals and Ecce Homo* Vintage New York
- Pavlich G and Unger M eds 2016 *Accusation: Creating Criminals* University of British Columbia Press London
- Schiavone A 2012 *The Invention of Law in the West* Belknap Cambridge MA
- Schwerter S and Dick J K eds 2013 *Traduite, transmettre ou trahir: Réflexions sur la traduction en sciences humaines* Éditions de la Maison des sciences de l'homme Paris
- Scott J C 2009 *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* Yale University Press New Haven
- Sefton-Green R ed 2015 'Démoules': du carcan de l'enseignement du droit vers une éducation juridique Société de législation comparée Paris
- Semprún J 2009 'Reflections on Jewish and European Culture' *The Reading Room* 8:81-94
- Tomlins C 2016 "'Law As...IV" (2016-2017); "Law As... V" (2018-2019) Minor Jurisprudence in Historical Key' (on file with author)
- 2015 'Foreword: 'Law As...' III – *Glossolalia*: Toward a Minor (Historical) Jurisprudence' *UC Irvine Law Review* 5:239-261
- 2014 'Foreword: 'Law As...' II, History As Interface for the Interdisciplinary Study of Law' *UC Irvine Law Review* 4/1:1-18
- Tomlins C and Comaroff J 2011 "'Law As...": Theory and Practice in Legal History' *UC Irvine Law Review* 1/3:1039-1079
- Van Praagh S Smith L Dedek H 2015 *Stateless Law: Evolving Boundaries of a Discipline* Ashgate Burlington VT
- Weissmann D 2013 'De Kafka à la théorie postcoloniale: l'Invention de la « littérature mineure »' in Schwerter and Dick 2013: 73-85